JUDGMENT : Mr. Justice Cooke: Commercial Court. 23rd February 2005

Introduction

1. The Claimants, owners of cargo onboard the vessel Mariana apply to this Court for an order pursuant to section 68(2)(g) of the Arbitration Act 1996 (The Act) setting aside or alternatively remitting the Award of Messrs Kenneth Rokison Q.C and Michael Barker-Harber and Sir Anthony Evans dated 16th January 2004 (the Award). The Claimants also seek an order under section 80(5) of the Act extending the 28 day time limit under section 70(3) of the Act for making that application under section 68. The Award was published on 16th January 2004 and was collected by both parties jointly on 26th March 2004. Although there was an agreed extension of time for seeking permission to appeal under section 69 of the Act, there was never any extension of time for making an application under section 68, so that the time expired for any such application on 13th February 2004. The arbitration claim form was issued on 5th July 2004 so that an extension of time of about 20 weeks is required by the Claimants.

2. There is also a further award which the Claimants seek to set aside. The Award dated 16th January 2004 is the Award which determined the substantive claim made by the Claimants as cargo owners against the Defendants as owners of the vessel in respect of cargo damage caused by a fire onboard that vessel on 9th June 1998. The second award is dated 29th June 2004 and not only determined issues of costs between the parties in relation to the Award but also constituted a determination that the Tribunal was unable to reopen any of the issues determined in the Award or to receive additional evidence in relation to them. By a further arbitration claim form dated 21st July 2004, the Claimants sought to set aside the second Award on the same grounds as the first. That application was made within the 28 day time limit imposed by section 70(3) of the Act. The outcome of the application in relation to the Award will also determine the fate of the second Award.

3. In the arbitration, the Claimants originally alleged that the fire was the result of an attempt by the owners to render the vessel a constructive total loss. The Claimants maintained this allegation because they said that the Defendants' suggestion as to how the fire was caused was implausible, namely that the fire had been started by a smouldering cigarette which had been thrown into Hold 3 by a stevedore at Constanza on 8th June prior to closing the hatch covers. The Claimants' primary allegation on the pleadings was that the fire was started deliberately with the connivance of the Defendants. Their alternative case was that the fire was caused as the Defendants said but that this constituted unseaworthiness of the vessel for which the Defendants were liable. Approximately two weeks before the hearing, the Claimants abandoned their primary case that the fire was started deliberately and pursued only the unseaworthiness case, whilst stating that they did so for tactical reasons and still believed that the fire was in fact deliberate arson.

4. As recited in the Award, it was therefore common ground between the parties at the arbitration hearing that the fire in Hold 3 originated in one of the two bundles of creosote soaked carpet, timber pieces and other dunnage resting on top of the timber cargoes stowed on the starboard side in the forward part of the hold. That carpet had been put there to soak up any creosote which had leaked from the cargo present and the prior timber cargo which had been discharged. The Award also recited that: - *"it was also agreed that the fire was accidentally started by a burning cigarette end thrown into the hold when the starboard forward hatch cover was opened during the period of loading at Constanza. When the hatch cover was closed the fire was smouldering in the dunnage, most likely the carpet, and the vessel sailed from Constanza in that condition."*

5. In the Award, the Tribunal found that the Defendants had exercised due diligence before and at the beginning of the voyage which began at Constanza on 8th June 1998, to make the vessel seaworthy in all material respects and were therefore not liable for the cargo damage. Moreover, the Tribunal found that the vessel was not unseaworthy in some of the other respects alleged by the Claimants. They found that the Officers and crew were not incompetent, that the fire alarm system was operative and in good working order at the time of the fire, that the vessel was not unseaworthy by reason of the bundle of dunnage on top of the cargo in No 3 hold and that appropriate fire instructions were kept and displayed onboard the vessel. They made no finding one way or the other as to whether or not the presence of a smouldering cigarette in the bundle of dunnage on top of the timber cargo in No 3 hold in itself rendered the vessel unseaworthy as it was unnecessary for them to do so in the light of their finding of due diligence.

6. At paragraphs 67 – 90 of the Award, the Tribunal dealt with disputed factual issues. In particular they had to determine whether, and if so when, the fire alarm was activated by the fire and when and for what reason No 3 hatch cover was opened and by whom. In addition they referred to subsidiary issues of fact which were relevant only to the credibility of individual witnesses and, in the case of the second officer, Mr. Katsarakis, to the reasons why he did not come to give evidence.

7. The Claimants called the Turkish Pilot to give evidence which is referred to at paragraph 70 of the Award. He stated that he was unaware of the fire or any emergency until 13:50 hours on 9th June when he looked forward from the bridge and saw No 3 port aft hatch cover being opened. The Master's evidence was that, at about 13:45 hours, he heard the fire alarm sound and saw smoke coming from the fore and aft ventilators of No 3 hold. The CO2 system was used to release CO2 into the hold but there was a problem in closing the forward ventilator to seal the hold. The Master and Chief Officer were concerned because of the fuel oil in the double bottom tanks below No 3 hold and agreed that the hold should be opened so that water could be directed into it to cool the tank top.

8. There was a conflict of evidence between the Master and the Pilot as to the sounding of the alarm and the timing of discovery of the fire and the opening of the hatch covers. The Tribunal resolved this at paragraph 78 of the Award by finding that smoke was first observed coming from the aft ventilator of No 3 hold at about 13:45 hours and that the Pilot first became aware of the fire when he saw smoke coming from the hatchway at about 13:50. It was clear that the No 3 aft port side hatch cover was partly opened by 14:05 hours when the first of the fire fighting tugs reached the vessel and the Tribunal found that the process of opening the covers began just before 13:50, when the Pilot first saw the evidence of fire. The Tribunal concluded that the alarm had sounded after 13:45 hours and shortly before 1350 hours.

9. On the evidence before the Tribunal there was never any question that the hatch covers had been open at any stage prior to 13: 45 hours on 9th June or that any hot work or welding was being done on the hatch covers at any time that day. The evidence of the witnesses of fact called by the Defendants and that of the Pilot, called by the Claimants, was directly contrary to any such suggestion.

