Neutral Citation Number: [2019] EWHC 3368 (Comm)

Case No: CL 2019 000736

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2019

Before :

MR. JUSTICE TEARE

- -

Between :

OCEAN PREFECT SHIPPING LIMITED	**Claimant**
- and -	
DAMPSKIBSSELSKABET NORDEN AS	**Defendant**

- -
- -

Charles Priday and Jason Robinson (instructed by **Sach Solicitors**) for the **Claimant**
James Shirley (instructed by **MFB**) for the **Defendant**
Emily Wilsdon (instructed by **The Government Legal Department)** for the **MAIB**

Hearing date: 4 December 2019

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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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THE HONOURABLE MR JUSTICE TEARE

Mr. Justice Teare :

1. On 10 and 11 June 2017 the British registered vessel OCEAN PREFECT, which was under charter, twice ran aground in the course of entering the port of Umm Al Quwain in the UAE. As is often the case with such events the grounding of this British registered vessel caused the Marine Accident Investigation Branch, an independent inspectorate within the Department of Transport ("MAIB"), to investigate the circumstances of the grounding to see what lessons could be learnt with regard to improving the safety of shipping. As is also often the case when a vessel under charter grounds, her Owners alleged that the grounding was caused by a breach of the warranty by the Charterers that the port to which the vessel was directed by the Charterers was safe, and that such breach had caused financial loss to the Owners. The charterparty contained a London arbitration clause and so the Owners' claim is being pursued in arbitration.

2. The MAIB completed its investigation into the grounding and issued its report on 27 April 2018. The arbitration hearing is due to take place next week and the Owners wish to refer to the MAIB report. The Charterers and the MAIB say that that should not happen. They say that before the MAIB report is admitted into the arbitration the court must give permission for that to happen pursuant to regulation 14(14) of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012. The Charterers and the MAIB further say that permission should be refused. The Owners say that the court's permission is not required and that any decision as to admissibility of the MAIB report is a matter for the arbitral tribunal pursuant to section 34(2)(f) of the Arbitration Act 1996. If the court's permission is required then the Owners says that the court should grant permission in the interests of justice.

3. Since the arbitration hearing is scheduled to take place next week the court is required to decide the application as a matter of great urgency. The Owners' application was only issued on 27 November 2019 and was heard on 4 December 2019. In view of the need for urgency this judgment will not, perhaps, be as full as it would otherwise be. That is unfortunate because this is the first occasion on which the use of MAIB reports in a private and confidential arbitration has arisen for decision. The issue is, as will become apparent, of very great concern to the MAIB. Equally, the issue is of very great concern to the Owners who wish to rely upon the MAIB report to support their claim in the arbitration.

4. The Owners' arbitration claim was issued pursuant to CPR 62.2(1)(d). Although counsel for the MAIB objected to that procedure it seems to me to be unobjectionable. However, the MAIB was not made a party, although notice of the application was given to the MAIB. I consider the MAIB ought to have been made a party. The MAIB has a very obvious interest in the application.

5. The MAIB was established in 1989 following the HERALD OF FREE ENTERPRISE disaster. The manner in which it conducts investigations is governed by the Merchant Shipping Act of 1995. It is necessary to note a number of provisions. Section 259(2)(i) empowers an inspector

> "to require any person who he has reasonable cause to believe is able to give any information relevant to an ……..investigation ….(ii) to answer……..such questions as the

> inspector thinks fit to ask, and (iii) to sign a declaration of the truth of his answers."

6. It is the understanding of the Chief Inspector of the MAIB, Captain Moll, that a witness does not have any right to refuse to answer on the grounds that the answer may incriminate the witness. In return, section 259(12) provides that

> "no answer given by a person in pursuance of a requirement imposed under subsection (2)(i) above shall be admissible in evidence against that person ……..in any proceedings except proceedings in pursuance of subsection 1(c) of section 260 in respect of a statement in or declaration relating to the answer"

7. Proceedings pursuant to section 260(1)(c) include such matters as making a false statement.

8. The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 were made by the Secretary of State pursuant to powers conferred by section 267 of the Merchant Shipping Act 1995. They provide as follows:

> "5 (1) The sole objective of a safety investigation into an accident under these Regulations shall be the prevention of future accidents through the ascertainment of its causes and circumstances.
>
> (2) It shall not be the purpose of such an investigation to determine liability nor, except so far as is necessary to achieve its objective, to apportion blame."

