JUDGMENT : The Hon Mr Justice Morison Commercial Court. 15th December 2006

1 This is an application made under section 68 (2)(a) and (d) and section 69 of the Arbitration Act 1996 ['the Act'].

The background

2 The dispute between the parties centred on the entitlement of the Charterers, the Applicants, to cancel a charterparty dated 24 November 2004 ['the Charterparty'] made between them and the Respondents, the disponent owners ['the Owners']. The vessel, The Fu Ning Hai, was owned by a company called Cosco Bulk Carrier Co. Ltd ['Cosco'] who chartered it to the Owners on 7 June 2004. The Owners chartered it to the Charterers.

3 The relevant terms of the Charterparty are these:

15. That in the event of the loss of time from deficiency and/or default and/or strike of men or deficiency of stores, fire, breakdown or grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause whatsoever preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost and any expenses may be deducted from the hire except when such is caused by the Charterers and/or their agents and/or their servants ...

...

CLAUSE 56 -- Off-hire

Should the vessel put back whilst on voyage by reason of any accident or breakdown, or in the event of loss of time either in port or at sea or deviation upon the course of the voyage caused by sickness of or accident to the Crew or any person onboard the vessel (other than supercargo travelling by request of the Charterers) or by reason of the refusal of the Master or Crew to perform their duties, or by reason of salvage, or oil pollution even if alleged, or capture/seizure or detention or threatened detention by any authority including arrest, the hire shall be suspended from the time of the inefficiency until the vessel is again efficient in the same or equidistant position in Charterers' option, and voyage resumed therefrom. All extra directly related to expenses incurred including bunkers consumed during period of suspended hire shall be for Owners' account.

The Charterers may in their option, partly or wholly, add any off-hire period(s) to the Time Charter period which to be notified to Owners no later than 30 days prior to the vessel's redelivery.

During any off-hire period estimated to exceed 8 days, the Owners to give the Charterers not less than 5 days definite notice of resumption of the service.

If the vessel has been off-hire for a period of more than 30 days, the Charterers are at liberty to cancel the balance of this Charter Party, in which case redelivery shall take place upon vessel being free from cargo, irrespective of redelivery ranges.

...

CLAUSE 70 -- Drydocking

Vessel's next drydocking is due in May/July, 2005, owners intend to drydock the vessel in P.R. China for about 15 days (without guarantee). For which charterers' endeavour to bring the vessel to Singapore/Japan range and deliver to Owners for drydock.

Vessel to be placed off-hire upon Dlosp one safe port Singapore/Japan range with sufficient notice from Charterers and sufficient fuel on board. All fuel used by the vessel while off-hire shall be for owners' account.

Vessel shall be put back on hire at Dlosp dockyard or in charterers' option at a position or equivalent distance from last discharge port to the charterers' next destination with owners giving 15/10/7/5/3/2/1 days notice to Charterers.

Charterers have the option to add the above off hire period to this charterparty."

4 The main dispute between the parties was simply whether the Charterers were entitled to cancel the Charterparty under clause 56, on the grounds that the vessel had (allegedly) been off-hire for a period of more than 30 days. The Charterparty provided for arbitration in London by three persons. That provision was amended by consent: it was agreed that Sir Christopher Staughton should be the sole arbitrator. He sat for two days in early August 2006. He read the parties' written submissions, the written witness statements of fact and heard oral evidence from experts. He produced a written Award with reasons on 17 August. It is this Award which forms the subject matter of the present application.

The Award

5 I cite below the whole of the Award on the point at issue, since it deals, shortly and succinctly, with it and contains no confidential material.

3. The Charterers were required (by clause 4 of the Contract) to pay at the rate of USD21,000 daily to Owners' brokers in the USA every 15 days in advance. This, it would appear, was a high rate when the Contract was made in November 2004. Or at any rate it fell later, in the second half of 2005.

4. Early in September 2005 there was some discussion as to the dry docking of the vessel, which was required no later than December of that year. The vessel was at that time engaged in a voyage to either Isabel in the Philippines or Gresik in Indonesia. The first of those places was within the Singapore /Japan range, but Gresik was not.