10. The Claimants maintain that, subsequent to the conclusion of the hearing on 6th November 2003, they first obtained information that the actual cause of the fire was hot work (cutting and welding) carried out on board the vessel on the morning of 9th June 1998 and that evidence only became available to them in a form which they could adduce at a later stage, following the publication of the Award. They rely on evidence consisting of alleged contemporaneous notes made by the second officer Mr. Katsarakis and a statement from him dated 8th June 2004 in which he confirms the authenticity and accuracy of those notes. They rely also on statements made by Ms. Vagia, an assistant solicitor engaged by the Claimants and by Mr. Nikandros, a marine surveyor and consultant, who both give hearsay evidence of an oral statement made by the Bosun, Mr. Daskalakis to them on 10th June 2004 to much the same effect. Mr Daskalakis is said to have confirmed to them not only that hot work was carried out but that he was instructed to and did collect and destroy all evidence from hold No 3 which could prove that such work had been carried out. Further, the Claimants have a sworn affidavit dated 19th September 2004 from Mr. Nejloveanu and a signed statement dated 2nd January 2005 from Mr. Mladin, both of whom were Romanian Able Seamen onboard the vessel. Both give evidence of a Polish fitter Mr. Zdzislaw carrying out welding work at hold No 3 following use of an oxyacetylene cutting tool. Both say that all the crew were aware that the fire broke out as a result of the welding operation and sparks flying into the open hold whilst this work was being done. Each says that after the fire was extinguished the crew were ordered by the Chief Officer to gather up all the detritus caused by such welding and to throw it into the sea. The Claimants suggest that there was a conspiracy, to which the Shipowner Defendants were party, to hide the true cause of the fire. The only direct evidence implicating the directors or their managers in the fabrication of a version of events contrary to this appears in a letter from Mr. Mladin to the Claimants' solicitors, in which he refers to two representatives of the Defendants (a director and a port captain) coming to the ship and offering the crew money not to say how the fire really began.

The Arbitration Act 1996

11. Section 68 provides as follows, so far as relevant: -

> **"Challenging the Award: serious irregularity**
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> *68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)...*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –…*
>
> *(g) the award being obtained by fraud or the Award or the way in which it was procured being contrary to the public policy…*
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> **Challenge or appeal: supplementary provisions**
>
> *70.(3) Any application or appeal must be brought within 28 days of the date of the Award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process…*
>
> **Loss of right to object**
>
> *73.(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection - …*
>
> *(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection…"*

Discussion

12. The Claimants rely upon statements now in their possession which they did not have at the time of the arbitration. These, they say, demonstrate that the Defendants' case at the Arbitration as to causation of the fire was false and was based upon perjured evidence. Whereas the Defendant's case had been that the fire was started by a smouldering cigarette left in hold No 3 by a stevedore at Constanza, which the Claimants had accepted as the

probable cause in the absence of any other, the picture which now appeared was that there had been hot work at hold No 3 with sparks flying into the hold where flammable cargo and dunnage was stowed. The evidence adduced in support of the application was, the Claimants contended, such as to destroy the whole basis upon which the arbitration had proceeded. The Award was therefore in their submission obtained by fraud or was procured in a way which was contrary to public policy, inasmuch as the evidence from the Defendants as to what occurred on the ship was deliberately false. In the Claimants' submission it was not necessary to show that the alter ego of the Defendants was party to any such fraud or fabrication of evidence: it was enough if the Master, Chief Officer and crew had conspired together to hide the truth, whether in order to protect some of their number from prosecution by the Turkish or Greek authorities or for any other reason. Alternatively, the Claimants said that it was clearly to be inferred that the Defendants, in the persons of the directors and managers were party to the conspiracy.

13. In **Profilati v Paine Webber** [2001] 1LLR 715, at page 719-780. Moore-Bick J stated that: *"where the successful party is said to have procured the Award in a way which is contrary to public policy, it will normally be necessary to satisfy the Court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an Award in his favour. Moreover I do not think that the Court should be quick to interfere under this section".*

I respectfully agree.

14. Whichever limb of section 68(2)(g) of the Act is relied on by the Claimants, they must establish that the Defendants acted in such a way as to obtain the award by fraud or to procure it in a way which was reprehensible or involved unconscionable conduct. The former is established by the decision of the Court of Appeal in ***Birch v Birch [***1902] P131. The section 68 jurisdiction is a "longstop" and, to some extent at least, the existence of lying witnesses must be considered, if not an ordinary incident of litigation/arbitration, at least one that is not uncommon. It is for the parties to prepare for hearings, whether in Court or arbitration and to adduce the evidence which they wish to establish the truth. If a decision is to be challenged on the basis of false evidence, this can only be done by an applicant where the Defendant can fairly be blamed for the adducing of that evidence and the deception of the Tribunal. In the present case, it can make no difference whether the application is made on the basis that the Award was obtained by fraud or procured in a manner that is contrary to public policy. In each case the Claimant must establish that the Defendant was responsible for the fabrication of perjured evidence, which has brought about a result which has caused them substantial injustice.

15. In order to make good allegations of this kind which would justify setting aside the Award, the Claimants would have to establish on the balance of probabilities, but bearing in mind the nature of the serious allegations involved, that there was fraud or perjury in the procurement of the Award, at least on the part of the Master, Officers and crew. To do this would require a trial where the evidence put forward is tested.

16. The Claimants did not attend the hearing with their witnesses: nor had they applied to cross-examine the Defendants' witnesses who had put in evidence denying that there had been any hot work on the morning of the fire, whether at No 3 hold or elsewhere. It was the Claimants' position that it was enough for them to show that there was cogent evidence that such fraud or perjury had taken place and that the matter should then be remitted to the arbitrators for them to decide the factual questions which arose in consequence. In argument however, Mr. Hamblen QC, for the Claimants, was disposed to accept that it was necessary for him to prove the fraud or procuration contrary to public policy in order to obtain an order from the Court under section 68(3), since that section requires serious irregularity to be shown before the Court can grant relief. Since serious irregularity is defined as an irregularity of one or more of the kinds which appear in section 68(2) and section 68(2)(g) refers to the Award being obtained by fraud or the way in which the Award was procured being contrary to public policy, it is in my judgment clear that the fact of fraud or procuration contrary to public policy must be established to the Court's satisfaction before there is any question of remission to the Tribunal for it to make any further determination of any kind.

