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Case No: 2012 Folio 1719

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
AND IN THE MATTER OF THE ARBITRATION ACT 1996

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/10/2013

Before:

THE HONOURABLE MR JUSTICE FLAUX

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Between:

(1) PRIMERA MARITIME (HELLAS) LIMITED **(2) ASTRA FINANCE INC** **(3) COMET FINANCE INC**	**Claimants**
- and -	
(1) JIANGSU EASTERN HEAVY INDUSTRY CO LTD **(2) NINGBO NINGSHING INTERNATIONAL INC**	**Defendants**

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Robert Bright QC (instructed by **Reed Smith LLP**) for the **Claimants**
Graham Dunning QC and **Jern-Fei Ng** (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing date: 3 October 2013

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Judgment

The Honourable Mr Justice Flaux:

Introduction

1. The claimants were the buyers under two shipbuilding contracts with the defendants dated 12 July 2007 in relation to two Kamsarmax bulk carriers to be built at the defendants' yard in China. Disputes arising under both contracts were referred to arbitration in London pursuant to the LMAA Terms 2006 before the same tribunal, David Aikman, Mark Hamsher and Michael Howard QC. The basis for the claimants' claim for damages, so far as currently relevant, was that from 19 October 2007, the defendants had been in anticipatory breach of contact by refusing to perform the contracts in accordance with their terms, specifically in relation to delivery by the contractual delivery dates in 2011, and hence renounced the contracts.

2. The arbitration hearing took place over two and a half weeks, with eight days of oral evidence, both parties being represented by leading counsel. In all over 700 pages of

written submissions in opening and closing were presented to the tribunal which stated at [12] of its Reasons that: "It is because of the thoroughness of those submissions that we have been able to express our Reasons in comparatively concise terms". Nonetheless, the tribunal's third Interim Award dated 29 November 2012 was supported by detailed Reasons running to 84 pages. By that Award, the tribunal dismissed the claims, holding that although the defendants had renounced the contracts in an email of 19 October 2007 and at a meeting on 6 November 2007, the claimants thereafter affirmed the contracts.

3. The claimants now apply under section 68(2)(d) of the Arbitration Act 1996 to set aside that Award and remit it to the tribunal, on the grounds that the tribunal failed to deal with two issues which the claimants had put before them: (i) that the renunciation by the defendants was continuous; and (ii) in relation to the quantum of the claimants' claim, that the claimants would have "flipped" the contracts.

4. Notwithstanding the elegant and well-reasoned submissions of Mr Robert Bright QC on behalf of the claimants, by the end of the hearing of the application under section 68 I had concluded that the application should be dismissed. I informed the parties that that was my decision and that I would give a judgment setting out my reasons at a later date. This is that judgment.

Legal principles applicable to section 68(2)(d)

5. Section 68 of the Arbitration Act 1996 provides, inter alia, as follows:

> "68 Challenging the award: serious irregularity.
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> (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.
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> 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).
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> (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—
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> (d)failure by the tribunal to deal with all the issues that were put to it;"

6. In order to succeed under section 68 an applicant needs to show three things. First of all, a serious irregularity. Secondly, a serious irregularity which falls within the closed list of categories in section 68(2). Thirdly, that one or more of the irregularities identified caused or will cause the party substantial injustice. As Hamblen J said in *Abuja International Hotels v Meridian SAS* [2012] EWHC 87 (Comm) at [48] to [49], the focus of the enquiry under section 68 is due process, not the correctness of the tribunal's decision. As the DAC Report states, and numerous cases since have reiterated, the section is designed as a long-stop available only 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. This point, that section 68 is about whether there has been due process, not whether the tribunal "got it right", is of particular importance in the present case, where, for the reasons set out below, the claimants' real complaint is that they consider that the tribunal reached the wrong result, not a matter in relation to which an arbitration Award is susceptible to challenge under section 68.

7. In cases under section 68(2)(d), there are four questions for the court: (i) whether the relevant point or argument was an "issue" within the meaning of the sub-section; (ii) if so, whether the issue was "put" to the tribunal; (iii) if so, whether the tribunal failed to deal with it; and (iv) if so, whether that failure has caused substantial injustice: see per Andrew Smith J in *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm); [2012] 2 Lloyd's Rep 691 at [15].

