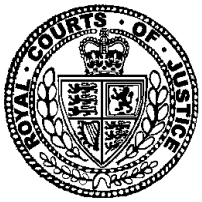

Neutral Citation Number: [2022] EWHC 766 (Comm)

Case No. CL-2021-000570

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Monday, 14th March 2022

Before:

THE HONOURABLE MR JUSTICE BUTCHER

B E T W E E N:

DUCAT MARITIME LIMITED

Claimant

and

LAVENDER SHIPMANAGEMENT INCORPORATED

Defendant

MR JOSEPH GOURGEY (instructed by **Preston Turnbull LLP**) appeared on behalf of the **Claimant**
MR JAMES BAILEY (instructed by **Jackson Parton Solicitors**) appeared on behalf of the **Defendant**

APPROVED JUDGMENT

……

THE HONOURABLE MR JUSTICE BUTCHER

MR JUSTICE BUTCHER:

1. This is an application by the Claimant, Ducat Maritime Limited, to which I will refer as "Charterers", under section 68 of the Arbitration Act 1996, to set aside part of an award dated 3 September 2021, of Mr Donald Chard, to whom I will refer as "the Arbitrator".

2. That award was made in an arbitration between Charterers and the Defendant, Lavender Shipmanagement Inc, to which I will refer as "Owners".

3. Charterers contend that there has been a serious irregularity, causing them substantial injustice, within section 68(2)(a) of the Arbitration Act 1996.

The facts

4. None of the relevant facts is in dispute. This, as I will set out later, is significant. Those facts can be summarised as follows:

5. The award in question arose from a dispute between the Owners and Charterers, under a charterparty in respect of the MV Majesty, to which I will refer as "the Vessel". The charterparty contained an arbitration clause, requiring the parties to submit any disputes to arbitration under the LMAA Small Claims Procedure 2017.

6. The Owners were the claimants in the arbitration, and sought US$37,831.83 by way of unpaid hire. That was on the basis of their final hire statement, or "FHS", which provided that there was an unpaid balance of that amount and its Claim Submissions therefore provided as follows:

> "The balance shown on Owners' FHS is due and owing. Accordingly, Owners claim US$37,831.83".

7. Charterers' position was as follows:

> (1) They agreed that Charterers had mistakenly calculated an extra day of hire, amounting to US$11,000, but accepted that Owner's FHS reflected the true position in that regard.
>
> (2) They raised disputes in relation to: first of all, a minor off-hire period; secondly, Owners' claim for damages for inadequate hull-cleaning; and, thirdly, amounts claimed by Owners in lieu of hull-cleaning, and dunnage removal. Charterers also sought to make a deduction for what they said was the balance due in respect of the MV Faith, a ship under the same management as the Vessel.
>
> (3) Charterers admitted that bank charges and additional war risks premiums were due.
>
> (4) They also sought to deduct US$15,070 for the Vessel's underperformance, by way of set-off and counterclaim, and consequently counterclaimed for overpaid hire. The overpaid hire was the counterclaimed underperformance, less the admitted sums

in respect of bank charges and additional war risk premiums, and was said to amount to US$6,258.35.

8. If Charterers had succeeded on all of their defences, and succeeded on the underperformance counterclaim, they would have been entitled to US$6,258.35. If Owners succeeded on every issue, they would have been entitled to the full amount which they claimed of US$37,831.83.

9. The Arbitrator's relevant findings on liability were as follows:

(1) That the Charterers' hire statements had included an extra day of hire amounting to US$11,000. That issue was not in dispute, as the Owners' FHS correctly represented the position.

(2) All of the disputed items on the Owners' FHS were properly due and payable, save that the Charterers succeeded in showing that US$9,553.92, namely the damages for inadequate hull-cleaning, and US$2,500 for dunnage removal costs, were not payable. In fact, the sum of dunnage removal costs of US$2,500 had not been listed on the Owners' FHS.

(3) The underperformance claim of US$15,070 failed, and so Charterers had no entitlement to make any deductions from hire on that basis.

10. The implementation of the Arbitrator's findings should, therefore, have been as follows:

(1) The Owners' FHS was correct, save that it should not have contained US$9,553.92 for damages for inadequate hull-cleaning.

(2) The Owners' FHS was also correct in not making any deduction for underperformance.

(3) The result was, therefore, that the Owners could claim US$28,277.91, namely, US$37,831.83 less US$9,553.92.

