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Case No: 2014 Folio 552

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 October 2014

Before :

MR JUSTICE EDER

- -

Between :

LORAND SHIPPING LIMITED

Applicant/ Owner

- and -

DAVOF TRADING (AFRICA) B.V.

MV "Ocean Glory"

Respondent/ Charterer

- -
- -

Benjamin Parker (instructed by **Clyde & Co**) for the **Applicant/Owner**
David Walsh (instructed by **Stephenson Harwood**) for the **Respondent/Charterer**

Hearing date: 24 October 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE EDER

Mr Justice Eder:

1. This is an application by the claimant, the Owners of the bulk carrier OCEAN GLORY, under s68 of the Arbitration Act 1996 in relation to an arbitration award dated 3 March 2014 seeking certain declaratory relief and an order remitting certain disputes back to the Tribunal. The application is supported by the first witness statements of Mr Martin Hall and Mr David Handley. I originally heard the application on 24 October 2014. At the end of that hearing, I informed the parties of my decision to grant the application and to remit the matter to the Tribunal. This Judgment sets out my reasons for that decision.

2. The background to the current application was, in large part, uncontroversial and can be summarised as follows.

3. Disputes arose between the Owners and the defendant Charterers under a voyage charterparty on the Gencon form dated 13 May 2013 which provided for the shipment of animal feed from the Ivory Coast to Morocco. The vessel apparently lost her rudder on 7 June 2013, having sailed from Abidjan, Ivory Coast with a cargo of wheat bran pellets. She was towed to Nadir, Morocco where she arrived on 2 July 2013 but discharging operations were then significantly delayed and were only completed on 6 August 2013. Complaints were made by the receivers about the condition of the cargo.

4. The charterparty (clause 27) provided for any dispute to be subject to English law and to arbitration in London. It also included the following time bar:

> "*Any claim must be lodged, as above, within six months of the last day of discharge of the chartered vessel, or, in the case of non-performance of the charterparty, within twelve months of charterparty cancellation date. In the event of non-compliance with the arbitration time limit set down herein, any claim shall be deemed waived and be absolutely barred.*"

5. Immediately following discharge, the Owners gave notice of their appointment of Mr Alan Oakley as arbitrator under the charterparty and requesting the Charterers to appoint their arbitrator in accordance with clause 27 of the charterparty although such notice did not specify any particular dispute or claim that was being referred to arbitration. Notwithstanding, in due course, the Charterers duly appointed their arbitrator, Mr David Barnett.

6. Thereafter, the Owners served a document described as "Claim Submissions for an Interim Award on Demurrage". That was a misnomer. The Arbitration Act 1996 does not use the term "interim award": see *Sucafina v Rotenberg* [2012] EWCA Civ 637, [2013] Bus LR 158 in particular at [23]. In my view, the term is a constant source of confusion and should be abandoned. Rather, properly described, this was, as I understand, an application by the Owners for a partial award pursuant to s47 of the Arbitration Act 1996. In effect, by those submissions, what the Owners sought was in truth a partial award for demurrage in the sum of US$86,437.50. Jumping ahead, such claim was indeed ultimately upheld by the Tribunal in its Award dated 3 March 2014. To be clear, the present application does not seek to challenge that part of the Award.

7. Rather, the main focus of the present application arises out of what the Owners stated in paragraph 11 of their claim submissions i.e.

> "*The Claimants seek an Interim Award at this stage, for the claim for demurrage. The Tribunal's jurisdiction is to be reserved for any and all claims against the Respondents, relating to any claim for damage to cargo, that may be brought against the Owners by the cargo receivers under the Bill of Lading and/or in respect of any and all damage suffered by the Vessel, by reason of the extended stay of the Vessel at the Port of Nador and/or the extended services of the Salvors under the LOF (due to the Charterers' breach of the Charterparty) and in respect of which the Claimants will seek an indemnity from the Respondents at the appropriate time*."