8. Andrew Smith J goes on to discuss what constitutes an "issue" and summarises the earlier authorities at [16]:

> "A distinction is drawn in the authorities between, on the one hand "issues" and, on the other hand, what are variously referred to as (for example) "arguments" advanced or "points" made by parties to an arbitration or "lines of reasoning" or "steps" in an argument (see, for example, *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83, 97 and *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The "Pamphilos")* [2002] 2 Lloyd's Rep 681, 686). These authorities demonstrate a consistent concern to maintain the "high threshold" that has been said to be required for establishing a serious irregularity (see *Lesotho Highlands Development Authority v Impergilo SpA and ors* [2005] UKHL 34 paragraph 28 and the other judicial observations collected by Tomlinson J in *AAB AG v Hochtief Airport GMBH and anor* [2006] EWHC 388 paragraph 63). The concern has sometimes been emphasised by references to "essential" issues or "key" issues or "crucial" issues (see respectively, for example, *Ascot Commodities NV v Olam International Ltd* [2002] 2 Lloyd's Rep 277, 284; *Weldon Plant v Commission for New Towns* [2001] 1 All ER 264, 279; and *Buyuk Camlica Shipping Trading and Industry Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm.)), but the adjectives are not, I think, intended to import a definitional gloss upon the statute but simply allude to the requirement that the serious irregularity result in substantial injustice: *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 at paragraph 10. They do not, to my mind, go further in providing a useful test for applying section 68(2)(d)."

9. The learned judge then went on to reject suggested yardsticks for measuring what is an "issue" by reference to what was or might have been in a list of issues. He went on to conclude that the particular point in that case, whether the defendant had assumed

responsibility for the loss was an "issue" within the meaning of the sub-section rather than simply an argument in the broader issue of foreseeability, at [21]:

> "The assumption of responsibility question, as it was identified and presented by PIC on this application is, to my mind, an "issue" within the meaning of sub-section 68(2)(d). It is not simply a way of presenting the question of foreseeability, and not simply an argument in support of a contention that losses were not within the First Limb or the Second Limb of *Hadley v Baxendale*. It can be difficult to decide quite where the line demarking issues from arguments falls, but here almost the whole of Dow's claim could have depended (and on the Tribunal's other conclusions did depend) upon how the assumption of responsibility question was resolved. I accept PIC's submissions about whether it was an issue because this accords with what I consider to be the ordinary and natural meaning of the word, and I find support for this conclusion in that, as I see it, fairness demanded that the question be "dealt with" and not ignored or overlooked by the Tribunal, assuming it was put to them."

10. Having found that that issue had been put to the tribunal, the learned judge went on to deal with the third issue about whether the tribunal had "dealt with" the issue in two paragraphs which are of some assistance in the present case, [26] and [27]:

> "26 Sub-section 68(2)(d) is about the Tribunal "dealing with" issues. The question whether an issue was dealt with depends upon a consideration of the award: as Mr Gavin Kealey QC said in *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm) at paragraph 38:
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> > 'It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section [68(2)(d)] is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined.'
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> 27 As Mr Smouha submitted, and Lord Grabiner acknowledged, a tribunal does not have to 'set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration': *Hussman (Europe) Ltd v Al Ameen Development and Trade Co and ors* [2000] 2 Lloyd's Rep 83 paragraph 56. Nor does a tribunal fail to deal with an issue that it decides without giving reasons (or a fortiori without giving adequate reasons): see *Margulead Ltd v Exide Technlogies*

> [2004] EWHC 1019 (Comm.) at paragraph 43. No less pertinent in this case, as I see it, are these considerations:
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> i) A tribunal does not fail to deal with issues if it does not *answer* every question that qualifies as an "issue". It can deal with an issue by making clear that it does not arise in view of its decisions on the facts or their legal conclusions.
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> ii) By way of amplification of this point, a tribunal may deal with an issue by so deciding a logically anterior point that the issue does not arise. For example, a tribunal that rejects a claim on the basis that the respondent has no liability is not guilty of a serious irregularity if it does come to a conclusion on each issue (or any issue) about quantum: by their decision on liability, the tribunal disposes of (or "deals with") the quantum issues.
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> iii) A tribunal is not required to deal with each issue seriatim: it can sometimes deal with a number of issues in a composite disposal of them.
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> iv) In considering an award to decide whether a tribunal has dealt with an issue, the approach of the court (on this as on other questions) is to read it in a "reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it": *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*. [1985] 2 EGLR 14 at p.14F per Bingham J.
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> v) This approach may involve taking account of the parties' submissions when deciding whether, properly understood, an award deals with an issue. Although submissions do not dictate how a tribunal is to structure the disposal of a dispute referred to it, often awards (like judgments) do respond to the parties' submissions and they are not to be interpreted in a vacuum."

The case presented to the arbitrators on renunciation and affirmation

11. In his submissions before the court, Mr Bright QC submitted that the claimants' case on affirmation at the arbitration had run a number of quite separate arguments on affirmation, two of which are relevant for present purposes: (i) that the defendants, having renounced the contracts in their email of 19 October 2007, had committed a number of specific repetitions of that renunciation, at the meeting of 6 November 2007 and in the Prospectus issued on 11 December 2007, so that even if there had been an affirmation prior to 11 December 2007, that would not preclude the claimants from relying on the renunciation in the Prospectus; (ii) the defendants' renunciation was continuous and an affirmation at one stage is not an irrevocable affirmation for all time in the future. Therefore, an affirmatory act at an earlier stage did not preclude the claimants from terminating when they did on 22 January 2008. The claimants' case was that the tribunal had dealt with the first of these arguments but not the second.