11. In fact, that is not what the Arbitrator did. Instead, he added the Charterers' unsuccessful counterclaim of US$15,070 for underperformance to the Owners' total claim. The result was that he found that Owners' total claim was actually worth US$53,692.66, which was more than the US$37,831.83 that Owners had, in fact, claimed.

12. His findings in this regard can be found at paragraphs 109 to 111 of the award. Those paragraphs are as follows:

"109. The Owners' claims for issues (iii) to (ix) together total USD 53,692.66. I have disallowed USD 9,553.92 for damages for inadequate hull cleaning by the Charterers and USD 2,500 for dunnage removal, and so the amended total is USD 41,638.74.

110. The amended total is greater than the balance of USD 37,831.83, shown on the Owners' FHS as due and owing and claimed by the

> Owners. The reasons for the difference between the aggregated total of claims at (iii) to (ix) and total claimed by the Owners have not been explained.
>
> 111. I cannot award more than has been claimed. I therefore accept the Owners' figures and award the Owners the claimed sum of USD 37,831.83".

13. This was a mistake by the Arbitrator, as has, very properly, now been accepted before me in the skeleton argument put in by Mr Bailey on behalf of Owners, and at the hearing. The nature of this mistake was straightforward. In holding that the Charterers' counterclaim was unsuccessful, rather than finding that they could not deduct this sum from Owners' claim, he instead added this sum to Owners' claim, when Owners had not claimed that sum.

14. In addition, and in consequence of that, the Arbitrator awarded the Owners interest, which included, in effect, interest on the amount of Charterers' failed counterclaim.

15. On 7 September 2021, the Charterers made an application to the Arbitrator under section 57(3) of the Arbitration Act 1996, seeking a correction of the award on the basis that there had been a clerical mistake or error arising from an accidental slip or omission.

16. In that application, they pointed out that the Arbitrator had added Charterers' underperformance counterclaim to the Owners' claim. They incorrectly stated that the correct amount due to Owners on the Arbitrator's findings was US$25,777.88, rather than US$28,277.91. That was the result of the fact that Owners, although they had claimed US$2,500 for costs of removing dunnage, had not included that in the FHS, and this had not been identified at this juncture.

17. In response to that application, Hewett & Co., who then represented Owners, contended that the Arbitrator had no jurisdiction to act as Charterers sought, and, in any event, that there had been no accidental slip or error, in that the Arbitrator had done what he intended to do.

18. On 10 September 2021, the Arbitrator declined the application to correct the award, stating that there was "no error or mistake in the calculations".

19. On 17 September 2021, Charterers made a further application to the Arbitrator to correct the award. On 20 September 2021, the Arbitrator declined that second application. It was in these circumstances that Charterers issued an arbitration claim form, challenging part of the award under section 68 of the Arbitration Act. It is that application which is before me.

The statutory provisions

20. Section 68 of the Arbitration Act 1996, provides, in relevant part, as follows:

> (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 grounds 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);…"

21. Section 33 of the Arbitration Act provides:

> (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 in the exercise of all other powers conferred on it".

Applications under section 68 of the Arbitration Act – general considerations

22. There is no dispute that, for a section 68 challenge to succeed, Charterers need to show an irregularity that falls within the exhaustive list of categories set out in section 68(2) of the Arbitration Act, and that that irregularity has caused or will cause substantial injustice to the applicant.

23. There can also be no dispute that an applicant, under section 68, has to surmount a "high hurdle", as it was put in *Bandwidth Shipping Corporation v Intaari (The 'Magdalena Oldendorff')* [2007] 2 CLC 537 at [35], or "high threshold" as it was put in *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2006] AC 221 at [28] and bears a "heavy burden", as was said in *New Age Alzarooni 2 Ltd and Another v Range Energy Natural Resources Inc* [2014] EWHC 4358 (Comm) at [12]. As was explained in paragraph 280 of the DAC report on the Arbitration Bill which led to the Arbitration Act 1996, the section was "really designed as a long stop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

Charterers' case on irregularity

24. Charterers' case was that the present case was, indeed, one where the Arbitrator had gone so wrong that justice called out for it to be corrected. Charterers contended that there was an irregularity falling within section 68(2)(a) on two bases:

> (1) The Arbitrator had failed to comply with section 33 of the Arbitration Act because he reached a conclusion that was contrary to the common position of the parties, and for which neither party

contended, without providing an opportunity for the parties to address him on the issue.

(2) He had made an obvious accounting mistake.

Charterers contended that this irregularity had caused them substantial injustice. I will consider each of the ways in which it is said that there was a breach of section 33 in turn, and then consider the issue of whether there was substantial injustice.