17. In those circumstances the Claimants applied for an adjournment and for directions to be given for the trial of the issue of perjury/fraud. Mr. Hofmeyr Q.C. on behalf of the Defendants maintained however that the Claimants were not entitled to an adjournment, since the position was plain on the face of the statute and it was the Claimants' own fault if they were not in a position to prove their case on the scheduled date for their application. He maintained however that the application was in any event doomed to fail on a number of distinct grounds which the Court could determine on a summary basis at this stage, without the need for an adjournment. I decided therefore to hear those points before making any decision as to whether an adjournment would be appropriate. The four points are: -

i) Have the Claimants lost the right to object to the alleged serious `irregularity by virtue of section 73 of the Arbitration Act 1996?

ii) Should the Claimants be given an extension of time for their application under section 68, since the application was made considerably after the expiry of the 28 day period for which section 70(3) of the Act provides?

iii) Is the application an abuse of the process of the Court?

iv) Since the Claimants' application involves consideration of fresh evidence, should the application be summarily dismissed because the Claimants cannot show that: -

a) The evidence had been discovered since the arbitration;

b) That evidence could not have been obtained for the arbitration with the exercise of reasonable diligence and;

c) The evidence is so material that its production at the Arbitration would probably have affected the result?

Section 73 of the Arbitration Act 1996

18. The effect of section 73 is that an objection to a serious irregularity may not be raised by a party after participating in the proceedings without taking the objection, unless that party can show that at the time of participation the grounds for the objection were not known to him and he could not with reasonable diligence have discovered them. The approach to this section appears from the decision of Moore-Bick J in ***Rustal v Gill & Duffus*** [2000] 1LLR 14 @ page 20-21. If the respondent can show that the applicant took part in or continued to take part in the arbitration proceedings without objection, after the grounds of objection arose, the burden passes to the applicant to show that he did not know and could not with reasonable diligence have discovered those grounds at the time. Moreover, the expression "continues to take part in the proceedings" in section 73 is broadly worded and is designed to ensure that a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is, or reasonably ought to be, aware of it. He is not permitted to allow the proceedings to continue without alerting the Tribunal and the other party to a serious irregularity, which, in his view, renders the whole arbitral process invalid. As Moore-Bick J points out, this is not only to avoid a waste of time and expense but is based upon a more fundamental point of fairness and justice. It cannot be right for a party to participate in proceedings, which he believes to be fundamentally irregular, with the intention of taking advantage of any decision in his favour, whilst keeping up his sleeve an objection to an irregularity, which he will only produce in the event of an unfavourable decision.

19. Moore-Bick J went on to say that there might well be periods in arbitration proceedings during which no formal step is required of one or other party but, during those periods, the parties will still be taking part in the proceedings. That proposition held good for the period between the conclusion of the hearing and the publication of the award when nothing further might be required of either party in the interim. He continued as follows: - *"In my judgment, unless a party makes it clear that he is withdrawing from the proceedings, he continues to take part in them until they reach their conclusion, normally in the publication of a final Award. I can see no reason why a party who discovers grounds of objection after the conclusion of the hearing and before the publication of the Award should not be required to voice it promptly, even at that stage, if he wishes to pursue it later on by challenge to the Award. To require him to do so is consistent both with the wording of section 73(1) and the principles which underlie it."*

20. I respectfully agree. The Claimants here, on their own evidence, heard from Mr. Katsarakis, in the period between the hearing (ending on 6th November 2003) and the publication of the Award (on 16th January 2004), that there had been hot work at No 3 hold on the morning of the fire. This was known to the Claimants by 12th November 2003. Moreover, the Claimants, together with the Defendants jointly collected the Award on 26th March 2004. The Claimants thereafter made submissions to the Tribunal about the effect of the Award and about the admission of fresh evidence as well as the issue of costs, all of which were determined in the second Award. The application to challenge the first Award was made on 5th July 2004; whilst the consequential application to challenge the second Award dated 29th June 2004 was made on 21st July 2004.

21. In my judgment, there is no doubt that the Claimants continued to take part in the arbitration proceedings in the period between the hearing and the publication of the Award and further took part in those proceedings by taking up the Award on 26th March 2004. Furthermore, they continued to take part in the Arbitral proceedings up until the second Award, albeit making their objection known on 24th May 2004. In order therefore to sustain any challenge under section 68, it is necessary for the Claimants to show, under section 73, that throughout that time they did not know and could not with reasonable diligence have discovered the grounds for the objection, which they now make. That they had some knowledge is plain from their own application and evidence: -

i) Paragraph 8 of the arbitration claim form reads as follows: - *"Following the conclusion of the hearing, on 17th November 2003 [a mistake for 10th or 12th November], Mr. Katsarakis informed one of the Claimant's experts, Mr. Nikandros, a marine surveyor and consultant, in person in Greece that the cause of the fire was hot work on the hatch cover of No 3 hold. He agreed to and did telephone an assistant solicitor at the Claimant's solicitors, Ms. Gerakaris and repeated what he had said to her. However Mr. Katsarakis was still not prepared to give a formal statement to that effect nor provide a copy of his contemporaneous notes. In all the circumstances leading and junior Counsel advised that it was not appropriate to advise the Tribunal of those conversations."*

ii) At paragraph 12 of Mr. Parton's first witness statement, he said: - *"It is right to point out that following the hearing Mr. Nikandros spoke to Mr. Katsarakis who then told him that the fire had been caused by hot work. However he was not at that stage willing to make a statement to that effect or to provide his notes. There was therefore little that could be done with the information provided and Counsel confirmed that it was neither necessary nor appropriate to put the information before the Tribunal."*

iii) Because of the references to Counsel's advice and the waiver of privilege involved therein, disclosure was made of exchanges between solicitors and Counsel. No evidence was adduced by the Claimants from any of the legal team involved to explain the records of these exchanges.

iv) There is an attendance note from Ms. Gerakaris dated 12th November 2003, which has two entries. The first refers to the conversation between Mr. Nikandros and Mr. Katsarakis concerning welding on the morning of

the fire. The second refers to a conversation with junior Counsel which appears to have taken place following an e-mail of the same date which reads as follows: -

"…I have just received a call from Mr. Nikandros and Mr. Katsarakis who were together at Piraeus in Mr. Nikandros' office. Mr. Katsarakis spoke to me on the phone he said that the hold was open since the morning and that the crew were welding over the hold and that was the cause of the fire. Regarding welding work the crew have been lying all along.

