Neutral Citation Number: [2025] EWHC 223 (Comm)

Case No: LM-2024-000165

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

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

Date: 10 February 2025

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

In an arbitration claim

Between:

MARE NOVA INCORPORATED	**Claimant**
- and -	
ZHANGJIAGANG JIUSHUN SHIP ENGINEERING CO., LTD	**Defendant**

- -
- -

Chirag Karia KC (instructed by **Waterson Hicks**) for the **Claimant**
There was no appearance on behalf of the **Defendant**.

Hearing date: 4 February 2025

- -

Approved Judgment

This judgment was handed down remotely at 2 p.m. on 10 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. These proceedings, under sections 68 and 69 of the Arbitration Act 1996 ("the Act"), arise out of the Final Award published on 12 February 2024 ("the Award") of Mr Ian Gaunt ("the Tribunal"), sitting as a sole arbitrator, in a reference between the claimant shipowner and the defendant shipyard.

2. The claimant challenges the Award pursuant to section 68 of the Act and, with permission granted by HHJ Pelling KC on 10 July 2024, appeals against it pursuant to section 69 of the Act.

3. I am grateful to Mr Chirag Karia KC, who appeared for the claimant, for his submissions. The defendant has played no part in these proceedings.

4. The claim is supported by the witness statement dated 11 March 2024 of Mr John Warwick Hicks, the solicitor with conduct of this matter on behalf of the claimant. A second statement of Mr Hicks, dated 23 January 2025, provides details of the various communications sent to the defendant, both by his firm and by the court, in the course of these proceedings. None of the communications have met with any response.

5. At the conclusion of the hearing, I stated that the section 68 challenge would be allowed and the section 69 appeal would be dismissed and that I would give my reasons in writing. This judgment sets out those reasons.

The Facts

6. The claimant is the owner of the vessel M/V "INASE" ("the Vessel") and was the claimant in the arbitration. The defendant is a ship repairer operating a shipyard in China and was the respondent in the arbitration. In March 2021 the Vessel entered the defendant's shipyard for scheduled drydocking and other works, pursuant to a ship repair contract between the parties dated 19 February 2021 ("the Contract"). The Contract incorporated Evalend Shipping Co S.A.'s General Conditions of Tender ("the General Conditions"). During those works, the defendant worked on, among other things, the Vessel's intermediate shaft bearing. The claimant's representative signed off the work on 30 March 2021. The defendant's charges were paid, and the Vessel left the defendant's shipyard on the morning of 31 March 2021. About three hours after the Vessel sailed from the shipyard, the crew noticed a burning smell coming from the vicinity of the intermediate shaft bearing. On inspection, it was found that the defendant had damaged the Vessel's intermediate shaft bearing. The claimant incurred costs and losses in consequence of that damage.

7. The claimant made a reference to arbitration and proposed the appointment of one of three nominated arbitrators. The defendant did not make an appointment of an arbitrator and stated that it did not consider that the Contract included a reference of disputes to English arbitration. The claimant made an application to the Commercial Court for the appointment of a sole arbitrator, and by order dated 13 July 2023 the Tribunal was appointed sole arbitrator in the reference. The defendant took no part in the ensuing arbitration proceedings.

8. In the arbitration the claimant claimed US$652,937 as (i) damages for breach of clauses 2.1, 2.2 and 2.3 of the General Conditions, (ii) damages for the tort of negligence, or (iii) money due under a six-month guarantee in clause 2.10 of the General Conditions. The clauses relied on were in these terms:

> "2.1 All tasks herein specified shall be carried out and completed in all detail. All workmanship and materials are to be of the best quality throughout and confirm to those now on the Vessel unless otherwise specified. All work is to be done to the satisfaction of the Owner's Representative and to the rules and requirements of the Classification Society concerned. Any dispute which may arise during the progress of the work as to quality of material or workmanship shall be left to the decision of the Owner's Representative.
>
> 2.2 All of the Vessel's structure and machinery shall be in correct alignment on completion of repairs and necessary measures must be taken to check and recheck the correctness of alignment before, during and upon completion of repairs.
>
> 2.3 Whenever the Specification calls for opening up machinery or equipment for survey by the Classification Society surveyor, the nominated units are to be completely dismantled; all parts cleaned and calibrated (copies of calibration to be handed to Owner's Representative) and reassembled using new jointing packing; bearings, where applicable, adjusted to the correct clearances; and the above included in the Tender price. In each case, the Contractor shall call in the Class Surveyor only after consultation with Owner's Representative.
>
> …
>
> 2.10 The Contractor shall guarantee workmanship, materials and any newly fitted equipment for a period of six months following completion of the repairs. Any defects, faults due to materials or workmanship discovered during this period and reported to the Contractor in writing before the expiry of the guarantee period of six months shall be made good by the Contractor at his expense. On completion of such corrective work, a new guarantee period of six months shall commence for such renewals or replacements. However, the Contractor's liability does not apply to defects arising out of materials provided by Owner."