8. It is fair to say that the language in this paragraph is somewhat confusing. Quite apart from the reference to an interim award (which is, as I have said, a misnomer), the suggestion that the Tribunal's jurisdiction should be "reserved" for "any and all claims against the Respondents, relating to any claim for damage to cargo, that may be brought against the Owners by the cargo receivers ..." gives rise to some difficulty. In particular, the use of the word "reserved" suggests that such claims had already been referred to the Tribunal. However, Mr Walsh submitted that no claim had been referred or was being advanced in the reference other than a claim for demurrage; that, as such, the Tribunal had no jurisdiction to "reserve" its jurisdiction in respect of such matters because no other claims had been submitted to it; that, in short, the Tribunal could not have done what the Owners had asked of it, even if it had wanted to; and that it was not open to the Owners to refer potential future claims to the Tribunal in any event. In that latter context, Mr Walsh relied upon the passage in Merkin on *Arbitration Law* (looseleaf) at para 13.11:

> "*An arbitration notice is valid only if it refers to an existing dispute between the parties. It was held by HHJ Humphrey Lloyd QC in Great Ormond Street Hospital NHS Trust v. Secretary of State for Health that an arbitration notice is ineffective if it relates to future disputes which have yet to arise. Were it otherwise, the inevitable effect of a general notice would be to satisfy the limitation period at the outset and make it possible for the claimant to raise a dispute at any time in the future.*"

9. Here, Mr Walsh submitted that the parties had agreed a regime in clause 27 of the charterparty requiring the relatively speedy resolution of all claims with a 6 or 12-month time limit for the lodging of claims; that asking the Tribunal to "reserve" its jurisdiction in respect of claims not being advanced was a not-so-subtle way of the Owners trying to circumvent the parties' agreement in clause 27; and that had the Owners' application been granted, it would presumably have meant that it could resurrect the potential future claims in many years to come, without the Charterers being able to rely on the agreed contractual time bar. Further, Mr Walsh submitted that the potential future claims were, in any event, unparticularised, unsupported by any evidence and, even in the way the Owners framed them, entirely speculative.

10. In response to these points, Mr Parker indicated that the difficulty faced by the Owners is that although no cargo claims have yet been brought against the Owners, under the relevant provisions of Moroccan law the receivers have until 16 August 2015 to commence legal proceedings. However, Mr Walsh in effect submitted that this was irrelevant to the contractual time bar contained in clause 27 of the charterparty.

11. Be all this as it may, following service of the Owners' claim submissions, the Charterers served their own defence submissions dated 21 November 2013 in which, after quoting paragraph 11 of the Owners' claim submissions, they stated in material part: "*We disagree with owners that we are responsible for any of the above. We disagree with owners that we are in breach of charter party …*". The defence submissions concluded by requesting the Tribunal to award as follows: "*Primarily and as final award: All claims denied, costs for account of owners … Alternatively as final award … demurrage in favour of owners of Usdl 13,312.50 … Others claims denied. Costs for account of owners.*" I bear well in mind that these defence submissions appear to have been drafted by the Charterers themselves and should be read with a commercial eye and not as a statute. However, it seems to me plain that the Charterers were proceeding on the basis that the claims referred to in paragraph 11 of the Owners' claim submissions had indeed been referred to the Tribunal: if they had not, and although the Tribunal could, I suppose, determine that it had no jurisdiction to determine such claims, it could not "deny" them in a final award.

12. Thereafter, the Owners served their reply submissions which stated in material part in paragraph 7 as follows:

> "*Only the claim for demurrage is currently the subject matter of these Submissions. Any other claims for damages arising from the delay in discharge of cargo and breaches of the Charterparty will be pursued later. The Owners deny the Charterers' allegations in paragraph 7 of their Defence Submissions that they are pursuing the wrong party in these proceedings. We repeat that the Owners' claim at this stage is solely for demurrage under the Charterparty. This is a claim for liquidated damages, which has arisen due to the Charterers' breach of the Charterparty terms. As per the terms of Clause 5(b) … the Charterers were responsible for the discharge of the cargo and the delay caused in doing so falls clearly upon them. This claim is unrelated to any and all other claims that may be brought against the receivers of the cargo under the Bills of Lading and/or against any and all other parties. This is clearly stated in paragraph 11 of the Claim Submissions.*"

13. In a further set of submissions, served on 24 December 2013, the Charterers re-iterated their argument that "*Owners do not substantiate any further claims*".

14. By agreement, the Tribunal proceeded to an award on the basis of the parties' written submissions. There was no oral hearing. The Tribunal then published what it described as its "Final Arbitration Award". This term appears again in the formal disposition. Paragraph 2 recited Clause 27 of the charterparty in full. Paragraphs 11–

29 concerned the Owners' claim for demurrage which are not directly relevant. The Tribunal then dealt with all other disputes arising under the charterparty very briefly, at paragraphs 30–31:

> "30. *Given the length of time since the cargo was discharged and that the Owners' provided no evidence that the cargo receivers / interests had or indeed intended to bring a claim against them under the Bill of Lading, we refuse their application.*
>
> *31. In the event that the cargo receivers / interests do make a claim, doubtless the Owners will consider whether it is possible to start new arbitration proceedings against the Charterers. It follows that this award is not made on an interim basis, but is final in respect of the issues decided herein*."