It is a bit late now to introduce this evidence even if we were able to get him to sign yet another statement.

Mr. Katsarakis added that a third engineer from the Chios (he will have to check the crew list to get the name as he can't remember it) has recently called him to warn him (or rather threaten him) that the owners are going to sue him in Greece for perjury. Mr. Katsarakis' reply was that if they do that he will tell the whole truth including giving details of the welding work and how they set fire to the ship.

Maybe we could use this evidence in the Hawknet action.

If you think that under any disclosure obligations we should advise the tribunal of any of the above please tell me. I am however of the view that the case is not (sic – "now") closed and any extra evidence/information will not be looked at with pleasure!"

v) The attendance note of the discussion with junior Counsel reads as follows: -*"…excluded article 4 + fire exception no unseaworthiness unless welding authorised by Owners would have been deadly obligations ceased as not a document only witness who has given evidence."*

vi) Following this, on 17th November, leading Counsel responded in the following way: -*"…How interesting to hear that the crew was welding. I always had a sneaking suspicion about that because they were so keen to get another fitter on board, the hatch cover was undoubtedly in a very poor state, and everyone was so quick to say there was no welding. Presumably the work was interrupted before the Pilot boarded and they kept the cover on its wheels instead of dropping it and dogging it with the intention of carrying on after he disembarked. I do not think we need to disclose this information. It is privileged material: cf a contemporaneous document."*

22. The effect of these documents is clear enough. Having obtained information from Mr. Katsarakis as to the hot work being the cause of the fire and the alleged lies told by the crew in that respect, Ms Gerakaris sought advice from Counsel as to what to do. It can be seen that she had been told of a threat to sue Mr. Katsarakis for perjury in relation to the evidence that he had given at the arbitration (in a statement dated 13th October 2003 to which I will refer later) and that his response was that he would "tell the whole truth including giving details of the welding work and how they set fire to the ship". She was concerned about seeking to introduce new evidence if they could get him to sign another statement but there is no suggestion that he had said that he would not do so. Indeed he was threatening to inform on the Defendants.

23. She thought the material could be used in the charterparty arbitration (the Hawknet action) but was concerned as to whether the obligations of disclosure required her to inform the Tribunal of what she had found out. (In the last line of the e-mail, the word "not" was apparently a typographical error for "now").

24. The reference to "*yet another statement*" to be given by Mr. Katsarakis and to any extra evidence being regarded unfavourably by the Tribunal arose because of events at the arbitration. On the penultimate day of the arbitration the Claimants disclosed a document, which had only just come into the possession of the Claimants' solicitors, namely a statement that Mr. Katsarakis had made to the Turkish authorities. This statement contradicted his earlier statement of 13th October 2003 and was damaging to the Claimants' case. It was, very properly disclosed, but was greeted with disfavour by the Tribunal, who initially thought that the Claimants were seeking, in the course of closing speeches, to introduce fresh evidence. In fact the document was disclosed as a matter of obligation and not because the Claimants wished to do so.

25. The attendance note of the conversation with junior Counsel reveals that he took the view that the new evidence from Mr. Katsarakis would not be helpful to the Claimants at all. The Claimants' case had been that the vessel was unseaworthy by reason of the smouldering cigarette in No 3 hold before and at the commencement of the voyage. If the fire was caused by hot work effected by the crew after the voyage began, that case was destroyed. There would then be no unseaworthiness at the commencement of the voyage and the Defendants would be entitled to the protection of Article IV (2)(a) or (b) unless the fire was caused with the actual fault or privity of the owners. Thus Counsel appears to have advised that there was no case to be advanced unless the welding had been authorised by the owners. The introduction of the evidence would therefore have been fatal ("deadly") to the Claimants' case. He advised however that as this was not a statement in a document (unlike the statement which had to be disclosed during closing speeches) but only an oral statement from a witness who had given evidence, there was no obligation to disclose it. It is clear therefore that Counsel's advice was that this evidence was of no help to the Claimants but (fortunately) that there was no obligation to disclose this damaging material.

26. When leading Counsel reverted by e-mail, she stated that this new information confirmed what she had always suspected, namely that there had been hot work. She simply advised that there was no need to disclose the information because it was privileged material, as compared with a contemporaneous document such as the statement to the Turkish authorities, which had required disclosure during the course of closing speeches.

27. There is no suggestion in any of this material that the Claimants would have made use of any statement or notes of Mr Katsarakis such had been in their possession. It is clear that the view formed was that the new information

would damage the Claimants' case of unseaworthiness at the commencement of the voyage by virtue of the smouldering cigarette end. The position is therefore that, as at 12th November 2003, before the Award was published, the Claimants were aware of a witness who said that the cause of the fire was hot work, that the crew had lied about the cause of the fire and that he had been the subject of threats from the Defendants' management. The Claimants did not have a statement from him nor his notes, nor did they seek either. Equally, there is no direct evidence that he would not have supplied a statement or notes at that stage, despite Mr. Parton's assertion to this effect.

28. It is clear from the evidence that in October 2003 the Claimants' solicitors had been in contact with Mr. Katsarakis and also with Mr. Daskalakis' wife. Both these crew members came from the same village in Crete. The Claimants say that Mr Katsarakis then said that he knew the true cause of the fire but would not reveal it. A statement was obtained from Mr. Katsarakis in which he said, at paragraph 4 that he was not inclined to supply his notes, unless the Court authorities asked him to. In that statement he referred to all the panels of hold No 3 being closed and secure except for the two aft panels which were raised on their wheels (but still flat) leaving a small opening of about 20-30 centimetres in the middle of the hold. He also said that the fire alarm did not sound. He made no suggestion that hot work had been conducted on the vessel on the day of the fire.

29. In cross-examination of Mr. Nikandros at the Arbitration, the latter said that Mr. Katsarakis was prepared to supply his notes if so requested by the Tribunal. No request was ever made to the Tribunal to ask for such notes.