5. On 9th September the Owners or their brokers sent a message to the Charterers as follows:

"re: mv fu ning hai ref d/d arrangement, considering the vsl dely position is in se asia, head owns want to arrange a short trip fm south Kalimantan with coal to south china, dur abt 15 days, then head owns will take the vsl fm south china to Nantong for drydock. pls cfm it is ok with chtrs. Thks brgds"

6. *The Charterers replied through brokers on 12th September as follows:*
   "Noted that H. Owners propose to arrange a short trip fm South Kalimantan with coal to South China, dur abt 15 days and the vsl then to proceed to Nantong for drydock.
   On the understanding that for the purposes of C/P clause 70 the Vessel will be off-hire on DLOSP discharge port. Charterers are pleased to confirm their consent to H. Owners taking the vessel back for their own account to undertake this business.
   Owners pls note that as per our fixture with sub-chrts, the discharge port will be either Isabel or Gresik. As it seems now, the discharge port will most probably be Gresik, but this is not finally confirmed yet. We will keep Owners informed.
   All rights/obligations under the C/P otherwise to be unaffected."
   Rgds
   Jens Axmann
7. *The Owners replied on 14th September:*
   "pls update the iti of this vsl urgently"
   The answer from the Charterers on 16th September was:
   "vsl sailed Jeddah 15th Sept ETA Gresik 4th Oct -- estimate abt 4/5 days for discharge -- whether vsl will redeliver DOP intention Gresik on/abt 8/9 Oct WP/AGW"
8. *On 23rd September the Owners wrote:*
   "THE SUBJ VSL ETA BANJARMASIN 09TH / OCT, ETC & ETS 14TH /OCT, ETA HUANGPU 20TH/OCT, ETCD 25TH/OCT.
   IT WILL TAKE 15DAYS IN DRYDOCK AT GUANGZHOU SHIPYARD.SO THE VSL EXPECTED TO BE REDELY TO HBC O/A 15TH/NOV, IAGW/WP/WOG."
   This message, when deciphered, shows that the dry dock was to be at Guangzhou rather than Nantong. Nevertheless the time required from completion of discharge at Gresik to the redelivery to the Charterers "if all goes well, weather permitting, without guarantee" would amount to thirty-six days.
9. *Then followed a calculation by the Charterers of bunkers for the present voyage, which was not accepted by the Owners. I leave that aside for the moment. The vessel in due course discharged at Gresik and proceeded on the voyage for Cosco. The Owners sent a message to the Charterers saying that the vessel was expected to arrive at Guangzhou on 23rd October and was expected to leave Guangzhou on 16th November to resume the service of the charterparty. The Charterers replied:*
   "Thks below. Noted. All terms and conditions of C/P remain unaffected."
10. *Later, notice was given that the vessel was expected to be delivered to the Charterers on 12th November. But before that could happen the Charterers gave this message to the Owners on 9th November 2005:*
    "MV 'FU NING HAI' C/P dd. 24 Nov. 04
    Pursuant to C/P clause 56 of the subject C/P, we are at liberty to cancel the balance of the Charterparty if the vessel has been off-hire for a period of more than 30 days.
    The Vessel has been off-hire since DLOSP Gresik on 9 Oct 05 at 14:30hrs UTC and we hereby given notice exercising our right under clause 56 to cancel the balance of the Charterparty.
    Brgds
    HBC, Hamburg"
    The Owners replied on 10th November:
    "TOP URGENT AND IMPORTANT
    CHARTRS LAST NOTED.
    OWNERS FULL REJECT CHARTRS CANCELLING THE BALANCE OF C/P. OWNERS HV TEND THE CASE TO OWNERS DEFENCE CLUB UK. THEY ARE JUST INVESTIGATING.
    CHARTR HV CONFIRMED OWNERS CAN PERFORM ONE TCT, SO THE TIME SHOULD NOT BE CALCULATED. OUR DRY DOCKING TIME IS ONLY 20 DAYS. IT IS LESS THAN 30 DAYS. SO CHARTR HV NO RIGHT TO CANCEL THE C/P. CHRTRS MUST CONTINUE THE C/P.
    THANKS
    B RGDS"
    And the Charterers countered:
    "we refer to Owners' last.
    with respect, our consenting to Owners performing a short voyage for their own account is irrelevant. specifically, our consent was on the basis that for the purposes of cl. 70 the Vessel was to be off-hire DLOSP Gresik and "all rights/obligations under the C/P otherwise to be unaffected" (our msg.no. 956762 dd. 09 Sept. 05).
    the Vessel went off-hire DLOSP Gresik 09 Oct. 05 at 14:30 hrs UTC and pursuant to C/P clause 56 of the subject C/P, we are at liberty cancel the balance of the Charterparty if the Vessel has been off-hire for a period of more than 30 days.
    we respectfully suggest that Owners take immediate steps to look for new employment for their Vsl.
    Brgds
    HBC, Hamburg"
11. *On 14th November 2005 the Owners accepted the Charterers' conduct as a repudiation of the charterparty and claimed damages. The Charterers began these arbitration proceedings, but it is the Owners who are pursuing their claim against them.*

