CA on appeal from Commercial Court, Mr Justice Christopher Clarke, before Waller LJ, Gage LJ; Lawrence Collins LJ. 17th October 2007

Lord Justice Waller :

Introduction

1. This is an appeal brought with the permission of the judge by the Owners of the *Magdalena Oldendorrf*, (the Owners), from a judgment of Christopher Clarke J dated 17 October 2006 by which he dismissed their application under section 68 of the Arbitration Act 1996 to have an arbitration award in favour of the respondents (the Charterers) remitted to the arbitrators. The issue before Christopher Clarke J and on the appeal is whether the arbitral tribunal acted contrary to its duty under section 33 of the 1996 Act to act fairly. The Owners allege that the critical point on which they lost the arbitration was a point with which they were not given a reasonable opportunity to deal or on which they were not given a reasonable opportunity of putting their case.

The facts

2. The full history of the dispute between the parties, the issues before the arbitrators, and what occurred at the hearing before the arbitrators are set out in the judgment of the judge. I gratefully adopt (1) the background facts (paragraphs 2 to 5); (2) his description of the voyage (paragraphs 6 to 9); (3) his analysis of the Charterers' case as pleaded and formulated prior to the hearing (paragraphs 10 to 14); (4) his summary of the submissions and evidence at the hearing up to the written closing submissions (paragraphs 15 to 26).
3. In relation to the all important oral hearing on the final morning on which the judge's decision and the decision on the appeal really turns, between paragraphs 27 and 43 the judge sets out important parts of the transcript of what occurred and reaches conclusions as to what was being said, and what would reasonably be being understood to be being said which have not been seriously challenged and which again I would adopt.
4. The above will enable me to summarise more shortly the position at the different stages so as to identify and deal with the point which arises on the appeal.
5. The Owners are the Owners of an ice-classed ship (the vessel) and chartered her to the Charterers on an amended Baltime form dated 2 March 2002 for a period of 45 days plus up to 10 days for a voyage to Antarctica. The hope was that the vessel would arrive at and leave Antarctica in the early part of the Antarctic winter. The charter provided for a reduced rate of hire if the vessel became frozen in, but also contained a warranty as to the ice breaking capabilities of the vessel. The vessel was delivered at Cape Town on 11 April 2002, but was not redelivered until December 2002. That was because although she managed when going to and coming from Mirnyy and going to Novolazerevskaya (Novo) to cross the ice belt which encircles Antarctica on three occasions, when she departed Novo on 30 May she met with such adverse ice conditions that she had eventually to take shelter in Muskegbutka Bay where she spent the winter.
6. The Owners claimed in the arbitration US$2,672,981.81 unpaid hire. The Charterers said they were not liable for such hire because they were entitled to set-off a claim for damages for breach of the warranty as to the vessel's ice breaking capabilities. Their case at the hearing of the arbitration was that but for a breach of warranty the vessel would have returned to Cape Town before 30 May (I put this broadly for the present, the detail matters as we shall see); in the alternative their case was that when the vessel left Novo on 30 May (as she in fact did) if there were no breach of warranty she could have got through the ice; and in the further alternative their case was that since the *Almirante Irizar* which came to the vessel's rescue got through the ice in June, the vessel could have escaped then. Although the Owners at an early stage in the hearing admitted before the arbitrators that the vessel did not comply with the warranty a major part of the hearing was taken up with examining the extent of the vessel's incapacity and the condition of the ice she encountered, that having an impact on whether the vessel could have escaped through the ice ring and when.
7. Ultimately the arbitrators found that the vessel was seriously in breach of warranty and that jamming in the ice on certain dates in May was caused by that incapacity. In relation to the issue of causation i.e. the case whether the vessel even if not in breach of warranty would have escaped, they only found for the Charterers on a very narrow point identified now as the 17 hour point. They found that but for being delayed in the ice by 5 hours on 5 May, 10 hours on 22 May and 2 hours on 23 May (a total of 17 hours) the vessel would have left Novo at mid day 29 May 2002. They found further that on that date instead of taking a westerly course which she did when she in fact left on 30 May, she would have taken a more direct course, and would have got through the ice ring. The Owners, before Christopher Clarke J and now before us, through Mr Young QC say they did not have a reasonable opportunity to deal with that case and if they had they would have provided an answer not dealt with by the arbitrators i.e. that because of the hurricane force of the winds during the period running from the early hours of 24 May up until 27 May the vessel never could have left Novo earlier than she in fact did.
8. It is necessary to identify how the 17 hour point arose but in the light of my adoption of the judge's judgment I can again do so quite shortly. The Charterers' case, as pleaded in their Defence of 21 November 2003, was put this way:-