30. At paragraphs 85-88 of the Award, the Tribunal discussed the position of Mr. Katsarakis and his witness statement. They referred to the contradictory evidence in his earlier statement to the Turkish authorities about the fire alarm sounding. They referred also to his evidence to the Greek ASNA enquiry in Piraeus when he referred to the alarm being sounded by the Master. They went on also to refer to his unwillingness to attend the hearing to give evidence, the reasons for which were much debated. The Claimants accused the Defendants of putting pressure upon him not to come to London after his witness statement had been disclosed. There was evidence that Captain Pagonis of the managers, had spoken to him twice on 14th October. It was said that he had shouted at him and threatened him with proceedings for perjury if he gave evidence that the alarm had not sounded, contrary to his earlier evidence. Captain Pagonis did give evidence before the Tribunal and accepted that he had reminded Mr. Katsarakis of his previous statements but denied shouting or making threats. The Tribunal then referred to Mr. Katsarakis' discussion with both parties as to the amount he might be paid to cover his expenses and by way of compensation for loss of earnings if he was to travel to London to give evidence at the hearing but made no express finding as to what had occurred between him and the Defendants.

31. The Defendants' solicitors had offered, when this point of alleged intimidation first arose, to travel to Crete with the Claimants' solicitors to allay any fears, which Mr. Katsarakis might have about coming to give evidence. That offer was not taken up by the Claimants' solicitors for the reasons set out in a statement dated 5th November 2003 by Mr. Parton. In paragraph 7 of that statement he expressed his understanding from Mr. Nikandros that Mr. Katsarakis did not wish to make any further statement in the matter.

32. None of this however indicates that Mr. Katsarakis was unwilling, on 12th November 2003 to provide a statement or his interview notes or that, at the time there was any desire or intention on the part of the Claimants to obtain them if they could. All the evidence is to the contrary. In a fax of 26th April 2004, after the Award had been published, Mr. Nikandros says that he had contacted Mr. Katsarakis that day and asked him if he would give a statement. Mr. Katsarakis rang back to say that he would, after considering the matter, and would also provide a copy of the particular page of his notes. He asked for €5,000 to do so.

33. There is no evidence of any attempt in the mean time (between November 12th 2003 and 26th April 2004) to contact Mr. Katsarakis or indeed anyone else to check on his story or to obtain evidence from any other source about hot work as the cause of the fire. His notes were then sent on 24th May 2004. His statement was taken thereafter and is dated 8th June.

34. It seems that the figure agreed for the provision of this statement and notes was €2,500 but, leaving aside questions of negotiation over money, the history militates against any suggestion that there was any real difficulty in obtaining Mr. Katsarakis's notes or his statement. The key part of the notes appears in entries under the dates 8th June 1998 and 9th June 1998 where he refers to a Polish fitter carrying out hot work on "the vertical inserts on the McGregor covers of the holds" whilst his one page statement explains that his notes describe the events as they happened and represent his comments "during the course of the nine days from the incident".

35. It is in my judgment clear that the Claimants decided in November 2003 that they did not wish to adduce any evidence from Mr. Katsarakis and to present it to the Tribunal prior to the publication of the Award. They may well have had doubts as to his credibility in the light of his 13th October statement in the arbitration which was contradicted by two earlier statements which he had made, and in the light of his unwillingness to attend the hearing, whatever justification he had put forward for that. His requirements for payment of money presumably also did not inspire confidence. Nonetheless if the Claimants had wished to do so, they could have taken steps to take a statement and investigate his notes, to ascertain if there were other witnesses who would testify to the events at issue and obtain statements from them and, if necessary, give hearsay evidence of what he had said. It is clear that the advice given by Counsel was to the effect that his evidence (and any like it) would be detrimental to the Claimants' case and was not therefore to be advanced. Thus no further steps were taken to pursue this line of evidence at all.

36. In the result, nothing was done to obtain his statement or notes nor to check the position with any other potential witnesses until after the Award had been collected on 26th March 2004. When faced with an application to the Tribunal to pay the Defendants' costs, the Claimants wrote to the Tribunal on 26th April 2004. In that letter reference was made to the information given by Mr. Katsarakis to Mr. Nikandros on 12th November and his repetition of that information to Ms. Gerakaris of the Claimants' solicitors. A copy of Mr. Nikandros's fax of 26th April 2004 to the Claimants' solicitors was enclosed, in which he confirmed that Mr. Katsarakis would provide a statement and the relevant page of his notes. It was submitted that the Tribunal should admit this evidence, when obtained, and should reconsider the cause of the fire. If the Tribunal should consider itself functus officio in that respect, it should at least admit it for the purpose of assessing costs. The letter went on: - *"Here we have a classic case of if only they had told the truth from the outset there was no need for them to have done otherwise. The writer in 25 years in shipping law and investigations and the Tribunal being very experienced in these matters may agree has lost count of the number of times he has come across made up stories which need not have been made up."*

    The message conveyed by the paragraph is that the allegedly false version of events given by the Officers and crew of the vessel was unnecessary since, had they told the truth about hot work, this would not have affected liability. The author was saying however that these lies were relevant to the question of costs since the hearing had proceeded upon a false basis. Thus a hearing was sought to determine the issues raised by the new evidence and to make a new finding of fact as to the cause of the fire and to order costs in favour of the Claimants on an indemnity basis.

37. Following receipt of Mr. Katsarakis's notes on 24th May 2004, the Claimants then contacted Mr. Daskalakis and met with him on 10th June. He would not supply a statement but the hearsay statements of Ms. Vagia and Mr. Nikandros were signed on 16th June. They were then sent to the Tribunal on that date. It thus appears that there was no particular difficulty in obtaining evidence from Mr. Daskalakis and that, had the Claimants sought to do so in November 2003, this could have been achieved before the Award was issued, let alone collected.

38. As regards the Romanian witnesses, whose statements were ultimately obtained, the Claimants approached a Romanian lawyer on 18th June 2004. A statement was not obtained from Mr. Nejloveanu until 15th July. In the case of Mr. Mladin, the first contact was made on 17th September 2004 and a statement was signed on 2nd January 2005. The Defendants say that none of the alleged difficulties in contacting these two crew members are valid and it certainly does not appear that these matters were dealt with as matters of urgency even given the late start. More importantly however since Mr. Nejloveanu's evidence was obtained within a period of a month, this also could no doubt have been obtained before the Award was published if the Claimants had desired to do so in November 2003. In the case of Mr. Mladin, there appears to have been a greater problem but I find that it might well have been possible to obtain his evidence before the Award was published and certainly before it was collected, had the Claimants set about the matter speedily and in an appropriate way.