9. Regulation 13(2) imposes an obligation upon the MAIB not to make certain documents or records (for example statements taken by an inspector or evidence from voyage data recorders) available for purposes other than a safety investigation, unless a court orders otherwise. Regulation 13(3) provides that a person who has given a statement to an inspector "may make available a copy of their statement or declaration to another person as they see fit". Regulation 13(5) provides:

> "Subject to paragraph (6), no order must be made under paragraph (2) unless the Court is satisfied, having regard to the views of the Chief Inspector, that the interests of justice in disclosure outweigh any prejudice, or likely prejudice, to-
>
> a. the safety investigation into the accident to which the document or record relates:
>
> b. any future accident safety investigation undertaken in the United Kingdom; or
>
> c. relations between the United Kingdom and any other State, or international organisation."

10. Regulation 14(14) provides:

> "If any part of any document or analysis it contains to which this paragraph applies is based on information obtained in accordance with an inspector's powers under sections 259 and 267(8) of the Act, that part is inadmissible in any judicial proceedings whose purpose or one of whose purposes is to attribute or apportion liability or blame unless a Court, having regard to the factors mentioned in regulation 13(5) (b) or (c), determines otherwise."

11. Regulation 14(15) provides:

> "For the purposes of paragraph (14) the documents are any publication produced by the Chief Inspector as a result of a safety investigation."

12. Regulation 14(17) defines "judicial proceedings" as including;

> "Any civil or criminal proceedings before any Court or person having by law the power to hear, receive and examine evidence on oath."

13. These regulations were first issued in 2005. The 2005 regulations were differently worded. The entire report was to be inadmissible and the word "tribunal" was also found in regulation 13(9) and (10) as follows (emphasis added):

> "(9) If any part of <u>the report or analysis therein</u> is based on information obtained in accordance with an inspector's powers under sections 259 and 267(8) of the Act, <u>the report</u> shall be inadmissible in any judicial proceedings whose purpose or one of whose purposes is to attribute or apportion liability or blame unless a Court <u>or tribunal</u>, having regard to the factors mentioned in regulation 13(5) (b) or (c), determines otherwise.
>
> (10) In this regulation judicial proceedings includes any civil or criminal proceedings before any Court, <u>tribunal</u> or person having by law the power to hear, receive and examine evidence on oath."

14. The evidence before the Court from the Chief Inspector of the MAIB, Captain Moll, was that the 2005 Regulations were introduced by Parliament to address a concern that MAIB reports were being frequently relied upon by parties in proceedings to establish blame or liability. That recollection is supported by the comment in *Admiralty Jurisdiction and Practice* by Meeson and Kimbell 5th ed. at paragraph 7-104 that prior to 2005 it was not unusual for the MAIB report to be included in the trial bundle. Reference was made to *The Bowbelle* [1997] 2 Lloyd's Reports 196 and *The Saint Jacques II* [2003] 1 Lloyd's Reports 203 where, in the latter case, Gross J. permitted reference to be made to the MAIB report as fresh evidence; it had been published after the decision of the Admiralty Registrar and before the hearing of an appeal from his decision. When maritime casualties were investigated by means of a Formal Investigation under the Merchant Shipping Act the report of the Formal Investigation was not admissible in subsequent litigation (usually, but not always, a

collision action in the Admiralty Court); see *The Speedlink Vanguard and The European Gateway* [1986] 2 Lloyd's Reports 265 at pp.269-270. Nevertheless judges of great authority, in particular Devlin J. and Steyn J., suggested that the reports of a Formal Investigation should be made available to a court (pursuant to a statutory provision) so that it could make such evidential use of the report as it thought fit; see p.273. In the event the statutory provision introduced in 2005 made the limited provision now to be found in regulation 14(14) of the 2012 Regulations.

15. The 2012 Regulations were introduced to implement the Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident ("the IMO Code") and the EU Directive 2009/18/EC. Chapter 23 of the IMO Code provides that states should ensure that investigators carrying out a marine safety investigation only disclose information from a marine safety record where "it is necessary or desirable to do so for transport safety purposes and any impact on the future availability of safety information to a marine safety investigation is taken into account". Chapter 23 goes on to state:

> "States involved in marine safety investigation under this Code should ensure that any marine safety record in its possession is not disclosed in criminal, civil, disciplinary or administrative proceedings unless:
>
> "1. the appropriate authority for the administration of justice in the State determines that any adverse domestic or international impact that the disclosure of the information might have on any current or future marine safety investigations is outweighed by the public interest in the administration of justice.
>
> ………."