9. Two further clauses in the General Conditions were mentioned in the Award and may conveniently be set out here. Clause 3.1 provided:

> "3.1 On completion of repairs and in the presence of the Contractor's Representative the vessel is to undergo dock trials and sea trials to demonstrate that all items which have been repaired or renewed are in good working order to the full

> satisfaction of the Owner's Representative. Any defect due to unsatisfactory workmanship or bad material, which is found during these trials shall be rectified by the Contractor with all speed and at his own cost and expense. On completion of satisfactory trials, the vessel is considered redelivered to the Owner."

Clause 6.3 provided:

> "6.3 The Contractor's liability shall begin at the time when the vessel is delivered to Contractor's yard, pier or other location designated by him, ready for repairs, and shall cease only when all of the work herein specified has been completed to the satisfaction of the Owners or their accredited representative, and all of the Contractors equipment and all rubbish have been removed from the vessel."

10. The arbitration proceeded on the basis of written submissions and evidence; there was no hearing. The defendant took no part other than to state that it did not agree to submit the dispute to London arbitration. The Tribunal put various written questions to the claimant concerning its case, and the claimant gave detailed responses.

11. The Award confirmed that the Tribunal was satisfied that he had jurisdiction and that the defendant had been properly served. Regarding the substance of the claim, the Tribunal found that the damage to the Vessel was caused by the incorrect alignment of the intermediate shaft bearing. This amounted to a breach of each of clauses 2.1, 2.2 and 2.3. However, the Tribunal rejected the claim for damages on the basis that the defendant's liability was discharged the moment the Vessel sailed from the shipyard by the operation of clauses 2.1 and 6.3 of the General Conditions. Having set out the relevant clauses, including clause 3.1, he continued in the following paragraphs of the Award:

> "65. Although clause 3 of the Evalend Conditions of Tender provides for sea trials as well as dock trials, the Owner does not appear to have insisted on any sea trial, which would no doubt have immediately revealed the problem. In the left hand margin of the Work-done List, the initials 'C/E' appear. It may be that some of the checks were made or witnessed by the Chief Engineer, as indeed appears from his witness statement, but the Owner's appointed representative clearly accepted that the contracted work had been satisfactorily carried out. Mr Tiliakos' signature shows that the Owner's representative did sign off on the bearing clearances after the bearing was re-assembled and before the Vessel left the shipyard after its first redelivery. Some checks as to clearances were clearly made, although it has not been explained precisely what they were nor have the specific results been provided. Whatever the checks were, they obviously did not reveal the problem, although this became apparent immediately the Vessel left the shipyard and navigated in normal conditions. The Owner was entitled under the Evalend Conditions to have checks carried out to its

> satisfaction. Had it insisted on that sea trials or other tests these would no doubt have been carried out by or with the assistance of the shipyard and, as noted above, would almost certainly have revealed the problem before the initial delivery of the Vessel.
>
> 66. It is suggested by the Chief Engineer that the reason for the damage was that the temperature sensor had been damaged during reassembly of the bearing. The raised temperature was however only an indicator of a problem with the alignment of the bearing and not the root cause of the damage to the bearing which was much more likely due to misalignment, not detected by the checks carried out in the shipyard. Whatever the cause, it seems to me clear, from the fact that the 'work herein specified' had been completed to the satisfaction of the Owners' as evidenced by the signature of its representative on the 'Work-done List' and that no sea trial was required, that the Contractor's basic liability under the Contract was discharged under the terms of clauses 2.1 and 6.3 of the Evalend Conditions when the Vessel first left the shipyard."