25. In relation to the Charterers' first way of alleging a breach of section 33, Mr Gourgey, on behalf of the Charterers referred to the following passage in *Russell on Arbitration, 24th Edition*, paragraph 5-049, which has been cited, with approval, on a number of occasions, including in *Grindrod Shipping Pte Limited v Hyundai Merchant Marine Company Limited* [2018] 2 Lloyd's Reports 121 at [38], and *PBO v DonPro and Others* [2021] EWHC 1951 (Comm) at [29]. That passage is as follows:

> "To comply with its duty to act fairly under s.33(1) of the Arbitration Act 1996, the tribunal should give the parties an opportunity to deal with any issue which will be relied on by it as the basis for its findings. The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award. If the tribunal is minded to decide the dispute on some other basis, the tribunal must give notice of it to the parties to enable them to address the point. Particular care is needed where the arbitration is proceeding on a documents-only basis, or where the opportunity for oral submissions is limited. That said, a tribunal does not have to refer back to the parties its analysis or findings on the evidence or argument before it, so long as the parties have had an opportunity to address all the "essential building blocks" in the tribunal's conclusion. Indeed, the tribunal is entitled to derive an alternative case from the parties' submissions as the basis for its award, so long as an opportunity is given to address the essential issues which led the tribunal to those conclusions…"

26. Further, Mr Gourgey referred to what was said by Sir William Blair in *Grindrod Shipping Pte Limited v Hyundai Merchant Marine Company Limited* at [39] as follows:

> "In *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at page 15, Bingham J put this principle as follows:
>
> 'If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment'…

> That was a decision under the previous arbitration legislation but it remains good law for the purposes of sections 33 and 68(2)(a) of the 1996 Act".

27. Mr Gourgey argued that, in the present case, it had been common ground between the parties that the Owners' total claims added up to US$37,831.83, and that the underperformance claim was the Charterers' counterclaim, not the Owners' claim. The Arbitrator had departed from that common ground and had failed to give Charterers an opportunity of addressing him on two key aspects of his decision, namely:

> (1) that the Owners' claims, in fact, added up to US$53,692.66; and
>
> (2) that the underperformance claim was a part of the Owners' claim.

Mr James Bailey for Owners, in his very well-presented submissions, submitted that it was not, in itself, a breach of a tribunal's duty of fairness to reach a conclusion for which neither party had contended. He accepted that if a tribunal considers that the parties have missed an important point, and intends to decide the case on a basis not contended for, it would ordinarily be fair to seek clarification before doing so. However, here, the underperformance claim was in the arena. Both parties had had an opportunity of putting their case about it, and there was no evidence to suggest that the Arbitrator considered or appreciated that the parties had missed the point.

28. I agree with Mr Gourgey that, in the present case, there was an irregularity, constituted by the Arbitrator's failing to adhere to the common ground between the parties, in deciding how much was owed on a basis which had not been argued by either party, without giving them the opportunity to comment on it. This represented a failure to comply with the section 33 duty.

29. The position was that the parties had been in agreement that the Charterers' counterclaim did not form part of the Owners' claim. They had not made submissions on that point because there was no need to. That issue was not in the arena.

30. Furthermore, while he did not realise that he had made a mistake, the Arbitrator did realise that there seemed to be a problem. In paragraph 110 of the award, he recognised that the total of the amounts which he was treating as being due to Owners was greater than the amount they had claimed in their FHS. He thought that this had not been explained. Without asking for an explanation, the solution he imposed was, as he saw it, to confine Owners to their claim, and award them the amount of US$37,831.84. I consider that, when he realised that the amount he thought was due to Owners was more than the amount they had claimed, and that this was unexplained, he should not have proceeded to resolve the problem as he did, without giving the parties the opportunity of commenting on it. Had he done so, the error would have come to light. That is a sufficient basis to conclude that there was an irregularity within section 68(2)(a).

31. Mr Gourgey, however, also relied on the fact that there was, as he put it, "an obvious accounting mistake". He said that this amounted to an irregularity. He contended that the

case was factually very similar to *Danae Air Transport ASA v Air Canada* [2000] 1 WLR 395. There, the arbitrators there had treated a *Calderbank* offer as including the value of the offer to forego a counterclaim when comparing it with the amount they had awarded. The Court of Appeal decided that the award could be remitted to the arbitrators under section 22 of the Arbitration Act 1950, on the basis that there was a procedural mishap. As Ward LJ had said at 408, the injustice was "rank or 'gross and obvious'".