16. Chapter 25.4 of the IMO Code provides:

> "Where it is permitted by the national laws of the State preparing the marine safety investigation report, the draft and final report should be prevented from being admissible in evidence in proceedings related to the marine casualty or marine incident that may lead to disciplinary measures, criminal conviction or the determination of civil liability."

17. Thus the essentials of the scheme governing investigations by the MAIB and reports issued by the MAIB are clear. The purpose of an investigation by the MAIB is to improve maritime safety through the ascertainment of the causes of a maritime casualty. The purpose is not to determine blame. Those who give evidence to the MAIB are protected from their evidence being used against them in subsequent legal proceedings. Where any part of an MAIB report is based upon information obtained in accordance with the inspector's powers that part is inadmissible in any judicial proceedings designed to attribute or apportion blame unless a court determines that the interests of justice outweigh any prejudice to future accident safety investigation and relations between the UK and other states or international organisations. The reason for the general inadmissibility of those parts of an MAIB report in proceedings concerned with blame is not difficult to discern. It is because the purpose of an MAIB

report is the improvement of maritime safety, and not the determination of blame which is usually the purpose of subsequent legal proceedings. To use an MAIB report for the determination of blame would be likely to prejudice future accident safety investigations because those who are asked in any future investigation to provide information may be reluctant to do so if they know that the resulting report may be used to determine blame. It is also because the IMO and other states support the approach that reports by maritime investigatory bodies should not be admitted into proceedings that may lead to the determination of civil liability.

18. It is now necessary to recount, in summary form, what happened in the arbitration proceedings.

19. The Owners have alleged that the port to which the vessel was directed was unsafe because, inter alia, the pilots were not properly trained and had inadequate knowledge of the port.

20. When witness statements were exchanged in April 2019 the Charterers relied upon statements from the two pilots on board the casualty. Each said that, with regard to the more serious of the two groundings, the master had dispensed with their services. Each also said that he had told the MAIB that the master had the con of the vessel and that each was disappointed with the report because it criticised him. The pilots were not alone in criticising the MAIB report. The master in his evidence said that he did not accept one of its findings.

21. Experts' reports were exchanged in July 2019. Captain Roberts provided a report on behalf of the Owners. In the course of his report he made reference to the MAIB report "where there are discrepancies between the evidence of witnesses and the text of that report, and where such text supports my opinions." He did so notwithstanding that the MAIB report stated on its face:

> "This report is not written with litigation in mind and, pursuant to Regulation 14(14) of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012, shall be inadmissible in any judicial proceedings whose purpose, or one of whose purposes is to attribute or apportion liability or blame."

22. I was referred to a number of references in the report by Captain Roberts. Why Captain Roberts considered it proper to refer to the MAIB report is not apparent.

23. Captain Hanlon provided a (very long) report on behalf of the Charterers in the course of which he made three references to the MAIB report. Again, it is not clear why, given the note on the face of the report, he did so.

24. Captain Roberts in his supplementary report dated November 2019 referred to the MAIB report in these terms:

> "It is noticeable that MH's opinions and conclusions on this incident are in marked contrast to those of the independent MAIB. Although he has clearly read the MAIB report, MH

> makes little comment on the contents of that report, particularly when it clearly contradicts his own opinions and conclusions.
>
> Importantly, the MAIB investigation did not identify that the pilots did not have the con for the entry into UAQ on 11 June. If the master had retained the con, I feel sure that the MAIB would have ascertained that highly relevant fact and included that in their report.
>
> The MAIB report does not criticise the vessel's lack of a long approach lined up with the channel course.
>
> The MAIB report does not criticise the Vessel's Passage Plans.
>
> The MAIB report identifies that the port lacked maritime resources and expertise."

25. It thus appears that the Owner's expert is seeking to use the MAIB's report, which is expressly not about blame but about safety, to support his own opinions in the arbitration. There are further references to the MAIB report in the body of Captain Roberts' report.