Accordingly, they submitted that was an issue put to the tribunal which it had failed to deal with.

12. I agree with Mr Dunning QC that when one looks at the claimants' written closing submissions where the question of affirmation was dealt with in detail, the clear delineation Mr Bright QC now relies upon is strikingly absent. Thus, this section of their submissions is headed "Repetition/continued renunciation". It begins by referring to the specific instances of renunciation relied upon: the email of 19 October 2007, the meeting of 6 November 2007 and the Prospectus dated 11 December 2007 and sets out the first argument referred to in [11] above. In that context, the written submissions refer to one of the principles laid down by Moore-Bick J in *Yukong Line Ltd of Korea v Rendsburg Investments Corporation* [1996] 2 Lloyd's Rep 604:

> "Although the injured party is bound by his election once it has been made, the fact that he has affirmed the contract does not of course preclude him from treating it as discharged on a subsequent occasion if the other party again repudiates it."

13. The next paragraph of the written submissions begins with the proposition that: "As well as a right to accept a fresh repudiation/renunciation after an initial affirmation, a party may, after affirmation, treat a continuation of the previous renunciatory/repudiatory stance as a renunciation/repudiation." There is then citation of the two authorities upon which the claimants relied before the tribunal, the first of which is *Safehaven Investments Inc v Springbok Ltd* [1996] 71 P &CR 59, a decision of Jonathan Sumption QC sitting as a Deputy High Court Judge of the Chancery Division and in particular a passage in that judgment where the learned judge stated:

> "It does not follow from this analysis that the innocent party may in all cases change his mind after affirming the contract. If for example, after he had affirmed it, the repudiating party's conduct suggested that he proposed to perform after all, then that party's previous repudiation is spent. It had no further legal significance. If on the other hand, the repudiating party persists in his refusal to perform, the innocent party may later treat the contract as being at an end. The correct analysis in this case is not that the innocent party is terminating on account of the original repudiation and going back on his election to affirm. It is that he is treating the contract as being at an end on account of the continuing repudiation reflected in the other party's behaviour after affirmation."

14. The claimants' written submissions characterised this "as a case where the subsequent correspondence from the party in breach was properly to be understood as maintaining the position that the contract had been terminated, and <u>thus repeated the renunciation</u>" (my emphasis). The second case relied upon was the decision of the Court of Appeal in *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436 a shipbuilding case where the buyers had indicated prior to payment of the second instalments that they could not perform the contracts and were thus in anticipatory breach. The yard issued keel-laying notices and then served notices of rescission when the second instalments were not paid. The Court of Appeal held the serving of keel-laying notices was not an unequivocal affirmation.

15. The claimants in their written submissions relied particularly on the obiter part of the judgment of Rix LJ which went on to discuss the position if it was wrong that there had not been an affirmation. They referred to [96] of his judgment where he held there was a continuing repudiation after affirmation and approved the analysis of Thomas J at first instance who had cited *Safehaven* and had said:

> "Once the innocent party has affirmed, he must go on performing. He must then be able to point to behaviour that amounts to a repudiation after the affirmation either by way of some fresh conduct amounting to repudiation or by way of the continuing refusal to perform amounting to repudiation..."

16. The claimants then referred to Rix LJ's endorsement of counsel's submission in that case that the buyer's silence was a pregnant silence speaking of maintained recalcitrance, which continued in circumstances where there was a duty on the buyers to make it clear that they were not continuing with their previous repudiatory attitude of not being willing to proceed with the contracts unless they were renegotiated. The claimants relied on that analysis to submit that the defendants' failure to respond to the claimants' solicitors' letter of 14 December 2007 (which ended with an insistence that within seven days the defendants unequivocally confirm that they would deliver the vessels by the original delivery dates) fell into the same category of a pregnant silence, in other words continued renunciation.

17. I agree with Mr Dunning that these written submissions, far from making separate arguments about repeated renunciation on the one hand and continuing renunciation on the other, essentially dealt with them as aspects of the same overall issue. It seems to me that the issue was whether, subsequent to the affirmation, the defendants had renounced the contracts, reviving the claimants' right to terminate. Once it is recognised that that was the "issue" for the purposes of section 68(2)(d), the suggestion that the tribunal did not deal with it in its Award is unarguable. However, even if the "issue" was the narrower one of continuing renunciation, the tribunal did clearly deal with that issue, and it is to that question that I now turn.