12. The consequence of this reasoning was that the claim for damages, advanced in the sum of US$652,937, was rejected on the ground that the defendant's liability for any breach had been discharged by the operation of clauses 2.1 and 6.3. The Tribunal awarded the claimant only US$298,651, which he held to be the amount falling due under the guarantee in clause 2.10. The following paragraphs of the Award are relevant.

> "*Scope of liability under the guarantee*
>
> 67. In my view however, the Contractor clearly remains liable under its guarantee. The real question in this case is as to the extent of the guarantee as a matter of construction of clause 2.10 of the Evalend Conditions, namely [the text of the clause was set out].
>
> …
>
> 75. In summary I conclude that the amount payable by the Contractor under its guarantee is:
>
> | | |
> |---|---|
> | Tug and Agency Costs | USD273,232 |
> | Repair costs | USD25,419 |
> | Total | USD298,651 |
>
> …
>
> *Dispositive award*

> 79. Having taken upon myself the burden of this reference and having carefully and conscientiously read and considered the submissions and documents put before me and given due weight thereto, I make and issue this my Final Award as follows:
>
> (1) The Owner's claim succeeds in the amount of USD298,651;
>
> (2) The Charterer is obliged to pay to the Owner the said amount of USD298,651 (Two hundred and ninety eight thousand United States Dollars six hundred and fifty one United States Dollars);
>
> (3) The Charterer shall pay the Owner the said amount forthwith; …"

13. In short summary, the claimant's challenge to the Award pursuant to section 68 of the Act contends that the Tribunal's dismissal of the larger damages claim on the basis of discharge of liability under clause 6.3 constituted a serious irregularity, because the possible discharge of liability had never been raised in the arbitration proceedings and the claimant had had no opportunity to address the point, and that this serious irregularity has given rise to a substantial injustice to the claimant because it has been deprived of the opportunity to contend, with at least a realistic prospect of success, that the defendant's liability for breach of contract was not discharged and that the claimant is entitled to damages in a larger sum than was awarded under the guarantee. The claimant's appeal against the Award pursuant to section 69 of the Act rests on the contention that the Tribunal's ruling on the discharge of the defendant's liability for breach of contract was wrong in law.

The Statutory Provisions

14. The relevant statutory provisions are as follows:

> "33. *General duty of the tribunal.*
>
> (1) The tribunal shall—
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

"68. *Challenging the award: serious irregularity.*

(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. …

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

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

…

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

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

"69. *Appeal on point of law.*

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. …

(2) An appeal shall not be brought under this section except—

…

(b) with the leave of the court. …

(3) Leave to appeal shall be given only if the court is satisfied —

> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award —
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
>
> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
>
> (4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
>
> …
>
> (7) On an appeal under this section the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award,
>
> (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
>
> (d) set aside the award in whole or in part.
>
> The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

The Section 68 Challenge

15. The Tribunal dismissed the damages claim on the ground that, on the true construction of the Contract, the defendant's liability for breach of contract was discharged when the Vessel first left the shipyard. I am satisfied that the dismissal of the damages claim on that basis constituted a serious irregularity affecting the

arbitration proceedings and the Award. The evidence shows that the discharge of liability was never raised as an issue in the arbitration proceedings. The claimant did not raise it. The defendant did not raise it, because it took no part in the arbitration. The Tribunal did not raise it; the only correspondence from him on the merits of the claim did not touch on the question, and he did not at any point seek submissions on the point. The first mention of clause 6.3 in the arbitration proceedings was in the published Award. Clause 2.1 was, of course, relied on by the claimant; however, it was relied on as the source of the defendant's primary contractual obligations, not as a provision bearing on discharge from liability for breach of those obligations.

16. In my judgment, the claimant is correct to contend that the resting of the decision concerning the damages claim on a ruling upon a matter that had not been raised in the proceedings constituted an irregularity of the kind mentioned in section 68(2)(a) of the Act, namely a failure by the Tribunal to comply with the general duty in section 33. As the question of discharge of liability had not been raised, the claimant had had no opportunity to put its case on the point and no opportunity to address the case for the defendant (albeit raised by the Tribunal itself) on the point.