39. The issue then is whether or not the Claimants continued to take part in the proceedings when they knew or ought, with reasonable diligence to have discovered, the grounds for their objection, namely that there had been a serious irregularity affecting the proceedings or the Award by reason of fraud and perjury. It is clear that at all times between 12th November and 29th June 2004, the Claimants continued to take part in the arbitration. This is made clear by their continued applications to the Tribunal to reopen their findings on the cause of the fire whilst making submissions about costs in relation to the second Award. For the reasons set forth earlier, merely failing to withdraw from the proceedings, whilst waiting for the Award or the second Award would be enough to constitute the continuance of participation in the proceedings but it is here clear that positive acts were taken by the Claimants in collecting the Award and making submissions in relation to the second Award. It was not until 24th May 2004 that a section 68 objection was first made.

40. It is equally clear that throughout that time, they had knowledge of Mr. Katsarakis' version of events. Mr. Hamblen Q.C contended that the Claimants could not be said to "know" of the grounds for the objection, nor could they be expected to do anything simply on the "say so" of Mr. Katsarakis in the absence of any statement or notes from him, which constituted credible evidence which could be put before the Court. This point loses all its force however in the light of the following matters: -

    i) The exchanges with Counsel in November 2003 show that a decision was made not to pursue this line of evidence at all because it was not considered to be advantageous to the Claimants. They wished to continue with their unseaworthiness case, which would have been destroyed by this new evidence, if accepted. The immediate issue under discussion therefore was whether or not the information had to be disclosed as a matter of obligation rather than whether it should be utilised to better the Claimants' position.

    ii) There is no satisfactory evidence that Mr. Katsarakis would not have produced his statement and notes if he had been asked – no doubt upon payment of a negotiated sum of money. The speed with which the notes and statement were produced when the matter was raised with him again on 26th April 2004, following publication of the Award, belies any suggestion that the material would not have been obtainable in November/December 2003.

    iii) The Claimants made no effort to contact Mr. Daskalakis or the Romanians or indeed anyone else, in order to check the version of events put forward by Mr. Katsarakis at any time until after the publication of the Award and, moreover, they failed to do so with any speed thereafter.

    iv) There is no evidence that the Claimants did not believe what Mr Katsarakis had told them or that they needed confirmation in the shape of evidence of others, or a statement from him or his notes.

41. Mr. Hamblen Q.C. maintained that, in order to satisfy section 68(2)(g) of the Act, he had only to show that there had been perjury and conspiracy to fabricate evidence on the part of the Officers and crew of the vessel as opposed to the management of the Defendants themselves. If this is so, it cannot be said that the Claimants did not know everything they needed to know for the purpose of section 73 on 12th November. At that stage they knew that Mr. Katsarakis was saying that hot work had been done and that the evidence given by the Officers and crew was a pack of lies. If the Claimants did not believe this, then it could be argued that they had no knowledge for the purpose of section 73, but no representative of the Claimants has said that Mr Katsarakis she was not believed and the comments of leading Counsel in the e-mail, show that, to the contrary, this information confirmed the suspicions that she had always held. Moreover, nothing therefore occurred after 12th November to change the Claimants' state of knowledge prior to the issuing of their application, save the obtaining of written material from Mr. Katsarakis and hearsay evidence from Mr. Daskalakis, whilst the statements from the two Romanian able seamen were obtained subsequently and merely confirmed what they had already heard. Mr. Hamblen Q.C. sought to say that it was the emerging body of evidence which made all the difference but in circumstances where the Claimants say that Mr. Katsarakis is to be believed and never suggest that they did not believe him, it appears to me that the Claimants, on their own case, knew the grounds for their objection on November 12th 2003, since the objection is that the Award was obtained by fabricated and perjured evidence.

42. On a proper construction of section 68(2)(g) of the Act, it is in my judgment clear that the Award must be obtained by the fraud of the Defendants or procured by the Defendants in a manner contrary to public policy. I was not addressed in any detail upon the question as to whose fraud could be attributed to the Defendants. It is possible (but I say no more than that) that there is some distinction to be drawn between members of the crew on the one hand and managers or directors of the company on the other, depending upon the nature of the employment of the individual concerned, the identity of the employer (management company or the like) and the identity of those responsible for running the arbitration. Whether or not this is the case, it cannot avail the Claimants here since there was no development in their state of knowledge on this point at any time prior to 2nd January 2005 (long after the issuing of the application) when Mr. Mladin's letter suggests that a shareholder/ director and a Port Captain gave instructions, on visiting the vessel shortly after the incident, to tell lies about the cause of the fire. The reality of the matter is that the Claimants have always sought to draw the inference and asked the Court to draw the inference that the Award was obtained by fraud on the part of representatives of the Defendants or that the Award was procured in a manner contrary to public policy by such representatives (whatever the identity of the individual or individuals concerned). Nothing turns upon any point in time at which the Claimants knew the identities of all those involved in the alleged obtaining or procurement of the Award since, at the arbitration, the Master, the Chief Engineer, the part owner/director and the Port Captain who visited the vessel immediately following the incident, and another part owner all gave evidence. The Claimants' position has always been that the whole case of the Defendants was founded upon false evidence given by these persons.

43. Even if there could be said to be any doubt about the "knowledge" of the Claimants as to the relevant perjury, fraud or procuration of the Award contrary to public policy, in my judgment it is clear that the Claimants could, with reasonable diligence have discovered the grounds for their objection by obtaining evidence in the shape of the statements which they now have in hand, long before they did. To continue to participate in the arbitration proceedings up to 16th January 2004, 26th March 2004 or 25th May 2004, without carrying out any further investigations after 12th November does not amount to the exercise of reasonable diligence in discovering grounds for objection following receipt of the information from Mr. Katsarakis on 12th November itself. With that information in hand, even if that in itself was not enough to constitute knowledge for the purpose of section 73 of the Act, any party who wished to consider taking the point that the Award was procured by perjury and fabricated evidence on the part of the Defendants, their servants or agents, would have immediately taken steps to contact other potential witnesses, to check Mr. Katsarakis's version of events with them and to obtain statements from them in order to put the matter before the Tribunal at the earliest possible opportunity, rather than keeping quiet and waiting for the Award before even beginning to take any further steps to pursue the point.