32. While *Danae* was a case decided under the Arbitration Act 1950, Mr Gourgey said that the position should be the same under the Arbitration Act 1996. He referred to a passage in *Merkin and Flannery on the Arbitration Act 1996, 6th Edition*, paragraph 68.5. There, the authors say:

> "In the Notes to section 57, we raised the question as to what a party may do if faced with a situation in which the award contains a glaringly obvious error that the tribunal appears to have overlooked, but, when put to it, the tribunal refuses to acknowledge the error or to amend the award in response to an application under section 57(3)(a). Something similar happened in *Danae Air Transport ASA v Air Canada*… The award in that case was remitted on the basis that what had occurred was a 'procedural mishap'...
>
> Under the 1996 Act, however, the position is slightly less clear. To use the example given in *Danae*, suppose the tribunal had thought that 2 + 2 = 5 and had made an award which they refused to correct on that basis. Tuckey LJ thought that there would be no problem remitting the award, even if the error were not admitted. However, under the 1996 Act, there is no obvious basis for remitting the award. There would be no admitted error, and it is difficult to see on what grounds the award could be challenged within the confines of section 68. Our best answer is that, if the tribunal refused to accept to correct such an obvious mistake, that would simply be 'unfair' in the broadest sense of the word, and so challengeable under section 68(2)(a)".

33. Mr Gourgey emphasised the last sentence quoted, contended that it was correct, and that the present was indeed a case in which the nature of the mistake made the Arbitrator's conduct of the reference unfair.

34. For the Owners, Mr Bailey submitted that the Courts had made it clear that section 68 is not available for challenges based on the inadequacy or illogicality of the reasoning of the tribunal. In this regard, he referred to what was said by Flaux J in *Sonatrach v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm), 1 CLC 473 at [11], as follows:

> "…The focus of the enquiry under section 68 is due process, not the correctness of the tribunal's decision: see per Hamblen J in *Abuja International Hotels v Meridian SAS* [2012] EWHC 87 (Comm) at [48] to [49]…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, upon close analysis, the claimants' real complaint is that they consider that the tribunal reached

> the wrong result, which is not a matter in relation to which an arbitration award is susceptible to challenge under section 68".

35. Further, Mr Bailey called attention to the analysis of Teare J in *UMS Holding Limited and Others v Great Station Properties SA and another* [2017] EWHC 2398 (Comm) at [28] and [38], as follows:

> "[28] …Fourth, section 68 is concerned with due process. Section 68 is not concerned with whether the tribunal has made the 'right' finding of fact any more than it is concerned with whether the tribunal has made the 'right' decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a 'wrong' finding of fact…
>
> [38] …It is clear that the mere fact that the arbitral tribunal has reached the wrong conclusion cannot constitute a serious irregularity within section 68… It is also clear that so long as an arbitrator deals with an issue it does not matter that he has done so 'well, badly or indifferently': see *Secretary of State for the Home Department v Raytheon Systems* [2014] EWHC 4375 (TCC) at [33(vi)] per Akenhead J. I therefore have difficulty in accepting that the mere fact that the tribunal's reasoning is manifestly illogical or cannot rationally be sustained can amount to a serious irregularity… To regard illogicality or irrationality by itself as a form of serious irregularity would lead to the courts examining the reasoning of an arbitral tribunal to see whether it was logical and rational. That is not envisaged by section 68".

36. Mr Bailey emphasised that *Danae* was a case decided under the previous legislation, not under the 1996 Act. He referred to what was said in *Bandwidth Shipping Corporation v Intaari* at [47] by Lawrence Collins LJ as follows:

> "I doubt if reference to pre-1996 cases on misconduct or technical misconduct or procedural mishap (such as *Interbulk v Aiden Shipping Co (The Vimeira) (No.1)* [1984] 2 Ll Rep 66) is today helpful. Today the question is whether the tribunal has given the parties a fair opportunity of addressing them on all issues material to their intended decision, or whether there has been a denial of a fair hearing".

37. Mr Bailey submitted that an obvious accounting error, which had not been admitted by the tribunal, did not constitute any of the kinds of irregularity specified in subsection 68(2) of the Arbitration Act 1996. He emphasised that in the passage of *Merkin and Flannery* relied upon by the Charterers the authors had said that it was difficult to see on what ground a 2 + 2 = 5 type error could be challenged within the confines of section 68.

38. In any event, he submitted that the present was not a 2 + 2 = 5 type mistake. It was the sort of mistake which may be made when dealing with various accounting entries.