17. The irregularity is a "serious irregularity" for the purposes of section 68(1) because it has caused substantial injustice to the claimant, in that the claimant has lost the opportunity, which had a realistic prospect of success, to persuade the Tribunal that the defendant's liability was not discharged and that the larger damages claim should be allowed. Indeed, I would go further. For reasons that I shall set out when considering the section 69 appeal, I consider that the Tribunal was clearly wrong in law to conclude that the defendant's liability was discharged by operation of clauses 2.1 and/or 6.3.

18. Accordingly, I hold that there was a serious irregularity affecting the arbitration proceedings and the Award. The proper course, in my view, is to remit the Award to the Tribunal for reconsideration.

19. Finally in this connection, I note that the present claim originally relied also on an irregularity of the kind mentioned in section 68(2)(d), in that it was said that the Tribunal failed to consider whether the effect of clause 6.3 was to discharge not only the defendant's contractual liability but also its tortious liability. As the claimant's contention is that the issue of discharge was never put to the Tribunal, it is understandable that this further basis for the section 68 challenge was not pursued.

The Section 69 Appeal

20. The question of law ("the Discharge Question") on which permission to appeal was sought was stated in the claim form as follows:

> "Whether, on their proper construction, clauses 2.1 and/or 6.3 of the Evalend Conditions in the contract between the Claimant and the Defendant had the effect of discharging the Defendant's liability for its breaches of that contract from the moment the Vessel first left the Defendant's shipyard."

21. In granting permission to appeal on the Discharge Question by his order dated 10 July 2024, HHJ Pelling KC gave the following reasons:

> "The decision of the Tribunal on the above question of law set out in the Arbitration Claim Form in these proceedings is obviously wrong within the meaning of section 69(3)(c)(i)) of the Arbitration Act 1996 ('AA') for the reasons set out in the Skeleton Argument generally and at paragraphs 22-26 in particular and the requirement in AA, section 69(3)(b) will be satisfied if and to the extent that the claimant's challenge under s.68(2)(a) fails. The determination of the question will substantially affect the rights of the claimant (thereby satisfying AA, section 69(3)(a)); and it is just and proper in all the circumstances for the Court to determine the question since otherwise the claimant will be precluded from claiming over US$350,000 alleged to be due to it from the defendant."

As those reasons make clear, permission to appeal was given on the basis that, if (contrary to the claimant's primary case) the Discharge Question *was* properly raised in the arbitration, the condition in section 69(3)(b) would be satisfied. However, as the foregoing discussion of the section 68 challenge makes clear, the Discharge Question was not in fact a question which the Tribunal was asked to determine. The proper course, therefore, in my view, is to allow the section 68 challenge but to refuse the appeal.

22. Nevertheless, I shall address the Discharge Question, for two reasons: first, my conclusions on it form one of the bases on which I have concluded that the serious irregularity has caused substantial injustice to the claimant, so that they form part of the reasoning on which the decision on the section 68 challenge is based; second, the Award is to be remitted to the Tribunal for reconsideration, and that reconsideration must proceed on a correct understanding of the law. And in my judgment, the Tribunal was clearly wrong to hold that the defendant's liability for breach of contract had been discharged, whether under clause 2.1 or under clause 6.3.

23. A convenient starting point is the principle that, in construing a contract, the court will require the presence of clear words to rebut the presumption that no party to the contract intended to abandon the rights and remedies that would otherwise arise by operation of law in respect of a breach of contract by another party. This principle was explained and expounded by Lord Leggatt in *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29, [2021] AC 1148:

> "108. The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the

circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations.

109. The first and still perhaps the leading statement of this principle is that in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689 ('*Gilbert-Ash*'). The question was whether the parties to a building contract had agreed to exclude the contractor's common law and statutory right to set off claims for breach of warranty against the price. The right allegedly excluded was thus one which would diminish the value of the claim otherwise maintainable against the contractor. Lord Diplock said (at 717H):

> 'It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.'