44. In the ***Stainless Patriot*** [1979] 1LLR 589 at pages 590-591, Donaldson J (as he then was) referred to the power to remit awards to arbitrators under Arbitration Acts prior to the Act. There was, under earlier legislation, the power in the Court to remit awards where there were grounds for saying that there was new evidence, which ought to be considered by the arbitrator. Relief was refused in that case because the party seeking relief had neglected to take advantage of the opportunity to ask the arbitrators to delay issuing their Award whilst it considered whether it was possible to get evidence of the type which it sought to adduce after the Award had been issued. In the present case, if the Claimants had wished to do so, they could have applied to the Arbitrators to delay the issue of an Award whilst they investigated matters, which went to the root of the proceedings, which had taken place. They could then have sought, with the benefit of the evidence, which they now have, permission to amend their case and adduce this fresh evidence before the arbitrators so that it could be considered in the context of the arbitration itself. Whilst it is plain that this would have been a drastic course of action to adopt in the light of the case which they had already put, and would have involved, if successful, a rehearing and a reconsideration of all the evidence already given, the Claimants either were in a position to do that or could with reasonable diligence have put themselves in a position to do that. Instead they made an assessment of the benefits of using such material, considered it to be unhelpful, took the view that they were not bound to disclose the material and relied on the unseaworthiness case they had already put in the hope that the Arbitrators would find in their favour. After the Award was issued and the claim had failed, the Claimants then sought to challenge the Award, which if

successful, would result in a further hearing of evidence some two years or more after the original hearings, an outcome even more drastic.

45. I therefore find that the Claimants participated in the arbitration proceedings up to and including 16th January 2004, up to 26th March 2004 and up to 24th May 2004, knowing of the grounds which they now put forward by way of objection to the Award. Even if that is not so, it is clear that the Claimants could with reasonable diligence, in those periods, have discovered the grounds for the objection they now make by obtaining the evidence on which they now rely or at least enough of it to know the grounds for the objection they now advance.

Extension of time

46. The extension required is approximately five months, from 13th February 2004 to 5th July 2004. The fact that an extension was agreed until the expiry of one month after the collection of the Award for seeking permission to appeal under section 69 of the Act is two-edged. It could be seen as indicating that finality was of lesser importance to these parties than in some other cases. It could also be seen as indicating that the parties were prepared to agree to an extension of time under section 69 but specifically would not agree an extension for a section 68 challenge. The reality is, I suspect, that neither party had a section 68 challenge in mind at the time of agreeing the extension for section 69 purposes.

47. In ***Kalmneft v Glencore*** [2002] 1LLR 128, Colman J set out at paragraph 59 the factors which the Court would take into account when considering the question of an extension. It is recognised that each case turns on its own facts but a number of considerations are likely to be material, including the length of the delay, the reasonableness of the actions of the party who allows the time limit to expire and the delay to occur, the extent to which the Defendant to the application or the arbitrators caused or contributed to the delay and to the existence and extent of prejudice which may be suffered in addition to the mere loss of time if the extension is granted. The Court will also take into account the strength of the application and whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined. The Court of Appeal in ***Nagusina v Allied Maritime*** [2002] EWCA Civ 1147 identified the first three factors as the most important and stated that prejudice to the Defendant was not a prerequisite for refusal (paragraphs 38-39).

48. The Defendants relied upon the ***Johanna V*** [2003] 2LLR 617 at page 623 where Thomas J (as he then was) pointed out that the Act specifically draws attention to the potential loss of the right to challenge an award under section 67. The same point can properly be made in relation to section 68 by reference to the wording of section 73.

49. In this case there was substantial delay but the key issue, as in the context of section 73, must be the reasonableness of the Claimants, although in this case the focus is on the delay, as opposed to diligence in discovering the grounds for objection to the Award. The two plainly overlap since, if the Claimants acted with reasonable diligence to discover the grounds for the objection, they would self evidently be acting reasonably in not issuing proceedings prior to that discovery. If however they had the requisite knowledge within the 28 day period allowed by section 70(3) of the Act, or could with reasonable diligence have had that knowledge within that period, they cannot have been acting reasonably in the context of consideration of an extension of time.

50. I have already held that the Claimants had the necessary knowledge as at 12th November 2003 and, if there was any doubt about that, could with reasonable diligence have discovered the grounds for their objection by the time the Award was issued, let alone the time when it was collected.

51. Mr. Hofmeyr Q.C. maintains that there was further unreasonable delay before issuing proceedings on July 5th, following the collection of the Award on 26th March. It was not until 26th April 2004, as set out above, that the Claimants contacted Mr. Katsarakis again. Even then they did not obtain his notes for a further month (25th May) nor his statement until 8th June. They did not even seek to approach Mr. Daskalakis until 25th May nor meet with him until 10th June. Whilst it would have been virtually impossible to make an application under section 68 without a statement from at least one of the potential witnesses, the actions of the Claimants between 13th February 2004 and 5th July cannot be characterised as reasonable in the circumstances. The Claimants' exchanges with the Tribunal from 26th April onwards, in which they sought to persuade the Tribunal to admit the evidence and sought the agreement of the Claimants to such admission present no good reason for not applying to the Court. It was self evident, notwithstanding the arguments raised to the contrary, that the Arbitrators were functus officio in relation to the matters they had decided whilst the idea that the successful Defendants would accede to the admission of evidence of this kind was risible.

52. The Claimants' failure to take objection to the Award within the period of 28 days of its publication reflects the same attitude, which they had adopted in the period from 12th November 2003 to the date of publication. The letter of 26th April 2004 to which I have already referred shows that the Claimants did not consider that the end result of the arbitration would be any different notwithstanding the lies which they alleged had been told. The exchanges of correspondence with the Tribunal were, as I construe them, in reality an attempt to gain a benefit out of the new evidence in relation to an order for costs. It was only following the second Award, which determined the question of costs against them on 29th June that, on 5th July 2004 the Claimants issued the section 68 application.

53. If the Claimants had been able to meet the section 73 test and been able to show that they had participated in the arbitration proceedings up to 29th June without the requisite knowledge and in circumstances where, by

exercising reasonable diligence they could not have discovered the grounds for their objection, they would no doubt have been acting reasonably in not making an application until 5th July. Since this is not the case, it is plain that, with the knowledge they had or should have had, the application should have been issued long before 5th July.