The Award dealt with the question of continuing renunciation

18. In the section of the Award dealing with anticipatory breach, the tribunal dealt with the claimants' case of renunciation from [56] onwards. At [61] the tribunal set out the four specific expressions of indifference relied on as constituting renunciation and at [62] it said:

> "We had to consider the parties' conduct over a period of months, both in relation to renunciation and to waiver. So far as the former is concerned, we think that only these four events require consideration as candidates for the role of renunciatory breach. We have however taken into account the whole history of the parties' acts and communications, because they provide both context for and illumination of these four events".

19. Mr Bright relied upon the second sentence of that paragraph in support of his submission that the tribunal had overlooked his case on continuing breach and had only dealt with specific instances of renunciation. If that sentence were taken in

isolation, that submission might have some force, but when one looks both at the paragraph as a whole and at the rest of the Reasons it is not a fair point. As Mr Dunning pointed out, the last sentence makes it clear that the tribunal had considered whether other matters required consideration as possible renunciatory breaches but considered they did not. Furthermore, that last sentence is an important indicator of the reasoning by which the tribunal ultimately reached the conclusion that other matters (such as the absence of response to the solicitors' letter of 14 December) did not amount to renunciation: looking at all the communications, it did not consider this was a case of "pregnant silence", a matter to which I return below.

20. The tribunal then went on to look at the four instances of renunciation in turn and concluded at [77] of the Reasons that the defendants' email of 19 October 2007 was a renunciation. It then concluded at [78] that a further email of 22 October 2007 was not a fresh breach but constituted "a continuation of the Yard's existing renunciation". This is a fair indication that the tribunal had the case of continuing renunciation in mind. It went on to conclude at [87] that at the meeting on 6 November 2007, there had been: "another adamantine refusal by the Yard to meet the contractual delivery dates. This would have been a fresh anticipatory repudiation even if there had not already been such a breach on 19 October. As it was, it showed that the Yard was persisting in its renunciation of the contract". Again, that last sentence demonstrates that the tribunal had in mind the concept of persisting or continuing renunciation. Finally, the tribunal considered the Prospectus of 11 December 2007 and concluded at [89] that it could not be considered renunciatory. Accordingly, the tribunal concluded the claimants had made out their case that on 19 October and 6 November 2007, the defendants had renounced the contracts.

21. The tribunal then went on to consider the defendants' counter arguments, one of which was "repentance", that since anticipatory breach necessarily occurs before the date for actual performance, a contract breaker can cure the default by repentance provided it occurs before the breach is accepted by the innocent party. At [96] the tribunal concluded that the defendants had not repented, but went on at [97] to discuss the limits of that point in what is an important passage when considering the claimants' case that the tribunal overlooked the question of continuing renunciation:

> "It is important to notice, however, that this point has its limits. All that we are saying here is that the Yard did not satisfy the criteria to justify a finding that they would have performed the contract. <u>That is not the same as saying that there was a continuing or repeated renunciation</u>. This distinction is of some importance, though perhaps not crucial, when it comes to consider whether there or not the Buyers gave up their right to terminate. Our holding is that the Yard did not by its own actions destroy the Buyers' right to terminate. <u>It does not follow that the Buyers had an endlessly repeated right to terminate</u>, even if they had waived the breaches of which they specifically complained. Whether or not they had done so is the topic to which we now turn." (my emphasis)

22. I agree with Mr Dunning that the passages I have underlined in that paragraph indicate that the tribunal had well in mind the concept of continuing or repeated

renunciation. Although Mr Bright sought to draw a sharp distinction between two concepts: repetition of a renunciation on the one hand and continuing renunciation on the other, in order to seek to demonstrate that the tribunal had dealt with the former argument but not the latter, in my judgment, as Mr Bright's own written closing submissions before the tribunal demonstrate, there is not always a clear distinction. In a very real sense the supposed distinction between a repeated renunciation and a continuing renunciation through silence is a semantic one, since persisting in a previously expressed renunciation can be characterised as repetition, a point the tribunal itself makes at [99] in the passage quoted at [25] below. This is a matter to which I return below in relation to the critical paragraph of the Reasons, [134].

23. The tribunal then went on in the next section of its Reasons headed "Acceptance/Waiver/Election" to deal with the issue of affirmation. They began at [98] by citing a paragraph on anticipatory breach from Chitty on Contracts (at what is now [24-022] of the 31st edition). Of particular relevance to the current debate is this passage:

> "On the other hand, where the anticipatory breach takes a continuing form, the fact that the innocent party initially continued to press for performance does not normally preclude him from later electing to terminate the contract provided that the party in breach has persisted in his stance up to the moment of termination."

24. In fact, although the tribunal does not set it out, the footnote reference at the end of that passage in Chitty is to the passage in the judgment of Rix LJ in the *Latvian Shipping* case where he deals with continuing or renewed anticipatory breach ([94]-[100]). In those circumstances and given the citation of that passage from Chitty, it seems to me impossible to contend that, at least at this stage of its reasoning, the tribunal did not have in mind the argument that there was a continuing renunciation.