12. The Charterers' case, in a nutshell, is that they were entitled under clause 56 to cancel the contract if the vessel had been off hire for more than thirty days. It is said that the condition for cancellation was fulfilled on 9th November 2005. The Owners say that the condition was not fulfilled; or if it was, the Charterers were defeated by estoppel or waiver. The principal defence of the Owners is that clause 56, with its provision about the rights to cancel, does not apply to clause 70 which deals with dry docking.

13. I do not find that argument at all plausible. It is said that clauses 56 and 70 are separate and not overlapping and so the right to cancel after thirty days off hire did not occur in a case of dry dock. That might be the case if the contract had been written by a chancery draftsman, but it does not have that appearance. Charterparties seldom do. Dry docking, as it seems to me, is the occasion most likely to result in a delay of thirty days; or at any rate it must be one of a few events which are likely to cause thirty days off hire. I would expect Charterers to provide against that misfortune, if they can.

14. However, clause 70 expressly provides that the vessel "shall be put back on hire at Dlosp dockyard". I express no concluded view that clause 56 also applies to clause 70, as in my opinion there is another answer to the Charterers' case. By agreement of Cosco, the disponent Owners and the Charterers, the vessel was put at the disposal of Cosco for a short voyage carrying cargo from Benjarsmasin to South China. There is some doubt as to what contractual terms were agreed for this variation, but this much is clear, that for a short period the Charterers and Owners would not give instructions for the use of the vessel, the hire would not be paid to the Owners, and presumably they too would cease paying hire to Cosco.

15. This arrangement was in my opinion quite different form that which occurs between a charterer and an owner under an ordinary dry dock arrangement, or for that matter any other off hire event. It did not come within the provision as to cancelling the charterparty within clause 56 at all. The provisions in clause 56 of the charterparty affected the Owners and the Charterers, not Cosco. Hence it was necessary for Cosco to obtain consent from both the Owners and the Charterers for the new arrangement. As part of that arrangement, Cosco presumably did not claim any hire during the short voyage from Gresik to South China. Equally, the Owners presumably did not claim hire from the Charterers. But that period when hire was not paid was certainly less than thirty days -- it was said to be less than twenty days. It is arguable that in the period which followed, when Cosco had finished their voyage, the Owners were now off hire under clause 56. But that period did not amount to thirty days.

16. The Charterers argued that in a number of respects they did not know how long they would have to wait before the vessel would be returned to them. But they were told the time which would be taken by the short trip with coal -- about 15 days. Thereafter, there does not appear to have been any complaint as to lack of information by the Owners as to progress.

17. It is said that the arrangements made for the short voyage carrying coal and the dry docking were to the advantage of Cosco or the Owners, or both. That may be so, in some respects. But there was also an advantage to the Charterers, who were released from the burden of hiring an expensive ship at a time when they could no doubt hire one that was cheaper. Indeed Mr Von Husen, the joint managing partner of the Charterers, said: "as the freight market worsened, and it became obvious that we were paying too much for the ship, we began to wish that the vessel would indeed be delayed in dry-dock and thus present us with an opportunity to get out of the fixture". By contrast, the Owners were in serious danger of a large loss if the Charterers' version of the contract was correct.

18. Mr Von Husen also said, of Cosco, "we saw their request as giving rise to a definite possibility that the total off-hire period would exceed 30 days (subject of course to how long the dry-docking took). We did not feel obliged to alert Owners to this possibility, something that might not happen in any event ..." Mr Che Jiyong, manager of the Owners, on the other hand, says that he assumed that the right of cancellation would not apply to the coal fixture. I am a shade sceptical about both sides. But what matters is not what the parties thought was likely to happen, but what they agreed in their contract. As to that, I hold that there was no agreement that Cosco's coal fixture would count as part of thirty days of off hire. At the least, it must have been a strong possibility from 9th October to the time when the vessel was again available for service to the Charterers would exceed thirty days. But that, in the event, did not bring clause 56 into operation.