54. None of the other factors set out by Colman J can carry much weight when set alongside this history. Whilst the element of prejudice to the Defendants caused by the delay is limited, if it exists at all, it is relevant to point out that the application involves the third allegation by the Claimants of fraud against the Defendants. The first was the allegation of scuttling which was dropped. The second was the allegation of a conspiracy to conceal the inoperability of the fire alarm and its sounding, which failed before the Tribunal. The third is a wholesale attack upon all the evidence put forward in relation to the incident. Whilst the real prejudice to the Defendants lies in the nature of the application and its content, it is right to point out that the greater the delay in making such allegations, the more indignation is caused and the more difficulty the Defendants may encounter in responding.

55. I have in mind the question of overall justice and fairness in the context of this application. The importance of finality in arbitrations is well recognised as a matter of policy underlying the 1996 Arbitration Act. Notwithstanding the gravity of the allegations made and the consequences, if true, I cannot see that there is any justification for granting an extension to the Claimants in circumstances where they eschewed reliance on the grounds, which they now put forward, from November 2003 to April/May 2004. It is unreasonable to make an application in July 2004 based on the self same grounds.

56. Whilst the strength of the application is one, which the Court can take into account, it is self-evident in the present case that there are extensive conflicts of evidence between the parties. There are obvious challenges which could be made to the Claimants' evidence including the inconsistency of Mr. Katsarakis's evidence thus far, the hearsay nature of the evidence of Mr. Daskalakis and the difficulties of reconciling any of the new evidence with the evidence of the Pilot, whose evidence was adduced by the Claimants at the arbitration hearings. At all events, I am not in a position to evaluate the evidence as it appears on the statements in a way which enables me to take this into account as a factor one way or the other in the context of an extension of time.

Abuse of process

57. The Defendants' abuse of process argument rests on the same factual premises as the arguments under section 73 and those put forward as reasons for refusing an extension of time. The decision not to seek to advance an alternative case in the arbitration, prior to the issuing of the Award and to take the point only after losing the arbitration can properly be characterised as an abuse of process. There is no need for reference to any authority on the subject but once again the Johanna V presents an analogous example following the taking of a deliberate decision.

The nature, content and strength of the evidence

58. In order to make any determination on this point it would be necessary for me to evaluate the evidence put forward by the Claimants as against that of the Defendants – both that produced in the arbitration and that which was put before the Court for this application. As I have already decided this matter against the Claimants on three grounds, it is not necessary for me to embark upon this process if it is one which the Court should summarily undertake in the context of a section 68 application, as Mr Hofmeyr Q.C. suggested.

59. Because arguments were addressed to me as to the proper approach on this matter, I set out my views on the subject.

60. The Defendants submitted that the Claimants' application involved the admission of new evidence and that, before the material could be admitted, the Claimants had to establish that they could meet the tests set out in ***Westacre v Jugoimport*** [2000] QB 288 at page 307 where Waller LJ said this: - *"I have not considered fully what the position is now that the Act of 1996 is in force, but in this context it is difficult to think that if under section 68(2)(g) it were suggested an award had been obtained by fraud and that relief under section 68(3) should be granted, the court would not insist on the same condition, i.e., unavailability of the evidence produced as at the time of the arbitration, and that such evidence would have had an important influence on the result."*

61. Section 68 and section 73 of the Act set out the criteria to be applied. In the case of section 68, the Claimant has not only to establish a serious irregularity but also one which has caused or will cause substantial injustice to the applicant. The notion of substantial injustice can take account of any failure by the applicant to adduce evidence at the time when it should have been adduced, namely during the hearing and also of the nature, content and strength of that evidence and its consequent influence on the result of the arbitration. I see no difficulty in the Court taking account of this factor as mentioned by Waller LJ.

62. Equally, section 73 contains its own provisions relating to the loss of the right to object where the grounds were known or should have been known to the applicant whilst he continued to participate in the proceedings. Once again the unavailability of the evidence at the time of the arbitration, to which Waller LJ refers is a factor which is brought into section 73 by its own wording.

63. Waller LJ referred at page 306 C – D to the position with regard to domestic judgments and applications to set them aside on the basis that they were obtained by fraud. He referred to the possibility of summary dismissal of such an application: - *"Unless the plaintiff can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence and which is so material that its production at the trial*

would probably have affected the result and (when the fraud consists of perjury) so strong that it would reasonably be expected to be decisive at the rehearing and if unanswered must have that result."

64. His view was, that where enforcement of a foreign arbitration award was challenged on the basis of perjured evidence, it should be treated in the same way as a domestic award. There he referred to the circumstances in which awards could be remitted to the arbitrators under the legislation preceding the Act before referring to the Act itself in the terms which I have quoted.

65. It does not seem to me that the passage in the judgment of Waller LJ at page 306, which is a citation of Dicey & Morris on the Conflict of Laws, 12th edition 1993 (and now 13th edition at paragraph 14 – 128) constitutes a black letter test for applications under section 68(2)(g) of the Act, since the Act contains its own express criteria for such applications. Nonetheless, the approach of the Court in relation to domestic judgments is a useful comparator when applications are made to set aside arbitration awards where the decision has been reached by the Tribunal of the parties' choice and the question of substantial injustice is one which can take account of the factors mentioned.

66. It appears to me that the references to perjury and the stronger test to be applied in such a case is intended to cover the position described at page 309 F – G of Waller LJ's judgment where the very issue before the arbitrators was whether the witness or witnesses were lying and that is the point which the applicant seeks to resurrect in the context of the challenge to the Award. The issue of substantial injustice again falls to be considered in the light of this factor.

Conclusion

67. For the reasons already given I need not come to any summary conclusion as to whether or not the new evidence would have had an important influence on the result of the arbitration, having found that the evidence was available during the course of the arbitration, prior to the issuing of the Award, that the Claimants participated in the arbitration with knowledge of the grounds of objection, or at the very least could with reasonable diligence have discovered those grounds, that no extension of time should be given for the making of this application and that the application itself is an abuse of process.

68. For these reasons the application is dismissed and there is no need for any adjournment of the application for a trial of the issue of perjury/fraud.

Mr. N. Hamblen Q.C. and Ms. C. Hanley (instructed by Jackson Parton Solicitors) for the Claimant
Stephen Hofmeyr Q. C. and Gavin Geary (instructed by Ince & Co.) for the Defendants