25. At [99] of the reasons, the tribunal set out a summary of the legal principles applicable to waiver or affirmation, one of which was: "A party who has waived one anticipatory breach is not debarred from accepting its subsequent repetition, and repetition may consist in simply persisting in a previously expressed renunciation." This is both a clear indication that the tribunal had the concept of continuing renunciation well in mind and a demonstration, as I have already said, that any distinction between repetition and continuation of a renunciation is more apparent than real.

26. The tribunal then went on to discuss in detail the defendants' case on renunciation. It is not necessary to set out any of that detail but it is noteworthy, in the context of the criticisms levelled by Mr Bright against the tribunal's conclusion at [134], that at [102] the tribunal said that this was not a case of mere silence and inaction in the relevant period between October 2007 and January 2008 but, as the tribunal found: "here, by contrast, there was constant communication. It was the character of three months of constant dealings between the parties and what that signified in terms of waiver or acceptance of the breach which concerns us."

27. Having quoted extensively from the claimants' solicitors' letter of 14 December 2007 to which I have already referred, the tribunal said at [130] that if the claimants'

conduct by that date did not amount to waiver, then that letter confirmed that the claimants' right to terminate for renunciatory breach was still alive. However, the tribunal concluded at [132] that the letter was too late and that, by early December 2007, the right to terminate had been lost because the claimants had waived the breach and affirmed the contracts. It then went on to hold at [133] that, even if that were wrong, the effect of the letter would have been that the tribunal would have concluded that there had been an affirmation by the end of 2007, because having set a seven day deadline for the defendants to give the unequivocal confirmation the claimants sought, once that deadline expired, the claimants should have terminated promptly thereafter and certainly by the end of the year, if that is what they wanted to do.

28. The tribunal then turned to the issue of whether there had been further renunciation in [134], a paragraph of some importance, so that it merits quotation in full:

> "If the Yard had repeated the renunciatory breach in late December or January, the right to terminate would have revived. As Moore Bick J observed in *Yukong v Rendsburg*:
>
> > 'Although the injured party is bound by his election once it has been made, the fact that he has affirmed the contract does not of course preclude him from treating it as discharged on a subsequent occasion if the other party again repudiates it.'
>
> <u>His affirmation does not extend to future renunciatory breaches of the same character.</u> The Buyers said that the Yard had provided no answer to their claim that repeated renunciations revived their right to terminate. That submission was relevant only if the publishing of the Prospectus was a further renunciation. We have held that it was not. From mid-November onwards, the Yard remained silent on the question of what course of action they would take. It is overwhelmingly probable that they would never have yielded if the Buyers had insisted on timeous performance. They would never have announced that they would take all possible steps to secure engines in time to perform the contracts. But as events unfolded they did not tell the Buyers again that their position was unchanged. <u>It would be a strong thing to hold that a fresh anticipatory breach of contract was committed by silence. No doubt, this can be done. In some cases, in the context of the dealings between the parties, the silence may be taken as an unequivocal re-iteration of a previous express renunciation</u>. But in the present case, we think that matters had been left in a more fluid state by the Buyers' indications of what their intentions were and by the long period in which they failed to come to a decision. The breach had been waived by early December, waived again if it had been repeated by late December; and there was nothing in the parties' dealings in January 2008 which could be taken as having revived it." (my emphasis)

29. Against the first underlined passage there was a footnote reference by the tribunal to *Safehaven* and *Latvian Shipping*. Notwithstanding that reference, which clearly demonstrates that what the tribunal had in mind by "future renunciatory breaches of the same character" was repeated or continuing renunciation, Mr Bright submitted that the tribunal had overlooked continuing renunciation and was dealing with specific expressions of renunciation in the future. I cannot accept that submission. Given that those cases had been cited by the claimants in their written submissions in support of their case that there had been a continuing renunciation through "pregnant silence", it seems to me that the phrase "future renunciatory breaches of the same character" is the tribunal's way of expressing the concept of continuing renunciation.

30. Mr Bright then effectively subjected each sentence of this paragraph to a minute textual analysis with a view to demonstrating that the tribunal had failed to deal with the question of continuing renunciation. That is the wrong approach. A number of cases have emphasised that the court should read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults: see per Bingham J in *Zermat Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] EGLR 14 cited with approval by Andrew Smith J in [27] of *Petrochemical Industries Co v Dow Chemical*. A similar point was made by Teare J in *Pace Shipping v Churchgate Nigeria Ltd* [2009] EWHC 1975 (Comm); [2010] 1 Lloyd's Rep 183 at [20] specifically deprecating a minute textual analysis. Quite apart from the fact that this is the wrong approach, it did not assist the claimants' case. Instead it demonstrated that the tribunal had dealt with the argument about continuing renunciation.