15. It is common ground that the effect of an award in these terms, containing no reservation of jurisdiction over any other claims arising under the charterparty, exhausted the Tribunal's jurisdiction and rendered them *functus officio*.

16. Against that background, I turn to consider the Owners' application under s68 of the Arbitration Act 1996.

Summary of Owners' case under s68 of the Arbitration Act 1996

17. In summary, Mr Parker submitted as follows:

    i) It is plain from the terms of the Award that the Tribunal did not intend to shut out any further claims by the Owners against the Charterers in respect of any liability incurred by the Owners to third parties.

    ii) The Tribunal was plainly not considering the merits of such claims and cannot have concluded that such claims were bound to fail.

    iii) Moreover, the terms of paragraph 31 of the Award show that the Tribunal was not intending to rule out further claims by the Owners against the Charterers: implicit in paragraph 31 is an assumption that the Owners would not be shut out from commencing fresh arbitration proceedings after the Award had been published. If the arbitrators had recognised that Clause 27 made it impossible to start a new reference, paragraph 31 could not have been written in the terms that it was.

    iv) Unwittingly, however, the effect of the Tribunal's Award is to shut out all further claims completely.

    v) For the reasons set out below, that is the result of a serious irregularity causing substantial injustice within the meaning of s68 of the Arbitration Act 1996.

    vi) Under s68(2)(a), a failure by the Tribunal to comply with s33 of the Arbitration Act 1996 (the so-called "*general duty of the tribunal*") may constitute a serious irregularity.

vii) S33(1) imposes obligations on the Tribunal (a) to "*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) to "*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*".

viii) A central element of these duties is that the parties have the right to be given an opportunity to deal with any issue which will be relied on by the Tribunal when writing their Award:

ix) As it is put by the editors of *Russell on Arbitration* (23rd Ed, 2007), at para 5-050:

> "*… the tribunal should give the parties an opportunity to deal with any issue which will be relied on by it as the basis for its findings. The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award, and if the tribunal is minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point.*"

x) The leading judicial analysis of this principle remains the judgment of Bingham LJ in *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, 15:

> "*If an arbitrator is impressed by a point that has never been raised by the other side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment … It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance …*"

See also *The Vimeira* [1984] 2 Lloyd's Rep 66, 74–75:

> "*There is plain authority that for arbitrators so to decide a case without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to a technical misconduct and renders the award liable to be set aside or remitted*" (Robert Goff LJ).

xi) This guidance remains valid under s68 of the Arbitration Act 1996: see the judgment of Colman J in *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192, 208.

xii) The particular dangers of infringing this principle where the arbitration takes place on paper were emphasised by Colman J in *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep 109, 115:

> "*In a paper arbitration the temptation to arrive at a conclusion which may not have been envisaged by either party by reference to matters upon which the parties have not had the opportunity of addressing the arbitrators or in respect of which they have not had an opportunity of adducing further evidence, may be a particular temptation which arbitrators should be careful to avoid. It is important for the continuation of the standing and quality of international commercial arbitration in London, particularly in the commodity fields, that arbitrators should have this problem very clearly in mind. That being so, this application succeeds. The award will be set aside*."

xiii) In the present case, the Tribunal adopted a course of action which was not being advocated by either party and without giving the parties any opportunity to comment on what they were proposing to do:

a) The Owners were asking the Tribunal to reserve jurisdiction over any other claims arising under the charterparty.

b) As against this, the Charterers were asking for those claims to be dismissed on their merits, once and for all.

c) The Tribunal adopted neither of these courses of action, however. Instead they followed a path of their own devising, which was to refuse to exercise jurisdiction over other claims, on the assumption that such claims might be brought subsequently under a fresh reference to arbitration before a newly-constituted tribunal.

d) Prior to publishing their Award, the Tribunal gave no indication that they were minded to proceed in this way. If they had done so – as their duty under s33 required – the Owners would immediately have pointed out that Clause 27 of the charterparty was an absolute impediment to the commencement of fresh proceedings.