19. I do not overlook the Charterers' statement on 12th September 2005: "All rights/obligations under the C/P otherwise to be unaffected" Another version appears three times: "All terms and conditions of the C/P remain unaffected". I am not in any way persuaded that these two statements achieve anything. The words used convey no meaning. If an important statement is to appear in a contract, it must be given at least some degree of clarity. The most that the words says is that what has not been changed remains. As there never was anything to render Cosco responsible for a period of off hire, no change has been made.

20. Accordingly I find it unnecessary to decide whether there was an estoppel or a waiver which leads to the result that the Charterers cannot rely on clause 56 in a dry dock case; that result follows from the intervention of Cosco. Nor can I find anything in clause 15 of the contract to affect my conclusions. I do not draw any inference from the Charterers' proposed treatment of bunkers during the latter part of September 2005. Lastly, I do not call in aid any implied terms. It is the absence of any implied term imposing a cancellation on the Owners because of delay by Cosco, which is significant."

The Arbitration Claim Form

6 The Charterers issued their arbitration claim form on 13 September 2006 seeking permission to appeal under section 69 of the Act. Their point is that the Arbitrator ought to have concluded that the vessel had been off hire for a period of 30 days pursuant to clauses 70 or 15. The questions of law were said to be:

(1) whether, on the true construction of the agreement concluded between the parties on 12 September and/or of clause 70, the vessel was off hire from DLSOP ['dropping last outbound sea pilot'] Gresik on 9 October 2005 so that the Charterers were entitled to cancel the Charterparty on 9 November 2005 under Clause 56;

(2) whether the vessel was off hire pursuant to clause 15 of the Charterparty from 9 October 2005. In particular, whether there was loss of time from "dry docking for the purpose of examination" or "by any other cause whatsoever" and whether the full working of the vessel was prevented by the relevant off hire event.

7 Their contention that there was serious irregularity affecting the Award under section 68 was this:

(1) The point on which the Owners succeeded was one thought of by the Arbitrator himself and was answered by the fact that the vessel went off hire DLSOP Gresik on 9 October pursuant to the express terms of the email dated 12 September and/or clause 70 and/or clause 15. Yet, the Arbitrator failed to deal with these arguments which are central to the main issue between the parties.

(2) "The Arbitrator has failed to deal at all with the Charterers' argument that the vessel went off hire on 9 October pursuant to the express terms of their email dated 12 September and or Clause 70. The Arbitrator has failed to give any consideration at all to the basis of the Charterers' agreement to the Owners' performance of their coal voyage, namely " on the understanding that for the purposes of C/P clause 70 the Vessel will be off hire on DLSOP discharge port ." Apart from [in] the recitation of the email at paragraph 6 of the Award, there is no reference in the Award to these words nor their impact upon Clause 70 which is the relevant off hire provision although, for some reason, the Arbitrator appears to have considered that Clause 56 was the relevant off hire provision."

(3) The Arbitrator has also failed to deal with the Charterers' arguments based on Clause 15 "notwithstanding that there was extensive argument directed as to the meaning and effect of the observations of Mr Justice Rix in The Laconian Confidence ."

8 When the matter was considered on paper by Tomlinson J. on September 27 2006 he directed that leave to appeal under section 69 should be dealt with at the oral hearing of the section 68 application or otherwise as the Judge hearing the section 68 application shall direct.

Analysis of the Arbitrator's reasoning

9 It seemed to me and the advocates that the two applications overlap to a great extent and I heard both matters at the same time.

10 It seems to me that the result of these two applications depends upon the true analysis of the Arbitrator's reasoning. When that is done it becomes clear, I think, that not only has he arrived at a conclusion which is not obviously wrong but one which is correct. It is true that he left certain issues unresolved, as he was entitled to do. They became unnecessary having regard to the way the issues were decided.