31. To begin with, as Mr Dunning QC rightly pointed out, [134] of the Reasons very much tracks the points made in the claimants' written closing submissions, starting with the citation of the same passage from the judgment of Moore-Bick J in *Yukong v Rendsburg*. I have already considered and dismissed Mr Bright's submission that the phrase "future renunciatory breaches of the same character", with its citation of *Safehaven* and *Latvian Shipping*, was not addressing the question of continuing renunciation. In relation to the next sentence: "The Buyers said that the Yard had provided no answer to their claim that repeated renunciations revived their right to terminate" Mr Bright submitted that, since the tribunal had gone on to say this was only relevant if the publishing of the Prospectus was a further renunciation, it was clearly only referring to specific utterances of express renunciation, not continuing renunciation through silence. If that sentence stood in isolation, that might be a good point, but it does not. Lower down the paragraph the tribunal addresses clearly the issue of whether silence can amount to a repeated or continuing renunciation.

32. In my judgment, despite Mr Bright's attempts to argue the contrary, the second passage I have underlined in the citation of [134] of the Reasons is dealing with the question of repeated or continued renunciation through silence. The suggestion that the tribunal was not dealing with the issue is frankly hopeless. Mr Bright suggested that the reference to it being a strong thing to hold that a fresh anticipatory breach was committed by silence was an indication that the tribunal did not have the authorities of *Safehaven* and *Latvian Shipping* in mind. Quite apart from the fact that the tribunal had just cited the cases in a footnote, which makes it inherently unlikely that it had forgotten them in a few lines of the Reasons, the concept of it being a strong thing to

hold that there was renunciation by silence chimes with what Rix LJ said in the latter case at [96]:

> "The silence was not mere silence, it was overlaid with all that had gone before. It was a speaking silence. The difficulty with silence is that it is normally equivocal. Where, however, it is part of a course of consistent conduct it may be a silence which not only speaks but does so unequivocally. Where silence speaks, there may be a duty on the silent party in turn to speak to rectify the significance of his silence."

33. Furthermore, Mr Bright's submission that, because the tribunal referred to a fresh anticipatory breach committed by silence, it cannot have had in mind the question of continuing renunciation, is another example of a casuistic semantic distinction. Given that one is focusing on renunciation by pregnant silence, it seems to me one is necessarily dealing with repeated or continuing silence, not strictly speaking a "fresh" renunciation, in the sense of an entirely new renunciation. The word "fresh" is perhaps loose terminology, but the tribunal must be referring to repeated or continuing renunciation. Which it is does not matter: the critical question is whether the silence amounted to a renunciation, which is why the "issue" is really whether there was renunciation by silence after the claimants affirmed the contracts.

34. Mr Bright also sought to suggest that the finding of fact which the tribunal then made: "But in the present case, we think that matters had been left in a more fluid state by the Buyers' indications of what their intentions were …and by the long period in which they failed to come to a decision. The breach had been waived by early December, waived again if it had been repeated by late December; and there was nothing in the parties' dealings in January 2008 which could be taken as having revived it", somehow demonstrated that the tribunal had not had the "continuing renunciation" point in mind or had not addressed the right question. In my judgment, there are a number of answers to that criticism.

35. First, despite what Mr Bright submitted, it is quite clear that the tribunal was addressing why it was that, on the facts of this case, there was no renunciation after the claimants had affirmed the contracts. The reference to revival is to revival of the right to terminate, so there is nothing in the suggestion that that reference indicates that the tribunal had applied the wrong test in law. Second, taking [134] of the Reasons as a whole and applying a broad test of reasonable construction, it seems to me impossible to say that the tribunal has applied the wrong test in law. What the claimants' submission amounts to is that, because the tribunal reached a conclusion on the facts which the claimants do not like, the tribunal must have applied the wrong legal test.

36. In my judgment, that submission is misconceived. As I have said, it is impossible to say that the tribunal applied the wrong test in law as to what constitutes a renunciation. In that context, as I have said, whether it is a continuing renunciation or a repeated renunciation is irrelevant: it is not suggested that a different legal test applies to the former but not the latter. Thereafter, whether there was a renunciation is a question of fact for the tribunal. This is demonstrated by the most recent authority in this area, decided after the Award was published, the decision of Teare J in *White*

Rosebay Shipping SA v Hong Kong Chain Glory Shipping Limited [2013] EWHC 1355 (Comm) upon which Mr Bright placed particular reliance.