"*8. Had the vessel performed in accordance with the charterparty she would have returned to Cape Town on or about 30th May 2002 and/or she would not have been trapped in ice on or about 30th May 2002 and would not have needed to seek refuge in Muskegbukta.*

9. As a result of the matters set out above:

(i) Between 2nd May and 30thMay 2002 there was 5.8 days loss of time or delay.

(ii)Time lost from 19th April 2002 until 30 May 2002 due to the inefficiency of the vessel was properly deducted by the Respondents under clauses 11 (A) and/or 13 of the charterparty.

(iii)The vessel was off hire from 30th May 3002 and/or the Claimants are responsible for any delay thereafter pursuant to [the same clauses].

(iv)Further or in the alternative, during the 5.8 days referred to above and/or from 30th May 2002 the Respondents were deprived of the use of the vessel and the Respondents were entitled to deduct any hire during those periods."

9. The Charterers then:

a) gave particulars of how the 5.8 days were made up by letter of 28 May; 59.1 hours were for slow steaming and the remainder were said to be hours lost when the vessel was jammed in the ice on 2, 12/13, 22/23, 30 May and 30 May /1 June 2002.

b) by an amended defence relied on the fact that a different ship called the *"Almirante Irizar had returned to open waters on 7th August without a problem"*.

10. So, as the judge says, at this stage the Charterers were saying if the vessel had complied with the warranty (a) she would not have lost 5.8 days most of which was lost in May; (b) she would have returned to Cape Town by about 30 May i.e. have left Novo by latest 23 May; (c) that if she was still at Novo on 30 May she would not have been trapped and would have been able to cross the ice bar; and (d) she would in any event have been able to return in July/August 2002.

11. By the time of the hearing the Charterers had received a report from Mr Gibson who had calculated that using the charterparty speed and consumption figures and assuming the times alongside at Mirnyy and Novo were as set out in the charter party the voyage from Cape Town and back should have lasted 35.4 days (of which 6.87 would be from Novo to Cape Town) getting the vessel back to Cape Town by 24 May. The "*Gibson calculation"* was a purely theoretical calculation of speed over distance.

12. The Owners' reply was a lengthy one dealing with the details of how the vessel progressed during the period 10 April 2002 up until the decision to remain in Muskegbukta bay on 10 June 2002. But put shortly their position on the pleadings was to deny that there was any breach of warranty but also to allege that by virtue of certain factors such as the lateness in the year of the voyage, changes in the voyage, unusual ice conditions etc the Charterers could not establish that the vessel could, would and should have escaped the ice even if there was a breach of warranty.

13. Both parties put in written opening submissions. The Charterers through Mr Luke Parsons QC and Mr Chris Smith put in detailed submissions to support the case that the vessel was in breach of warranty. That included detailed submissions as to the dates in May when the vessel had got held up in the ice. The Charterers' case was that the vessel did not comply with the warranty and that was the reason she became trapped. So the case was put in this way:-

"(7) Had the Vessel been able to perform in accordance with the charterparty ice-breaking warranty and/or had the Vessel not been unseaworthy, the Vessel would not have been forced to winter in the ice and would have returned to Cape Town at the end of May/beginning of June. The Charterers say that if the Vessel had complied with her warranties she could have departed at any time as demonstrated by the ALMIRANTE IRIZAR which was about to depart on 6th August, when ice conditions would have been more severe than in June or July, despite having an ice breaking capacity inferior to that of the Vessel's warranted capability.

(8) Accordingly, the Charterers are not liable to the Owners for any hire over and above that which the Charterers would have been obliged to pay for the 35 days the Vessel should have taken to complete the voyage. Further, the Owners are in breach of charter and the Charterers are entitled to recover the losses counter-claimed as a result."