xiv) Furthermore, in adopting this course of action, the Tribunal relied solely on two considerations which had not been raised by either of the parties and which the Tribunal gave the parties no opportunity to address before the Award was published. They arose instead out of the Tribunal's private and unarticulated deliberations:

a) First, they relied on "*the length of time since the cargo was discharged*". However, if this had been raised with the parties, the Owners would have pointed out this was an irrelevant consideration because the Award was being produced only six and a half months after the completion of discharge. Accordingly, even on the assumption that there was a one-year time bar for cargo claims, the receivers still

had plenty of time to commence proceedings. (In fact, the receivers have until August 2015 to commence proceedings, by reason of the two-year time bar under the Hamburg Rules which are applicable in Morocco.)

b) Second, they relied on the fact that the Owners "*provided no evidence that the cargo receivers / interests had or indeed intended to bring a claim against them*". However, if this point had been raised with the parties, the Owners would have pointed out: (i) that arbitration proceedings had already been commenced between the Owners and cargo interests (and in which Mr Oakley was sole arbitrator); (ii) that the Owners had on 29 August 2013 provided a bank guarantee in favour of cargo interests in the sum of US$621,820.72; (iii) that the cargo receivers still had some 18 months, i.e. until August 2015, to lodge any claim; and (iv) that in these circumstances there was (at least) a real risk that cargo claims would be brought at some point before the expiry of the 2-year time bar in August 2015.

xv) As Robert Goff LJ held in *The Vimeira* [1984] 2 Lloyd's Rep 66, 75: "*It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal*."

xvi) The course of action adopted by the Tribunal has plainly caused the Owners substantial injustice, in that as matters stand they are now completely shut out from pursing any further claims against the Charterers. Accordingly, if cargo claims against the Owners are forthcoming, the Owners would have no ability to make any claim against the Charterers in respect of that liability – e.g. pursuant to Clause 5(b) of the GENCON terms, on the basis that the damage to the cargo was caused or contributed to by the Charterers' failure to discharge the cargo properly and reasonably.

xvii) The merits of any such claim are of course a matter for the Tribunal, rather than the Court. For present purposes, it is sufficient that: (i) the prospect of claims being brought by third parties against the Owners cannot be discounted; and (ii) if the Owners are held liable in respect of such claims in Morocco, they may in turn have a claim against the Charterers in respect of that liability, for damages and/or an indemnity.

xviii) Finally, the requirement under s68 to show "substantial injustice" does not require the Owners to satisfy the Court that the Tribunal would have reached a different view if it had complied with its duty under s. 33; it is sufficient that the Tribunal *might realistically* have reached a different conclusion: *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm), at [102] (Langley J). The Owners comfortably pass that threshold: indeed, it is difficult to see how the Tribunal could properly have declined to reserve jurisdiction if it had given the parties an opportunity to comment on the course of action which it had devised. It would have been immediately pointed out that Clause 27 would shut out any further claims, and this would surely have caused the Tribunal to reserve – rather than exhaust – its remaining jurisdiction.

Charterers' case

18. Mr Walsh readily accepted that although the Tribunal had a discretion under s47(2) of the Arbitration Act 1996 whether to make a final or a partial award, this was, of course, subject to the general duty of the Tribunal under s33 of the Arbitration Act 1996. In that context, Mr Walsh submitted (rightly in my view) that the courts have repeatedly emphasised the very high threshold for any allegation of serious irregularity causing substantial injustice under s68 of the Arbitration Act 1996. In particular, he relied on what Tomlinson J said in *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep 1, [63] (with emphasis supplied):

> "*In short, Mr Waksman submitted that this was just such a case as the Departmental Advisory Committee had in mind when, at para 280 of its report on the Arbitration Bill which became the 1996 Act it referred to a case where "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected". However I think it important to put that observation in the context of the whole paragraph in which it appears which reads as follows:*
>
> > *["]The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 is 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.["]*
>
> *Plainly those who subscribed to this passage envisaged that the hurdle to be overcome would be a high one - something "so far removed from what could reasonably be expected of the arbitral process", as opposed to an "acceptable consequence" of the choice of arbitration. In Lesotho Lord Steyn said of the requirement to show that there has been a "serious irregularity"*:
>
> *It is a new concept in English arbitration law. Plainly a high threshold must be satisfied.*