37. That was a case of an appeal under section 69 of the Arbitration Act 1996 in which one of the alleged errors of law was that the tribunal had concluded that the owners could not terminate the charterparty because they had affirmed it in circumstances where the charterers were continuing to renounce the charterparty. The owners relied on the principle derived from *Safehaven* and *Latvian Shipping*, both of which the learned judge cited before saying at [50] and [51] of the judgment:

> "50 Accordingly, in a case of renunciation or anticipatory breach of contract (as opposed to a repudiation based upon an actual breach) the tribunal of fact must carefully consider whether there were words or conduct after affirmation which demonstrate that the renunciation of the contract is continuing, so that a later acceptance of the continuing renunciation will be a legitimate termination of the contract.
>
> 51 Mr. Gunning submitted that it was clear that the charterers continued to renounce the charterparty after the affirmation and that therefore the court was able to consider whether the decision of the tribunal was correct in law or not. However, there was no express finding to that effect and I do not consider that I can draw an inference to that effect (assuming the court has power to do so, which is doubtful; see *The Baleares* [1993] 1 Lloyd's Reports 215 at p.228 per Steyn LJ). Whether the charterers, by words or conduct after the owners' affirmation, continued to renounce the charterparty cannot be said to an inference 'truly beyond rational argument' (which Steyn LJ suggested the court might have power to draw). The answer to that question is clearly a matter of fact for the tribunal. If the charterers were silent after the owners' affirmation of the charterparty it is for the tribunal to decide whether such silence was a 'speaking silence.'"

38. The learned judge went on to conclude at [53] that, in that particular case, the tribunal had erred in law in considering that it necessarily followed that a termination following affirmation was a repudiatory breach because they had failed to consider that, if the renunciation continued after affirmation, the owners could lawfully terminate for that continued renunciation. In my judgment, the same criticism cannot be levelled against the tribunal in the present case. As I have held, contrary to Mr Bright's submissions, it has dealt with the issue of continuing renunciation if, contrary to my primary view, it is an issue as opposed to one argument within an issue. There is no basis for any suggestion that the tribunal has committed an error of law, but even if there were that would not avail the claimants, since the contracts expressly excluded the right to appeal from an arbitration Award to the courts.

39. Again, contrary to Mr Bright's submissions, I consider that the tribunal has carefully considered in [134] of the Reasons whether there was continued or repeated renunciation by the defendants after the claimants' affirmation and has concluded that there was not, essentially because, in the period of three months from October 2007 to

January 2008, there was not "mere silence" but constant communications, which meant that it was unclear what the claimants' intentions were (hence the reference to the "more fluid state"), so that there was no duty to speak placed upon the defendants. It may be that that conclusion is not as clearly spelt out by the tribunal as it might be, but reading the whole of the Reasons, that is the conclusion which emerges and it is a perfectly reasonable and explicable one.

40. However, even if it were not and the tribunal's conclusion in [134] could be said to be surprising or unusual or even wrong, it is a conclusion of fact, which is not susceptible to review by the court whether under section 68 or otherwise. There is no merit in Mr Bright's suggestion that in some way that conclusion is so perverse that the tribunal cannot have dealt with the issue. As I have said, the tribunal clearly has dealt with the issue of continuing or repeated renunciation. Once it is recognised that it has dealt with the issue, there is no scope for the application of section 68(2)(d). As Mr Dunning correctly put it, once it is recognised that the tribunal has "dealt with" the issue, the sub-section does not involve some qualitative assessment of how the tribunal dealt with it. Provided the tribunal has dealt with it, it does not matter whether it has done so well, badly or indifferently.

41. It is wrong in principle to look at the quality of the reasoning if the tribunal has dealt with the issue. This emerges clearly from the judgment of Thomas J (as he then was) in *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83 at [56]:

> "I do not consider that s.68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that. "

42. As Mr Dunning pointed out that approach has been followed by other judges of this Court on a number of occasions, for example by Cresswell J in *The Petro Ranger* [2001] 2 Lloyd's Rep 348 who said at 351 col. 2: "there is a distinction between criticism of the reasoning and the failure to deal with an issue". Most recently, Andrew Smith J makes the same point at [27] of *Petrochemical Industries v Dow Chemical* quoted at [8] above. On analysis, the real complaint of the claimants in the present case is not that the tribunal has failed to deal with the issue or argument about continued renunciation, but that it has rejected the argument on the facts. That finding of fact by the tribunal is not susceptible to review by the court.

The quantum issue

43. The extent to which this application is an impermissible attempt to go behind the tribunal's findings or fact is highlighted by the second part of the application, which concerns the tribunal's findings that the claimants had not established their case that, but for the defendants' renunciatory breach, the claimants would have "flipped" the contracts, that is, sold the shipbuilding contracts to third parties at a profit. Of course, since the tribunal found that it was the claimants who had repudiated the contract, this point was academic and, in the light of my conclusion on the first part of the application, it remains academic. It follows that, even if there were anything in the

point, the application would be bound to fail, because the claimants cannot demonstrate that it would make any difference to the overall decision of the tribunal and, therefore, cannot show that any serious irregularity has caused or will cause substantial injustice to the claimant.