14. It is right to say that no case was put in terms that "*if all that the Charterers could establish was a delay of 17 hours through a failure to comply with the warranty, the result would have been that the vessel would have left Novo just before 30 May and in the result would then have been able to get through the ice ring*". Indeed Mr Young submitted before us that in reality the Charterers by appending Mr Martyanov's diary to their written submissions which showed hurricanes blowing in the period 24 to 27 May and by relying in their opening submissions on the Gibson calculation were accepting that no case could be made for the vessel leaving only a day or so before 30 May since the weather would always have prevented it completing its loading until 30 May.

15. However, there is no doubt as the judge records one of the issues identified for the arbitrators and agreed between counsel was in wide terms - "*If the vessel had complied with her ice breaking capacity and/or if the vessel had been seaworthy would she have been able to break through the ice and if so when?"*

16. The Charterers' case on causation was a broad one – if she had been as warranted she would not have been delayed at all prior to 30 May 2002; any pressure between 30 May and 10 June would not have impeded her; given the *Almirante Irizar* was able to make it through, the vessel should have been able to do so both prior to the date when the *Almirante Irizar* did so, as well as on the date when she actually did so, and Gibson calculations supported a return to Cape Town as early as 24 May (involving departing from Novo no later than 17 May) [see paragraphs 111 to 114 of Opening page 400 of A2].

17. The hearing lasted some 10 days. Most of the evidence was concerned with the vessel's capacity, and with the conditions of the ice encountered. It is right as Mr Young points out that in relation to causation Mr Parsons did not

seek to put a case by reference to the 17 hour point to the master i.e. he did not put a case that the vessel could have left Novo on 29 May and if it had done it would have taken not the westerly course that in fact she did on 30 May but a more direct course which would have enabled her to escape the ice. His case was of course more extensive than that in that he was seeking to establish as his primary case that any delay due to a breach of warranty prior to 30 May was much more than 17 hours.

18. At the end of the hearing there was an exchange of written closing submissions. The Owners' submissions dealt at length with the condition of the vessel, the condition of the ice and the question whether and to what extent the vessel complied with the warranty. Causation was however a critical issue. Mr Young and Mr Collett for the Owners had to deal with the incidents of the vessel being held up in the ice said to assist in establishing that the vessel was in breach of warranty, and they seem to have understood those incidents to be relevant also to the vessel being delayed prior to 30 May because by paragraph 29 they made a reference to the effect of the bad weather there when the vessel was approaching Novo on 27 May saying:-

"29. The delay encountered getting into Novo, after crossing the Ice Belt was due to the onset of a hurricane; she plainly could not either berth (or stay at berth) in such a wind and hence she "tacked" for two days, as she would have done with or without ice-breaking capacity."

19. Mr Parsons' written submissions also deal at length with the condition of the vessel and the extent to which she failed to comply with the warranty. On causation (as Mr Young emphasised) the thrust of his submissions was to deal first with whether the vessel should have been able to get through the ice on the journey it actually took when leaving Novo on 30 May reliance being placed on the ability if the *Almirante Irizar* to cross at the end of July/ beginning of August "two months after the vessel should have crossed the belt" [see page 472 A2]; second to seek to establish that the Captain's decision (once on that journey on 11 June) to winter and not try to get through the ice was because of his awareness of the vessel's incapacity. But paragraph 68 [page 475] said this:-

"68. The Charterers ask the Tribunal to find that the vessel would have returned to Cape Town by 24th May (see Gibson paragraph 8.57 G(ii) 2.229) if there had not been a breach of charterparty."

20. Certainly at this stage neither party was directing their attention to the possibility of the vessel leaving or being able to leave Novo only 17 hours before it did by reference to a calculation of the hours of delay caused by only some of the periods where the vessel was held up during May. Any pre-30 May case seemed to be by reference to the Gibson calculations which would have involved leaving on or before 17 May.