39. I consider that what has been said in *Sonatrach v Statoil* and *UMS Holding Limited* and other cases, as to the focus of the section 68 enquiry being whether there has been a failure of due process, and not whether the tribunal has got the answer right, to be unquestionably correct.

Illogicality or irrationality on the part of the tribunal does not, itself, bring the case within one of the heads of section 68(2).

40. It appears to me, however, that a gross and obvious accounting mistake, or an arithmetical mistake of the 2 + 2 = 5 variety made in the award, may well represent a failure to conduct the proceedings fairly, not because it represents an extreme illogicality but because it constitutes a departure from the cases put by both sides, without the parties having had an opportunity of addressing it.

41. In such a case, neither party's case is likely to have included the mistake as a basis for the result arrived at, and, in making the error, the tribunal is likely to have departed from common ground between the parties as to how arithmetical processes work, or whether items in an account are credits or debits, and to have done so without giving the parties an opportunity of addressing the justifiability of the departure.

42. If a "glaringly obvious error" in the award, to use *Merkin and Flannery's* phrase, can be said to arise in this way, section 68 can probably be regarded as applicable, without subverting its focus on process. As far as the present case goes, I have already found that there was a failure of process in considering the first way the Charterers contended for an irregularity.

43. My analysis of how an obvious accounting or arithmetical error may fall within section 68(2) indicates the Charterers' second way of contending for an irregularity actually adds little to the first.

Charterers' case on substantial injustice

44. The remaining question is whether the Charterers can show that the irregularity, which I have found to have occurred, caused them substantial injustice. Mr Gourgey submitted that the present was a clear case of substantial injustice. The mistake made had inflated Owners' claim by almost 50%, and meant that the Charterers were ordered to pay US$9,553.92 more than they should have been, or over 25% of the total award. Had the Charterers been given an opportunity of commenting on the matter, the Arbitrator might well have reached a different view, and a significantly different outcome might well have been produced. It was not necessary, he said, for Charterers to show more than that, and, in particular, not necessary for them to show that the result would necessarily, or even probably, have been different; see *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm) at [85(7)], and *Reliance Industries Limited v The Union of India* [2018] EWHC 822 (Comm), [2018] 2 All ER (Comm) 1090 at [14].

45. Mr Bailey contended that there was no substantial injustice. In particular, in accordance with the abridged SCP, the parties agreed to accept the possibility of some injustices; those, namely, which could "reasonably be expected as an ordinary incident of such arbitration", to use the language of Colman J in *Bulfracht (Cyprus) Ltd v Boneset Shipping Company Limited ("MV Pamphilos")* [2002] 2 Lloyds's Rep 681 at 687. Further, Mr Bailey submitted that it is legitimate to weigh the financial impact of the irregularity against the cost of remedying the problem. He emphasised that the element of the award being challenged is only US$9,553.92, and that that is comfortably exceeded by the cost incurred to date relating to the Charterers' section 57 applications and the present court proceedings.

46. In my judgment, there was, here, substantial injustice. I have no doubt that, had the Charterers been given the opportunity, before the award was made, to comment on the way in which the Arbitrator was proposing to deal with its failed counterclaim, and whether Owners' total claim should have been regarded as US$53,692.66, the Arbitrator might well have reached a different view, and that the result might have been significantly different.

47. I recognise that the sum involved is, by the standards of many commercial disputes, small. Nevertheless, it must be viewed in the context of the total amount of the Owners' claim, over which the parties considered it appropriate to arbitrate, which was US$37,831.83. I regard it as substantially unjust that a party should, by reason of an error such as that made by the Arbitrator here, be ordered to pay about 33% more than was due by way of principal, and be ordered to pay interest on its own unsuccessful counterclaim.

48. I regard that as going well beyond what could reasonably be expected as an ordinary incident of arbitration, even SCP arbitration.

49. As to the comparison with the costs of putting the mistake right, I have no doubt that these would have been very much less had the mistake been accepted by Owners earlier. This would doubtless have meant that the Arbitrator would have admitted his mistake, and either he would have corrected the award, or would have meant that section 68(2)(i) was of indisputable application.

Conclusion

50. For those reasons, I find that there was a serious irregularity which affected the award. I consider that, in the present case, it is not appropriate to remit the award to the Arbitrator, given that there have already been two unsuccessful applications to him to correct the award, and also given that it would involve unnecessary costs.

51. I therefore intend to set aside part of the award, namely the sum of US$9,553.92.

End of Judgment

Transcript of a recording by Ubiqus
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