In *Photo Production* [1980] AC 827, 850-851, Lord Diplock returned to this principle and explained its rationale more fully:

> 'Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only.' (Emphasis added)

110. Many further authoritative statements of this principle are quoted in Lewison, *The Interpretation of Contracts*, 7th ed (2020), chapter 12, section 20: see e.g. *Trafalgar House*

> *Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] AC 199, 208C (Lord Jauncey of Tullichettle); *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, 585 (Lord Goff of Chieveley); *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 1 All ER (Comm) 349, para 11 (Lord Bingham of Cornhill); *Bahamas Oil Refining Co International Ltd v Owners of the Cape Bari Tankschiffahrts GMBH & Co KG* [2016] UKPC 20; [2017] 1 All ER (Comm) 189, para 31 (Lord Clarke). Notable statements of the principle are also contained in several judgments of Moore-Bick LJ in the Court of Appeal. In *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27, para 23, he said:
>
> > 'The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be.'
>
> See also *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429; [2008] 2 Lloyd's Rep 216, para 20; and *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691; [2011] 1 All ER (Comm) 1077, paras 27-29. In *Seadrill* at para 29, Moore-Bick LJ described the principle as 'essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so."

24. In deciding that the defendant's liability to the claimant for breach of contract had been discharged, the Tribunal relied not only on clause 6.3 but also on clause 2.1 of the General Conditions: see paragraph 66 of the Award. Section 2 of the General Conditions is headed "Quality and Comprehensiveness of Work". The text of clause 2.1 has been set out above. The first two sentences of the clause impose express contractual obligations on the defendant. Neither in those sentences nor in the remainder of the clause are there any words expressing, or even implying, a limitation either on those obligations or on the rights and remedies of the Owner arising from those obligations.

25. The third sentence of the clause does not at all derogate from the obligations in the first two sentences or from the Owner's rights attendant on them. Rather, it confers an additional right on the Owner. In *Petrofina S.A. & Co. v Compagnia Italiana Trasporto Olii Minerali* (1937) 57 Ll.L.Rep. 247 a vessel was chartered by the owners to the charterers. The question was whether the owners were protected by the terms of the charterparty from liability for discoloration of the cargo of benzine. Clause 1 comprised an express warranty of seaworthiness in the sense of fitness to carry the stipulated cargo. Clause 27 provided, "Steamer to clean for the cargo in question to the satisfaction of charterer's inspector." The Court of Appeal rejected the appellants' contention that clause 27 had the effect of cutting down the scope of the obligation in clause 1. Lord Wright MR said at 251-252:

> "I find it impossible to accept that contention. We are dealing here with a contract of affreightment and it is necessary to bear in mind the well-established view that has been stated so often, that if it is sought to effect a reduction or a general limitation of the overriding obligation to provide a seaworthy ship—whether that is express or implied for this purpose does not matter—by other express terms of the charter-party or contract of affreightment, that result can only be achieved if perfectly clear, effective and precise words are used expressly stating that limitation. I think the language of Clause 27 here is not sufficient. To make it sufficient I think it would need to be amplified in something like this manner. It would have to run: 'Steamer to clean for the cargo in question to the satisfaction of the charterers' inspector and if that is done that shall be treated as fulfilment of the obligations under Clauses 1 and 16.' Clause 27 does not say so. I think, on the contrary, it has a much more limited effect. It gives, as I think, an added right to the charterer. He is entitled before he loads the cargo to have an inspection and to have a certificate, or whatever the form of the evidence is, that his inspector is satisfied. But, without express words, the satisfaction of the inspector cannot be relied upon by the owners as a discharge and fulfilment of their obligations."

26. In *Sacor Maritima S.A. v Repsol Petroleo S.A.* [1998] 1 Lloyd's Rep 518, clause 18 of the contract of affreightment provided, "The Owner shall clean the tanks, pipes and pumps of the Vessel to the satisfaction of the Charterer's Inspector." Mance J said at 523:

> "In *Petrofina S.A. & Co. v Compagnia Italiana Trasporto Olii Minerali* (1937) 57 Ll.L.Rep. 247 the Court of Appeal held that a clause like cl. 18 will, in the absence of clear words, be treated not as the measure of charterers' protection in matters of sea- and cargo-worthiness, but as offering *additional* protection to charterers. Charterer's inspector's approval will thus be no answer if the vessel is in fact also seaworthy and fitted for the voyage."

27. The final sentence of clause 2.1 provides no assistance to the defendant, as it cannot be construed as providing for any discharge of liability—least of all, as Mr Karia observed, for defects that were unknown and latent when the Vessel sailed from the shipyard.