26. Captain Hanlon in his supplementary report noted that Captain Roberts "relies heavily" on the MAIB report. He said that he had conducted investigations on behalf of the MAIB and that it had been impressed upon him "that they are designed not with a view to litigation or apportioning blame but purely to identify safety issues with a view to preventing casualties happening in the future". He noted what was on the face of the MAIB report and said:

> "Accordingly, throughout this report, I have wherever possible only referred to the MAIB report to address issues raised by [Captain Roberts'] report. "

27. I am told that there then followed some 30 references to the MAIB report. Given what he had (correctly) said about MAIB reports and given the note on the face of the MAIB report in question it is puzzling that he made so many references.

<u>Is the arbitration within the definition of "judicial proceedings" ?</u>

28. If the arbitration proceedings are judicial proceedings within the meaning of the Regulations then the MAIB report cannot be admitted into the arbitration unless the court so orders.

29. The definition of judicial proceedings in regulation 14(17) is not exclusive. Judicial proceedings are said to "include" any civil or criminal proceedings before any Court or person having by law the power to hear, receive and examine evidence on oath.

30. The context in which the phrase "judicial proceedings" is used is that provided by regulation 14(14), namely, that those parts of the MAIB report which are based upon information obtained in accordance with the inspector's powers are inadmissible in any "judicial proceedings" whose purpose was to attribute blame, unless a court decides otherwise. If such parts of the report were admissible then in the future those

asked to provide information to the MAIB as to a maritime casualty may be unwilling to do so. That is the reason for the general inadmissibility of the relevant parts of an MAIB report. That reason applies whether the civil dispute about liability is determined in court or in arbitration. That suggests that both courts and arbitral tribunals were intended to be encompassed within the phrase "judicial proceedings". Put another way, there appears to be no sensible reason why the parties should have to seek the permission of the court to refer to the MAIB report if the unsafe port case is heard in court, but not if it is heard in arbitration.

31. Further, the proceedings before the arbitral tribunal are judicial in character. The arbitral tribunal has a duty to conduct the arbitral proceedings fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; see section 33 of the Arbitration Act 1996. That duty is characteristic of the judicial function. Those performing duties of a judicial character are not liable in damages for negligence in the performance of such duties. That rule applies to arbitrators; see *Sutcliffe v Thackrah* [1974] AC 727 at p.735 E per Lord Reid. Moreover, the arbitrators are persons who determine disputes about civil liability "having by law the power to hear, receive and examine evidence on oath"; see section 38(5) of the Arbitration Act 1996 (though in practice witnesses in maritime arbitrations in London rarely, if ever, give evidence under oath). There may well be certain contexts where the phrase "civil or criminal proceedings" is not apt to include arbitration proceedings. But that is not the context in the present case.

32. Counsel for the Owners submitted that the proceedings before the arbitral tribunal were not judicial proceedings. They were not civil proceedings but were private consensual proceedings pursuant to which the arbitral tribunal had wide powers as to the "admissibility, relevance or weight of any material"; see section 34(2)(f) of the Arbitration Act 1996. I accept that the arbitral proceedings are private and consensual proceedings but they remain, in my judgment, "judicial". The arbitrators' powers pursuant to section 34 cannot entitle them to ignore regulation 14(14).

33. Counsel for the Owners relied upon the fact that in the 2005 regulations the definition of "judicial proceedings" referred to "civil or criminal proceedings before any court, tribunal or person" and suggested that the reference to tribunal was a reference to an arbitral tribunal with the result that the omission of that word in the 2012 Regulations showed that arbitral proceedings were no longer within the phrase "judicial proceedings". No explanation was offered as to why arbitration proceedings were, on this argument, excluded in 2012 from the operation of regulation 14(14) and no reference to any such change is to be found in the Explanatory Note accompanying the 2012 Regulations. Whatever the reason for this change I do not consider that it was intended to exclude arbitration proceedings from the definition of judicial proceedings. The ordinary and natural meaning of that phrase in the context in which it is found includes arbitral proceedings. That interpretation is consistent with the underlying object of the non-admissibility of an MAIB report or part thereof in proceedings whose object is the attribution of blame.