44. Nonetheless, since the point was argued, I will deal with it briefly. The relevant part of the tribunal's Reasons really begins at [177] where the tribunal sets out an unexceptionable statement as to the need for the claimants to show on a balance of probabilities that they would in fact have flipped the vessels:

> "If a particular resale had been in contemplation at the time of contracting, that would be enough for the Buyers to succeed under this part of their claim. But that certainly was not the case. It does not follow from the fact that possible resales were in contemplation that the loss actually occurred. The burden of proof would still lie on the Buyers to establish that they would in fact have flipped the contracts. To show that they might have done so would not be enough."

45. The tribunal then goes on at [178] to [180] to set out its findings as to the facts in some detail, referring to the evidence given by Mr Paul Coronis of the claimants and then finding at [180]:

> "Mr Coronis is doubtless correct in saying that he would have been more ready to onsell contracts with the Yard than the contracts with New Times; but it by no means follows that he would actively have sought to do this. It is not correct as a matter of chronology to say that the money would not have been spent on New Times ships if the contracts with the Yard had gone ahead, because there was a period of well over a month when the Buyers were committed to both. There is no evidence in that period of their actively trying to sell on the contracts for the Yard's ships. It is not just that there was no evidence of any offers before us, but there was no evidence of the Buyers being involved in any market activity whatsoever. "

46. The tribunal then reached its conclusion that this head of claim failed on the basis that the claimants could not satisfy the burden of proof, in these terms at [181]:

> "It may very well be that the contracts would have been sold on. But the evidence was not sufficiently full and convincing for us to hold on the balance of probabilities that they would have been. Still less is it possible to say when that hypothetical transaction would have taken place. Accordingly, we consider that it is after all appropriate to make the relevant comparison as at the contractual date of delivery."

47. Mr Bright complained about the fact that the tribunal had rejected the argument that the claimants would have flipped the ships (which it had accepted in principle) because the claimants had not proved that they would in fact have flipped the ships. He complained in particular about the finding: "there was no evidence of the Buyers

being involved in any market activity whatsoever", suggesting this overlooked Mr Coronis' evidence that, if the contracts had proceeded, he would have sold the ships and that he had marketed the ships to various brokers after 7 November 2007, but had been hampered by the inability to give any prospective buyers firm delivery dates because of the defendants' attitude. The claimants also referred to evidence of a broker they had called who confirmed he had been asked to find buyers and had contacted two buyers. In their evidence in support of this application, the claimants suggest that the tribunal has forgotten or overlooked this evidence.

48. In fact, as I read the tribunal's finding in [180], the point it was making was not that Mr Coronis did not try to sell the ships or would have done so if he could, but that there were no takers, which is what the tribunal meant by no "market activity". The claimants cannot point to any evidence of a firm buyer for the ships. In those circumstances, the tribunal's conclusion on the facts that this head of claim failed is not only understandable, but correct.

49. However, Mr Dunning correctly points out that it is beside the point whether the tribunal's conclusion on the evidence is correct. The claimants cannot seriously begin to suggest that the tribunal has not dealt with an issue and what this part of the application really is, is a scarcely veiled attempt to challenge the findings of fact of the tribunal which the claimants do not like. Even if the tribunal had overlooked a particular piece of evidence in reaching its findings of fact, that is not susceptible to challenge under section 68 or otherwise: see per Colman J in *World Trade Corporation v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 at [45]:

> "On analysis, these criticisms are all directed to asserting that the arbitrators misdirected themselves on the facts or drew from the primary facts unjustified inferences. Those facts are said to be material to an "issue", namely what were the terms of the oral agreement. However, each stage of the evidential analysis directed to the resolution of that issue was not an "issue" within Section 68(2)(d). It was merely a step in the evaluation of the evidence. That the arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. It is, in truth, a criticism which goes no further than asserting that the arbitrators made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences."

50. It is clearly not appropriate to use an application under section 68 to challenge the findings of fact made by the tribunal. If it were otherwise every disappointed party could say it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the Reasons or not given the weight it feels it should have been. That is precisely the situation in which the Court should not intervene. Matters of fact and evaluation of the evidence are for the arbitrators.

Conclusion

51. It follows that the application under section 68 of the Arbitration Act 1996 is misconceived and must be dismissed. In the circumstances, it is not necessary to consider the defendants' alternative argument that the claimants should be precluded

from making the application because they had failed to exhaust all available arbitral processes of appeal or review under section 70(2) of the Act, save to say that in circumstances where a party considers the tribunal has not dealt with an issue, it must make sense to raise the matter with the tribunal first, for the tribunal if appropriate to act pursuant to section 57, before making an application to the court. It may be that, in the particular circumstances of this case, the claimants could justify their failure to raise the matter with the tribunal, but as I say, since the application is dismissed anyway, it is not necessary to explore that question further.