> *There are many other judicial pronouncements to similar effect: Fidelity Management v Myriad International Holdings [2005] 2 All ER (Comm) 312, 314 (Morison J: a "long stop" to deal with "extreme cases where … something … went seriously wrong with the arbitral process"); World Trade Corporation Ltd v Czarnikow Sugar Ltd [2004] 2 All ER (Comm) 813, 816 (Colman J); Cameroon Airlines v Transnet [2004] EWHC 1829 (Comm) at para 94 (Langley J: "the test is indeed an extreme case"); The Pamphilos [2002] 2 Lloyd's Rep. 681, 687 (Colman J: "the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration"); Profilati Italia v PaineWebber [2001] 1 All ER (Comm) 1065, 1071 (Moore-Bick J: "it is intended to operate only in extreme cases"); The Petro Ranger [2001] 2 Lloyd's Rep. 348, 351 (Cresswell J); Egmatra v Marco Trading [1999] 1 Lloyd's Rep. 826, 865 (Tuckey J: "no soft option clause as an alternative for a failed application for leave to appeal").*"

19. Bearing those observations in mind, Mr Walsh submitted that the Owners do not satisfy the very high threshold for an application under s68 of the Arbitration Act 1996 and that none of the suggested "serious irregularities" advanced by Mr Parker withstand scrutiny. In particular, he submitted:

    i) The Tribunal did not misunderstand the issue in dispute. It was clear to the Tribunal from the Charterer's submissions that it sought a final award and that it was therefore opposing the Owners' application for what was, in effect, a partial award. The fact that it also disputed the substance of the alleged future claims is irrelevant.

    ii) The Tribunal gave both parties an adequate opportunity to address it on all of the issues. The fact that the Owners chose to say nothing more than it did is hardly the fault of the Tribunal, let alone a serious irregularity.

    iii) Quite why the Owners suggest that it ought to have been given forewarning that its application was going to be refused is unclear. No doubt all parties on the wrong end of awards would say that if only they had been told they were going to be unsuccessful, they would have made further submissions to the Tribunal. The fact that pre-award warnings are not given out is routine; it is not a sign that something has gone seriously wrong with the arbitral process. In any event, the further submissions that the Owners say it would have made all related to a point the Tribunal already had well in mind, namely the clause 27 time bar. Contrary to what the Owners say, it is clear from the Award that the Tribunal were fully aware of the implication of their decision in light of clause 27. As such, it is hard to see what difference any such further submissions would have made in any event.

20. In any event, Mr Walsh submitted that although it is common ground that the Owners are now out of time for bringing further claims under the charter, there is no compelling evidence that there are any such further claims; that until 21 October 2014, the only "evidence" before the Court was a single-page document in French

which was said to be some form of bank guarantee; that what the Court was meant to draw from this is unclear; that, as to the new evidence served on 21 October, the statement itself is short and its only purpose is to attach a one-page email from a Mr Abdelmjid of "PANDI MAROC" who are, apparently, the vessel's P&I Club; and that the email purports to confirm that no claims have been pursued in the local courts but alleges that cargo insurers have notified the Club of a claim. Further, Mr Walsh submitted that in addition to being served well out of time, the email is of no assistance to the Owners in this arbitration claim or the Court for the following reasons:

i) There is no supporting evidence attached to substantiate any of Mr Abdelmjid's allegations. The Charterers have no way of verifying whether what Mr Abdelmjid says is right or wrong. It would not have been difficult to have appended, for example, the alleged notification from cargo underwriters.

ii) This is important in circumstances where Mr Abdelmjid's email is merely a response to an email from the Owners' representatives (not exhibited but obtained by the Charterers) which effectively tells him what to "confirm" in his message: "*our lawyers ric are requesting your confirmation to the following*" so that "your message may be produced to the court as evidence". Mr Abdelmjid duly obliged.

iii) Even if evidence to support Mr Abdelmjid's allegations had been adduced, all it would show is that a claim had been made against the Owners by cargo interests. There would still be no evidence to suggest that the claims advanced against the Owners are capable of being passed on to the Charterers. The reality is that if the Owners had a basis for advancing indemnity claims against the Charterers, that basis and some supporting evidence would have been revealed by now.

21. Thus, Mr Walsh submitted, even if the Owners could demonstrate a serious irregularity, it cannot show any substantial injustice.

Discussion

22. I fully accept that the threshold under s68 of the Arbitration Act 1996 is very high and, in that context, I entirely agree with the observations of Tomlinson J in *ABB.* However, it seems to me important equally to bear in mind the observations of the other highly experienced judges in the cases cited by Mr Parker referred to above.

23. Bearing all these observations in mind and despite the most attractive way in which Mr Walsh advanced his submissions, I cannot accept them for the following reasons.

24. First, despite the uncertainty with regard to the original reference to arbitration and the appointment of Mr Oakley, it seems to me relatively plain that what I might refer to as the indemnity claims had indeed been referred to the Tribunal or at least the parties had proceeded on that basis. The fact that no specific claims had been quantified at that stage is not in my view fatal.