21. Oral submissions then commenced on the Saturday morning. Mr Young went first and he dealt in a broad brush way with the suggestion that the Charterers could establish a return of the vessel by the end of May/beginning of June simply saying he had put a big *"no"* beside it and suggesting that the Charterers had no evidence to support that contention [see paragraph 27 of the judge's judgment].

22. When Mr Parsons addressed the tribunal however under questioning from them and being asked about the relevant period, Mr Parsons said *"Well there are two different bases of thinking that. Because of course if she had not been delayed on the 12th and 13th and the 22nd and 23rd, she might have been coming through that bit earlier anyway…"* The judge records other submissions from the transcript at page 78 [see paragraphs 29 and 31], which I need not record because it is absolutely clear by a later passage that a point was being taken that but for a breach of warranty the vessel might have left Novo a few days earlier than 30 May (and <u>not</u> as early as 17 May). That becomes clear beyond peradventure from an interchange at page 130 and 131 of the transcript which it is right that I should quote in full:- "

16 So the question then is: when would the vessel have
17 returned? There are on this basis a number of
18 possibilities. She could have gone straight back from
19 the 30th, is one possibility. She might have been going
20 back a few days earlier because she was delayed, so she
21 would have been going back from, say, the 27th. Or she
22 might have been going back after the ice abated. Those
23 are the three possibilities. I did them in the wrong
24 order.
25 MR TEARE: Tell me which month you are talking about.
1 MR PARSONS: Yes, sorry. Either you could find that she was
2 trying to turn back a few days before the 30th May; from
3 Novo, because she would have got to Novo a little bit
4 early if she had not got stuck. That is <u>my first case</u>.
5 Second case is --
6 MR PERSEY: She would have gone straight north then because
7 there would have been no hurricane --
8 MR YOUNG [sc. PARSONS]: That is what I am saying. She would have gone
9 straight north. <u>The second one</u> is: that she would have
10 done that on the 28th instead of the 30th because she
11 got delayed getting there.

12 The second one is she would have gone straight north
13 from the 30th.
14 My third case is that she would have gone, if she
15 started going to the west, she would have broken out at
16 some stage or at the latest, once the pressure abated
17 from say the 6th or 7th she would have gone back. Those
18 are the three possibilities.
19 And Mr Gibson -- I have given you the reference --
20 has calculated the length of the route and it is
21 a question of taking that and applying that to one of
22 those dates effectively.
23 MR TEARE: And that is the reference you have taken us to,
24 is it?
25 MR PARSONS: Yes."

23. As the judge accepts, although on one interpretation of the transcript, Mr Parsons is putting two *"second"* cases, the reality was that after saying *"second"* he paused to dictate for Mr Teare's note what was his first case i.e. that but for the delays caused by the breaches of warranty the vessel would have left Novo on 28 May. This involved an abandonment of the Gibson calculations as the primary case but, since those were simply theoretical calculations, indeed Mr Young had made the point there was no evidence to support them, that was not perhaps that surprising. That the tribunal understood Mr Parsons' primary case to be the vessel leaving on 28 May, and not on the 17 May as required by the Gibson calculations, is demonstrated by the interchange quoted by the judge at paragraph 37, for the reasons given by the judge in paragraphs 38, 39 and 67. That interchange I should also quote in full:- "

24 MR TEARE: Just going back to paragraph 68. When
25 you say the Charterers asked the Tribunal to find the
1 vessel would have returned to Cape Town by the 24th May,
2 your first case, as you gave me a moment ago, that she
3 might turn back a few days before the 30th May, she is
4 going to arrive back in Cape Town by the 20th May. So
5 I am ignoring -- Mr Gibson says she would get back to
6 Cape Town by the 24th May but that is not your primary
7 case.
8 MR PARSONS: I better just think about that. The problem is
9 I was trying to do this while quantum was being
10 discussed and I had thought we would actually have
11 figures for different dates. Could you bear with me --?
12 MR YOUNG: A ten day ...
13 MR PARSONS: I am afraid I did not grapple with this because
14 I had thought quantum was being dealt with.
15 MR YOUNG: I have some sympathy with my learned friend.
16 MR TEARE: What we need to know in relation to your three
17 cases is an agreed figure for the number of days it
18 would take to get back to Cape Town."
19 MR YOUNG: After getting out of the Ice Belt.
20 MR TEARE: I am looking at page 229 and I cannot find an
21 answer on that page.
22 MR YOUNG: There is not one. I think it was 10 to 15 days.
23 MR PERSEY: Surely you could agree on that and let us know.
24 MR TEARE: Add to date to whatever date you think she would
25 have returned back, if you think that is the case.
1 THE CHAIRMAN: As Mr Persey says, this is not something that
2 needs to be done now and certainly not something that
3 should be done in a rush.
4 MR PERSEY: I think you should agree and send us a letter.
5 If you cannot then set out the parameters and identify
6 where you disagree.
7 MR YOUNG: I agree.
8 MR PARSONS: I agree. Having said those are our three cases,
9 because Mr Gibson has got had a (inaudible) I just need