<u>Discretion</u>

34. The unchallenged evidence of Captain Moll is that "in practical terms the whole of an MAIB report is usually based on information obtained under the inspector's powers and the reference to "part of" of the report has no significant effect. In practice, the

inspector's conclusion will be based upon a variety of sources of information and evidence he has obtained using his statutory powers such that it is generally not realistic to try to separate the sources of a conclusion in a part from other sources." Captain Moll had reviewed the MAIB's report in this case and confirmed that the conclusions are based on information and evidence obtained under the inspector's statutory powers in section 259 of the 1995 Act. No suggestion to the contrary was made.

35. Thus the question is whether the court is satisfied that the interests of justice in admitting the MAIB report into the arbitration outweigh any prejudice or likely prejudice to any future accident safety investigation or relations between the UK and another state or international organisation. Regulation 13(5) requires the court to have regard to the views of the Chief Inspector. That is probably intended by regulation 14(14) also. But in any event the court would have regard to his views concerning the effect of disclosure on future accident safety investigation or relations between the UK and another state or international organisation.

36. The submission made by counsel for the Owners was that the interests of justice required the MAIB report to be admitted into the arbitration proceedings because it had been referred to in the factual and expert evidence and so, in order for the tribunal to understand and weigh that evidence, it was necessary for the tribunal to read the MAIB report. Further, the interests of justice required the owners to be able to test the factual and expert evidence by reference to the MAIB report. More generally it was said the MAIB report was of particular evidential value because it was produced by an independent and experienced body, the report was the product of an impartial investigation by a highly competent investigator and it was a public document. It was submitted that the interests of justice demanded the admission into evidence of a report of "unparalleled quality".

37. These more general submissions of counsel of course have cogency and also derive support from the approach of the Court of Appeal in *Rogers v Hoyle* [2015] QB 265 when that court admitted into evidence a report of the Air Accident Investigation Branch (AAIB). But importantly the regulations concerning air accident investigations do not contain any regulation to the same effect as regulation 14(14) of the 2012 Regulations. Thus the Court of Appeal noted (at p. 315, paragraph 85) that Parliament sometimes does preclude the use of reports in civil proceedings. Parliament (or rather the Secretary of State) has done so with regard to the reports of the MAIB unless the court determines otherwise. In that context the quality of an independent and impartial report by an experienced investigator is not sufficient to justify the admission of the report.

38. Rather, the court is required to consider the likely prejudice to future accident safety investigations and relations between the UK and any other state or international organisation were the report to be admitted. As to these matters there is evidence from Captain Moll, the Chief Inspector of the MAIB. He has said that the admission of the MAIB report would be likely to prejudice future accident safety investigations. He noted that it would diminish the MAIB's ability to have candid and detailed conversations with witnesses and to have ready and unqualified access to accident sites. It would diminish the MAIB's ability to fulfil its statutory function and enhance the safety of all those at sea.

39. In response to such concerns counsel for the Owners submitted that it "cannot sensibly be suggested" that admission of an MAIB report in a private arbitral reference will jeopardise any future investigation undertaken by the MAIB in the UK or will jeopardise relations between the UK and other states. "The very fact the arbitration is private, and completely confidential, strongly militates against any suggestion the admission of the MAIB report could cause such prejudice to the MAIB or its work."

40. I note that in *Rogers v Hoyle* the court did not accept that in the field of air accident investigations the admissibility of reports would significantly affect the willingness of people to give information and assistance to the AAIB; see paragraph 96. However, the court is enjoined by the 2012 Regulations to have regard to the views of the Chief Inspector of the MAIB. I have noted his views. I am unable to say that he is wrong or has over-estimated the risk of prejudice to future accident safety investigation. With regard to the risk of prejudice to the relations between the UK and other states or international bodies such as IMO I am also unable to say that he is wrong or has over-estimated the risk of prejudice. The IMO Code, in chapter 25, expressly contemplates that reports will not be admissible in proceedings concerning the determination of civil liability.

41. I accept that arbitration proceedings are private and confidential. But a decision of this court to allow the MAIB report to be admissible will be in the public domain. Possible witnesses to future marine casualties may know of it or be told about it. Captain Moll has said that the MAIB goes to great lengths to reassure witnesses that their testimony is protected and to explain the provisions of section 259 to each and every witness before commencing an interview. The MAIB would have to add that the report may be admitted into private arbitrations where fault is at issue. I am therefore unable to accept that the private and confidential nature of arbitrations is a complete answer to Captain Moll's concerns.