28. Clause 6.3 appears at first sight to be a more promising basis for the Tribunal's conclusion, because it refers expressly to cessation of the Contractor's liability. However, when the clause is read in its context, it is clear that it does not mean what the Tribunal took it to mean. Section 6 of the General Conditions is headed "Insurance and Liability" and contains three clauses.

> "6.1 The Contractor shall be responsible for any loss [or] damage to the vessel or any of her fittings or equipment or stores, occurring out of the negligence of the Contractor during

> the Contractor's period of liability, excepting any loss or damage occasioned by acts of God. The Contractor shall take out adequate and proper insurance covering all workmen as required by law, it being expressly understood that all workmen furnished by the Contractor for the purpose of completing the work described shall, at the times, be employees of the Contractor and not of the Owners. The vessel will be kept insured by the Owners throughout the Contract, but such action by Owners is not intended to and shall not be construed as releasing the Contractor form [sic; read 'from'] any of the liabilities implied in this clause.
>
> 6.2 Contractor covenants and agrees to fully defend, protect, indemnify and hold harmless the Owners, their employees and agents from and against each and every claim, demand or cause of action and any liability, cost, expense (including but not limited to reasonable attorney's fees and expenses incurred in defense of the Owners), damage or loss in connection therewith which may be made or asserted by Contractor, Contractor's employees or agents, subcontractors, or any third parties [(]including but not limited to Owners agents, servants or employees) on account of personnel injury or death or property damage caused by, arising out of, or in any way incidental to, or in connection with the performance of the work hereunder, except such as may result solely from the negligence of Owners.
>
> 6.3 The Contractor's liability shall begin at the time when the vessel is delivered to Contractor's yard, pier or other location designated by him, ready for repairs, and shall cease only when all of the work herein specified has been completed to the satisfaction of the Owners or their accredited representative, and all of the Contractors equipment and all rubbish have been removed from the vessel"

29. When clause 6.3 is read in its context, it clearly has nothing at all to do with the discharge of an accrued liability for breach of contract or negligence. Rather, it defines the period of the Contractor's liability as bailee of the vessel. Clause 6.1 imposes liability on the Contractor as bailee "during the Contractor's period of liability". Those words obviously do not refer to a period after which no claim can be brought for a prior breach of duty. They refer to the period during which the Contractor is liable (that is, responsible) for the vessel as bailee. Clause 6.3 simply explains what that period is. Thus, the opening words of clause 6.3 ("The Contractor's liability shall begin at the time when the vessel is delivered to Contractor's yard") do not imply that the Contractor has, impossibly, incurred a liability in respect of an existing breach of duty; they mean that the Contractor is responsible for the vessel as bailee from the moment of delivery. Likewise, the provision that "The Contractor's liability … shall cease only when all of the work …" does not mean that the Contractor is then discharged from liability for its negligence or breach of contract committed during "the Contractor's period of liability"; it means

that the Contractor ceases to be liable (that is, responsible) as bailee when the work has been completed and the Contractor has finished its business with the vessel, and has removed its equipment and rubbish, which both constitute a form of continuing presence by the Contractor and present a potential for harm to the Owner and others. The Tribunal's interpretation of clause 6.3 as providing for the discharge of any accrued liability of the defendant, and thus as tantamount to the abandonment of accrued rights of action and remedy by the claimant, is directly contrary to the principle expressed in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* and *Triple Point Technology, Inc v PTT Public Company Ltd*.

30. Accordingly, I hold that the Tribunal's construction of the Contract and its conclusion that the defendant's liability for breach of contract had been discharged were obviously wrong in law. For the reasons already stated, however, the appeal will be dismissed.

Conclusion

31. The section 68 challenge to the Award is allowed on the ground that there was a serious irregularity affecting the arbitration proceedings and the Award, namely an irregularity of the kind mentioned in section 68(2)(a) which has caused substantial injustice to the claimant.

32. The Award will be remitted to the Tribunal for reconsideration. I do not consider it appropriate to give any direction as to the terms of any revised award that ought to be made. However, the reconsideration must proceed on the basis of the law as set out in paragraphs 23 to 30 above.

33. The section 69 appeal, which was brought in the alternative to the section 68 challenge, is dismissed.