10 it to see if I have missed something because it sounds
11 as though I have.
12 MR YOUNG: Yes. If it is of any consolation, I think the
13 problem that my learned friend has with Mr Gibson,
14 I think it is why it does not matter, is that the
15 discharging at Mirnyy, because of the thickness of the
16 ice, had to be done by helicopter which then had to be
17 stopped at various times because of weather or
18 visibility. And his calculations did not factor that in
19 at all, nor did he factor in the fact that if the vessel
20 had got into Novo earlier, the hurricane, the first of
21 the two hurricanes, would have hit earlier and so she
22 would have put off the berth then. So I suspect we
23 can -- we can ... well, I suspect we can probably agree
24 things once you have produced your award. No, we
25 cannot. That will not work."

24. One can see in the above interchange Mr Young referring to the effect of the hurricanes on the vessel's ability to berth even if she had got there a little earlier. Mr Young submitted to us that he was making that submission in the context of a discussion on quantum and was not making the point which he would have wanted to make if he had appreciated that the 17 hour point was being run. The point he would have wanted to make he would have put rather differently by pointing out, that in addition to all the points he had run as to whether the vessel was in breach of warranty and on causation, there was a further point if 17 hours of delay was all that the Charterers could establish, i.e. that she could not have left Novo before she did if her arrival there was only 17 hours delayed because the hurricane would have caused the delay until her actual time of departure in any event. That is not very different from the point he was making in relation to quantum and whether that would have been a good answer is open to question; but it was certainly not dealt with expressly by the arbitrators, and the judge accepted that he could not say "there was plainly no prospect of Mr Young's submission being right." [see paragraph 77].

25. When the Tribunal came to describe the issue on causation they did so in these terms in paragraph 48 of their award as follows:-

"*48. The Charterers' primary case, as clarified in their closing written submissions, was that the vessel would have returned to Cape Town by 24 May had she complied with her ice breaking warranty. In this regard reliance was placed upon a calculation of voyage time by their expert marine engineer, Mr Gibson. It was implicit in this case that the vessel would have left Novo sometime before 30 May (the day on which she in fact left Novo). Their secondary case was that if the vessel would have left Novo on 30 May in any event she would have been able to reach the open sea had she complied with her warranty and would not have been impeded by pressure in the ice, which was in any event intermittent. Their third case was that she should have been able to follow the channels created by ALMIRANTE IRIZAR in July 2002 and thereby reach the open sea. (In their closing oral submissions the third case was put on the basis that the vessel would have broken out of the ice on 7 or 7 June and no mention was made of following ALMIRANTE IRIZAR in August 2002)*"

26. Mr Young submits that it would seem that the Tribunal are still suggesting that Mr Parsons' primary case was based on the Gibson calculations, but in my view what they are doing is fairly reflecting what appeared to be the primary case in the written submissions but recognising that "implicit" in that case was a case that the vessel would have left before 30 May allowing a less extensive case to be argued so far as leaving prior to 30 May is concerned.