42. But the question remains; do the interests of justice in this case outweigh the likely prejudice to future accident investigations and the UK's relations with another state or international body?

43. I deal first with the expert evidence. It appears that both experts have relied upon the MAIB report to support their own opinions or to criticise the opinions of the other expert. In the absence of the limitations on the admissibility of the MAIB report in the 2012 Regulations the experts would no doubt be cross-examined on such matters where it was relevant to their opinions on the matters of "port set up" and navigation to which their reports relate. However, it is necessary to consider whether the experts can be satisfactorily cross-examined were the MAIB report not to be admitted into the arbitration. They obviously can be. Counsel will have the opinions and reasoning of his own expert with which to cross-examine the opposing expert. He will not need the MAIB report in order to do so. I therefore do not consider that the interests of justice in testing the evidence of the experts outweigh the likely prejudice to future accident investigations and the UK's relations with another state or international body.

44. There is a further point. The need to cross-examine the experts about the MAIB report has only arisen because the experts, and therefore those instructing them, have chosen to refer to the MAIB report without obtaining the consent of the court to admit the

report into the arbitration. The Owners cannot, I think, improve their ability to obtain the consent of the court by ignoring regulation 14(14).

45. There is then the question of the factual evidence of the pilots. The pilots have each said that they were instructed by the master that he did not require their services and that the master had the con of the vessel. They have each criticised the MAIB report in that context. Counsel for the Owners wishes to cross-examine the pilots and to suggest that their evidence is a recent invention because the narrative in the MAIB report makes no reference to the master dismissing the services of the pilots.

46. Counsel for the MAIB accepted that there was no embargo on a witness giving evidence of what he told the MAIB. Such oral evidence is not "a part of any document or analysis" in a "publication produced by the Chief Inspector as a result of a safety investigation"; see regulations 14(14) and 14(15). She accepted that the witness, in this case the pilots, could be cross-examined about their evidence by asking whether they had exercised their right, pursuant to regulation 13(3), to make a copy of their statement available. Their failure to do so might suggest that their evidence as to what they told the MAIB was unreliable. But she said that they could not be cross-examined by reference to the contents of the MAIB report.

47. I accept that if counsel is not permitted to cross-examine by reference to the MAIB report the Owner will, or may, suffer some prejudice. The question is whether the interests of justice, in particular, the ability of counsel to cross-examine by reference to the MAIB report, outweighs the likely prejudice to future accident investigations and the UK's relations with another state or international body. I do not consider that it does, for essentially two reasons. First, the likely prejudice to future accident investigations and the UK's relations with another state or international body is a matter of great public interest. It concerns the safety of life at sea. By comparison, the concern of the Owners is restricted to their commercial interests and their ability to recover a loss from the Charterers in this particular case. Their right to damages from the Charterers (assuming that the port was unsafe as alleged) is significant and material and the interests of justice require that right to be vindicated. But I do not consider that that private right, or the concomitant interests of justice, outweighs the likely prejudice to future accident investigations and the UK's relations with another state or international body. Second, it is not as if the Owners are unable to challenge the pilots' evidence if counsel is unable to refer to the MAIB report. Counsel for the MAIB suggested one way in which that could be done. There may be others. I was told that the pilot's evidence was unheralded; the Charterers had not originally pleaded that the master had dispensed with the services of the pilots. That circumstance may also give rise to fruitful cross-examination.

48. For these reasons I have concluded that I should refuse permission to admit the MAIB report into the arbitration proceedings. It seems likely that the probable consequence of my decision is that the parties will have to excise the references to the MAIB report in the factual and expert evidence. They will have to do so because otherwise there would be a breach of regulation 14(14). I hope that this can be done in time to allow the arbitration hearing to proceed next week. If it is difficult to do so in the time available that difficulty flows from the extremely late stage at which the Owners decided to seek the required order from the court. The Owners sought to blame the Charterers for not making it clear until 14 November 2019 that they regarded the

MAIB report as inadmissible. But the Owners ought to have made their application long ago, after receiving the pilots' statements in April 2019.

49. The lateness of the application also created difficulty for the court. It had to find the necessary judge at very short notice and the judge had to write a judgment under great pressure of time. At least one other case could not be heard in the Commercial Court on the day it was scheduled because of the lateness and urgency of this application. In any future case an application for an order under regulation 14(14) should be made long before the hearing so that these difficulties are not repeated.