An analysis of the Award

11 The initial proposal of the Owners made on 9 September was to seek the Charterers' consent to the vessel being taken over by Cosco for a short voyage of around 15 days before being taken by them from South China to Nantong, in Northern China for dry docking. Under Clause 70 the dry docking was going to take about 15 days. It must have been in the parties' contemplation that it was likely that the vessel would be off hire for 30 days or more. The Charterers' consent was being asked for because the Charterers were entitled to have the use of the vessel themselves prior to the dry docking. The reply of the Charterers was not as such an acceptance of the Owners' offer but rather it was a counterproposal. What the Charterers wanted to ensure was that as a condition of their agreement to the proposal the Owners were prepared to modify clause 70 and not require the vessel to be placed off hire for dry docking "DSLOP one safe port Singapore/Japan range" since Gresik was not within that range. Technically, this was a counter offer. The Owners then obtained an update on the vessel's itinerary, and sent their message on 23 September and referred to the redelivery of the vessel back to the Charterers, "if all goes well, weather permitting and without guarantee" some 36 days after the vessel went off hire. In other words, the Owners plainly thought that there would be no cancellation of the Charter under clause 56 merely through time off hire. There was a further exchange of messages when the Owners informed the Charterers that the vessel was expected to leave Guangzhou and the Owners stated that the vessel would resume the service of the charterparty on about 16 November. The Charterers replied noting the position and asserting that all terms and conditions of the Charterparty remained unaffected.

12 As the Arbitrator noted, "there is some doubt as to what contractual terms were agreed for this variation" and, I add, as to when precisely the contract was concluded. He went on to say that what was agreed effectively took the vessel out of the service of the charterparty in a way not contemplated by the Charterparty. It was an arrangement which did not come within the cancellation provisions of clause 56 at all. There was no agreement that Cosco's coal fixture would count as part of the 30 days off hire. In other words, during the period when no hire was being paid by the Charterers to the Owners or by them to Cosco, the vessel was not 'off hire' within the meaning of clauses 15, 70 or 56: it was a period when hire was not paid pursuant to a special arrangement. Effectively, the Charterparty was suspended during Cosco's use of the vessel. In order for the Charterers to ensure that this period counted as 'off hire' they had to say so more precisely than simply referring to the terms and conditions of the charterparty remaining unaffected.

13 It seems to me, therefore, that if this analysis is right, the Arbitrator was not required to say anything more. That deals with the first two points made in support of the challenge under section 68 . As to the final challenge under that head, namely the clause 15 point, the answer is the same; this was not a period of off hire it was a special

arrangement which took the vessel outside the terms of the charterparty which was effectively put into suspense [my words]. But there is another reason why the point made by Mr Jacobs QC fails.

14 Clause 15 has attracted a great deal of judicial and academic attention. In my view, this clause is in danger of being made invisible through gloss painted over it. In this case, Mr Jacobs was forced to contend that it was the agreement of the parties that prevented the working of the vessel, and that since an agreement could fall within the words "any cause whatsoever" the conditions of clause 15 were satisfied. The Arbitrator rejected that submission on the grounds that the period when the vessel was taken over by Cosco fell outwith the Charterparty altogether. But, further, it does seem to me most improbable that clause 15 could have been intended to cover an event of off hire to which the charterer had agreed. Clause 15 deals with events which prevent the full working of the vessel, for example breakdowns or arrests. But what must be prevented is the use of the vessel required for service under the charterparty. The consequence of prevention must be to stop the charterer from making use of the vessel so that it is commercially sensible for the payment of hire to cease. But if a charterer agrees to the vessel being taken out of service, so that he pays no hire, the element of prevention [against his will] is missing. The charterer is not being prevented from using the vessel; he has agreed not to use it during the period of Cosco's involvement. I regard the contention that clause 15 applied to the facts of this case as obviously wrong.

15 In relation to the application under section 69 , I reach the conclusion that not only was the Arbitrator not obviously wrong; rather he was obviously right. The Charterers must have realised that they were being asked to accept that the vessel might be out of their reach for longer than 30 days due to the special arrangement being made. They were content to have the benefit of a lengthy period when hire was not due, because of the fall in the market rate. Rather than seeking to rely on a statement that all terms of the Charterparty remained unaffected, they ought to have dealt with the point expressly since it was clear to them that the Owners were anticipating that the vessel would be brought back into their service after the dry docking. If they had made their position clear, namely that they wanted the time with Cosco to count under the charterparty, then the position might have been different. By leaving the question of cancellation unspoken, the Charterers must pay the price.

16 The emphasis in their application on what was said in the message of 12 September, ignores, I think, the other messages and the difficulty in knowing precisely what terms the parties had agreed. But the Arbitrator considered that what was agreed was a venture outside the contemplation of the Charterparty and thus outside clause 70, 56 and 15. The case on clause 15 is unsustainable.

17 I, therefore, dismiss both applications.

Mr Nigel Jacobs QC (instructed by Rayfield Mills) for the Claimant.
Mr John Snider (instructed by Holman Fenwick and Willan) for the Defendant.