27. What the tribunal ultimately decided was that there was a breach of the warranty as to the vessel's ice breaking capabilities. On causation, having analysed the evidence of the progress of the vessel prior to 30 May, they took the view that the Charterers had not established their case that but for the breach the vessel would have left Novo "*several days before 30 May. Rather it appears that she would have been ready to depart no more than a day earlier, actually about 17 hours earlier.*" [paragraph 55 of the Award]

28. They then dealt with the question whether if the vessel had cast off her lines at about 12 noon 29 May she would have been able to transit the ice belt. They noted the force of the wind at this time and concluded that the weather conditions were markedly better than on 30 May and would have lead to the vessel taking an easterly course rather than the westerly course taken on 30 May. They then analysed the condition of the ice by reference to the conditions actually encountered and concluded that if the vessel had been as warranted she would have more likely than not have emerged from the ice belt on 2 and 3 June.

29. Mr Young emphasised before us that he won on other points relating to causation and thus he submitted that not dealing with the 17 hour point has caused a *"substantial injustice"*. Just to put that in context, it is perhaps right to emphasise that the Owners did not win on the question whether there was a breach of warranty. Since the effect of the weather between 24 and 27 May was pointed out by Mr Young, it cannot actually be said with certainty

that these very experienced arbitrators had not taken the hurricane point into account in reaching their conclusion by reference to the 17 hours.

30. Furthermore having lost on the 17 hour point the tribunal's view of the position if 30 May had been the right date was taken very shortly and in terms which could not be described as a ringing endorsement of the owner's case the tribunal saying at paragraph 67:-

"67. Whilst it is possible that had the vessel complied with her ice breaking warranty her departure from Novo might have had a different outcome from the actual outcome we are not persuaded that this is more likely than not to have been the case."

31. Furthermore the tribunal's view was (contrary to the master's evidence) that one factor in the decision not to try further to get through the ice on 11 June was the master's awareness of the vessel's lack of capacity, but applying a "but for test" the tribunal found the decision would still have been taken by virtue of other factors not due to any breach [see paragraph 75]. This was on any view a close run thing for the Owners.

The Owners' contentions

32. Section 33(1) of the 1996 Act provides as follows:-

"The tribunal shall –

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

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

33. Section 68 of the Act so far as material provides:-

"(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 –

(a) failure by the tribunal to comply with section 33 (general duty of tribunal); . . .

(d) failure by the tribunal to deal with all the issues that were put to it; . . ."

34. I quote subparagraph (d) simply to emphasise that before the judge Mr Young was asked whether he had an alternative case for remission in reliance on (d). He confirmed that he did not, and that he rested his submissions on section 33(1)(a). That he further confirmed to us. His submission was that there had been a serious irregularity in that the Tribunal failed to give him and thus the Owners a reasonable opportunity to deal with the 17 hour point.

35. The difficulty with making good that submission is that section 33 has to be approached by reference to the conduct of the arbitrators. For an irregularity to be established in a case of this kind it must be established that the tribunal have acted unfairly (partiality is not in issue) by failing to give a party a reasonable opportunity of putting his case or dealing with that of his opponent. The authorities helpfully summarised by Tomlinson J in ***ABB AG v Hochtief Airport GmbH*** [2006] 2 Lloyd's Rep 1 indicate that an applicant under section 68 faces a high hurdle. Mr Young suggested that the *"general antipathy generated by a number of statements at first instance to s 68 applications summarised by Tomlinson J"* was wrong in principle. He submitted that where a substantial injustice may have been done because an argument appears not to have been addressed the inclination of the arbitrators should be to encourage remission and the attitude of the court should be to remit so as to prevent injustice.

36. Mr Young in his submissions to us tended to concentrate on explaining how he could be forgiven for not recognising that the 17 hour point might be the basis on which the tribunal would decide the issue of causation, and how thus it was understandable that he did not, in the opportunity the arbitrators gave him to reply to Mr Parsons' oral submissions on the Saturday morning, make a submission to the effect that the hurricanes provided a further answer as to why the Charterers could not win on causation if all they could show was a period of 17 hours delay.

37. When pressed as to whether he criticised the conduct of the tribunal, he suggested that they must have been aware that he had not dealt with the 17 hour point, and that they owed an obligation to ask him whether he had anything further to say on that point in addition to the points already taken as to why the Charterers could not succeed.