25. Second, as appears from the authorities referred to above, where a Tribunal wishes to adopt a course not advocated by either party, it is generally incumbent upon the

Tribunal to give the parties an opportunity to address it on that possible course before it is finally adopted. Depending on the circumstances, failure to do so will – or at least – may amount to a serious irregularity.

26. Third, it seems to me that Mr Parker is right in saying that the course adopted by the Tribunal in its Award is not one which was advocated by either party; and that such course was adopted without any proper notice to the parties. For present purposes and for the sake of argument only, I am prepared to accept that it might have been open for the Tribunal to accede to the Charterers' submissions and, in effect, finally to determine that the Owners' indemnity claims should be rejected on the merits. In that context, I do not consider that it is incumbent on a Tribunal to wait indefinitely for a claimant to pursue its claims subject always, of course, to its overriding duties including those under s33 of the Arbitration Act 1996 although I should emphasise that I do not say that such course of action would necessarily have been justifiable in the circumstances of the present case. Equally, it seems plain that the Tribunal might have acceded to the Owners' submissions that such claims should not be determined at least for the time being and should be "reserved" by the Tribunal. However, the Tribunal did neither of these things. Plainly, the Tribunal did not "reserve" anything to itself. So much is common ground. Equally, the Tribunal did not finally determine the Owners' claims – as is, in my view, plain from paragraph 31 of the Award. Rather, it decided to adopt what was, in effect, a half-way house i.e. both to refuse to reserve its jurisdiction and to decline to determine the claims in favour of the Charterers.

27. There is a further difficulty with the half-way house adopted by the tribunal which raises a fundamental issue as the nature of the arbitral process generally. As it seems to me, where a claim is submitted to a tribunal for determination, the tribunal is, in effect, obliged to determine the claim one way or another. Of course, the Arbitration Act 1996 contains detailed provisions with regard to the revocation of an arbitrator's authority (s23), the power of the court to remove an arbitrator (s24) and the resignation of an arbitrator (s25). However, absent agreement of the parties, my tentative view is that a tribunal has no power simply to decline to act. In the event, it is unnecessary to make any final decision on this point; and it would be inappropriate to do so particularly in the circumstances of the present case since I heard no argument in relation thereto. I say no more about it.

28. Exactly why the Tribunal chose to adopt the course of action it did is not clear. It may be because it considered that this was some form of acceptable compromise. It may be because it thought that it would still be possible for the Owners to pursue their indemnity claims notwithstanding the time-bar in clause 27. At first blush, what the Tribunal says in paragraph 31 of its Award would seem to support the latter – although Mr Walsh strongly argued to the contrary. In any event, it seems to me that these matters are somewhat speculative – and, in my view, ultimately of little, if any, relevance.

29. Fourth, whilst I am prepared to accept that such half-way house might have some attraction, it is one which the parties should, in my view, have been given the opportunity of addressing before being adopted by the Tribunal in its Final Award. In my view, the failure to do so constituted a serious irregularity within the meaning of s68 of the Arbitration Act 1996.

30. Fifth, in my view, this failure did cause substantial injustice to the Owners. In that context, I agree with Mr Parker's submission that it is not necessary for the Court to be persuaded that the Tribunal would necessarily have adopted a different course; and that it is sufficient that the Tribunal *might realistically* have reached a different conclusion. In that context, I bear well in mind the submission made by Mr Walsh with regard to lack of particularity of Owners' claims both as to the nature of the breaches allegedly committed by the Charterers to found a claim for an indemnity and the absence of cogent evidence with regard to any possible claims that might be advanced by receivers. I also agree that an assessment of the strength of such claims would potentially be relevant in considering whether or not the Owners have suffered substantial injustice. For example, if I could say that the Owners' claims were bound to fail or even perhaps were extremely weak, I might have been persuaded that the Owners had not suffered substantial injustice. However, I do not consider that it is possible for me to reach such conclusions on the material before me.

Conclusion

31. For all these reasons, it is my conclusion that this application under s68 of the Arbitration Act 1996 succeeds; that paragraphs 30-31 of the Award should be set aside and a declaration granted that they be of no effect; and that the matter should be remitted to the Tribunal in terms which reflect this Judgment. Further, I would order that the charterers pay the Owners' costs summarily assessed in the sum of £12,500. Accordingly, Counsel are requested to prepare a draft order for my approval. Failing agreement, I will deal with any outstanding issues.