38. In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an award or its remission by reference to section 68 and in particular by reference to section 33. Losers often think that injustice has been perpetrated when their factual case has not been accepted. It could be said to be "*unjust"* if arbitrators get the law wrong but if there is no appeal to the court because the parties have agreed to exclude the court, the decision is one they must accept. It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under section 33 and section 68.

39. If one concentrates in this case on the conduct of the tribunal and their perception it seems to me plain first that it was an issue in the arbitration when the vessel could have escaped through the ice ring. It was in issue whether,

but for a breach of warranty, she might not have left Novo earlier than 30 May. It is true that the Charterers had not sought to argue that the vessel might have left Novo only 17 hours before 30 May in their written submissions. Some case for a date earlier than 30 May was being made but by reference to the Gibson calculations which meant leaving Novo many days earlier than 30 May. However in the oral submissions on the Saturday morning a case of a day or so before 30 May was clearly pointed up as a possibility. This the tribunal reasonably understood, and there is no basis for saying that they thought that Mr Young for the Owners must have missed the point. As far as the tribunal were concerned Mr Young made no objection to the point being put by Mr Parsons in that way. As far as the tribunal were concerned Mr Young had been making many points for the Owners to defeat the Charterers' claim on causation, and had no reason to appreciate that Mr Young might be missing some additional point.

40. Can it be said that they acted unfairly in not saying something to Mr Young about the way Mr Parsons was now putting his case? In my view it would be placing an unfair burden on any tribunal where (I stress) they do not appreciate that a point is being missed, to check whether leading counsel understands what is being said.

41. Mr Young relied on what Ackner LJ said in ***The Vimeira*** [1984] 2 Lloyd's Rep 66 (CA) when he put the matter this way:- *"The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it."*

42. That supports the view I am seeking to express. If an arbitrator appreciates that a party has missed a point then fairness requires the arbitrator to raise it so that the party can deal with it. But where there is no such appreciation it is not unfair to leave it to counsel particularly highly experienced counsel who shows a detailed knowledge of the case to take such points as he wishes.

Conclusion

43. For the reasons I have endeavoured to give which are very much the same as those of the judge, I would dismiss the appeal.

Lord Justice Gage:

44. I agree with both judgments.

Lord Justice Lawrence Collins:

45. I agree that the appeal should be dismissed for the reasons given by Waller LJ.

46. As Christopher Clarke J observed, paragraph 280 of the Departmental Advisory Committee Report on the Arbitration Bill has been referred to often in this context. It is unnecessary to set it out again. What it emphasises is that what became section 68 was intended for cases where it could be said that what had happened was so far removed from what could reasonably be expected of the arbitral process that the court could be expected to take action. It was "*really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."* See especially Lord Steyn in ***Lesotho Highlands Development Authority v Impregilo SpA*** [2005] UKHL 43, [2006] 1 AC 221, at [28] ("Plainly a high threshold must be satisfied."). The approach set out in paragraph 280 of the DAC Report has been specifically adopted in this court: ***Warborough Investments Ltd v S. Robinson & Sons Ltd*** [2003] EWCA Civ 751, at [59], per Jonathan Parker LJ, applying ***Checkpoint v Strathclyde Pension Fund*** [2003] EWCA Civ 84, (2003) 14 EG 124, at [59] per Ward LJ.

47. I doubt if reference to pre-1996 Act cases on misconduct or technical misconduct or procedural mishap (such as ***Interbulk v Aiden Shipping (The Vimeira) (No 1)*** [1984] 2 Lloyd's Rep 66) is today helpful. Today the question is whether the tribunal has given the parties a fair opportunity of addressing them on all issues material to their intended decision, or whether there has been a denial of a fair hearing. This will no doubt be a rare case: for an example, see ***Cameroon Airlines v Transnet Limited*** [2004] EWHC 1829 (Comm). Section 68 is not to be used simply because one of the parties is dissatisfied with the result.

48. In this case the point was advanced in the Charterers' closing oral submissions. The Owners were represented by experienced counsel and solicitors. There was no reason for the arbitrators to have concluded that the Owners had not appreciated that the point was being taken, still less that they had a complete answer (in addition to their other arguments) to the point.

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Luke Parsons QC and Christopher Smith (instructed by Ince & Co, Hamburg) for the Respondent