England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2018] EWHC 1284 (Comm)
Case No: CL-2017-000531

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
24/05/2018

B e f o r e :

SIR WILLIAM BLAIR

Between:

GRINDROD SHIPPING PTE LTD	**Claimant (Claimant in the arbitration)**
- and -	
HYUNDAI MERCHANT MARINE CO. LTD	**Defendant (Respondent in the arbitration)**

Mr Benjamin Parker (instructed by Reed Smith LLP) for the Claimant
Ms Karen Maxwell (instructed by Holman Fenwick Willan, Hong Kong) for the Defendant
Hearing dates: 10 May 2018

HTML VERSION OF JUDGMENT

Sir William Blair :

1. This is an application made under s. 68 Arbitration Act 1996 to challenge the Partial Final Award of a London Maritime Arbitration Association (LMAA) tribunal given on 27 July 2017. In that award, the tribunal exercised its power under s. 41(3) of the 1996 Act to dismiss the claims brought in the arbitration on the basis of inordinate and inexcusable delay. The claimant's case is that the tribunal did so on grounds not advanced by the defendant in making the application, and consequently which the claimant says it did not have a fair opportunity to answer. The claimant says that had it had such opportunity, there are points it would have made which might well have caused the tribunal to reach a different conclusion.

2. The facts so far as relevant are as follows. By a time charter party dated 20 August 2010, the claimant, Grindrod Shipping Pte Ltd t/a Island View Shipping ("IVS"), chartered the motor vessel "K-AMBER" from the defendant, Hyundai Merchant Marine Co. Ltd ("Hyundai"), as disponent owners of the vessel. The dispute arises out of the master's refusal on 24 August 2010 to comply with voyage orders to sail from Australia to Mozambique and Tanzania. Such refusal was said to be on the basis of the piracy prevalent in the region at the time.

3. IVS began the arbitral process by appointing an arbitrator in July 2011. Claim submissions were served on 5 September 2011. When constituted, the tribunal consisted of Mr Patrick O'Donovan appointed by IVS and Mr Bruce Buchan appointed by Hyundai. They appointed the third arbitrator, being Mr Brian Williamson.

4. IVS claims US$687,722 (amended to US$928,804 in 2016). As disponent owners, Hyundai sought to pass the claim on to head owners, its sole claim being for an indemnity. There are (or were) therefore two arbitrations on foot, but though the arbitrators are the same, the arbitrations have not proceeded concurrently, and the court has only been concerned with the details of Hyundai's arbitration.

5. It is clear that the arbitration proceeded very slowly, though it is fair to say that both sides blame the other for the delays, and that some periods were taken up with attempts to negotiate a settlement. The details are not important for the purposes of this application.

6. One development which is significant took place in February 2016. At that time, IVS renewed a request for security which (according to the Procedural Chronology) had been made in October 2011. Hyundai, which was having well-publicised financial difficulties at this time, agreed to provide security, and its case is that if one of its ships had been arrested, that would have had a disastrous effect on the negotiations with its creditors. The security was in the form of a bond issued on 9 September 2016 by Aspen Insurance.

7. In August 2016, the six year limitation period expired. By that time (or shortly afterwards) the parties had got to the stage of documentary disclosure. On 5 January 2017 the head owners applied under s. 41(3) of the 1996 Act to dismiss Hyundai's claims on the basis of inordinate and inexcusable delay. On 20 January 2017, Hyundai made its own application under s. 41(3) against IVS in the present arbitration.

8. The parties advanced their respective cases in their lawyers' letters to the arbitrators, with substantial attachments of documents. There was no hearing, the parties being content to have the application dealt with on the papers.

9. Very sadly, Mr Buchan died on 11 July 2017. The parties agreed that if the remaining arbitrators were able to reach agreement (which in the event they were), they could proceed to a final award without the need for Hyundai to appoint a replacement.

The statutory powers

10. Section 41 of the Arbitration Act 1996 contains powers of the tribunal in case of a party's default which apply unless otherwise agreed. When enacted, s.41(3) was, in broad terms, intended to reflect the then powers of the English courts to strike out a claim for want of prosecution. (This leaves a slight oddity in that the power so far as it applies to English litigation has now been replaced by the provisions of the CPR.) Section 41(3) provides that:

> "If the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay—
>
> (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or
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> (b) has caused, or is likely to cause, serious prejudice to the respondent,
>
> the tribunal may make an award dismissing the claim."

11. Before exercising the power, therefore, the tribunal must be satisfied that there has been inordinate and inexcusable delay by the claimant, and further that this has given rise to "a substantial risk that it is not possible to have a fair resolution of the issues" (s. 41(3)(a)) or that it has caused the respondent "serious prejudice" (s. 41(3)(b)). Subsections (a) and (b) are alternatives, though of course they may overlap. It is not in dispute that once satisfied as to the statutory criteria, the tribunal's power to make an award dismissing the claim is discretionary, and that it may decide to impose some lesser order within its powers, for example as to costs or timetable or interest. The substantive effect of these provisions is not at issue in the present application (for a discussion in the context of maritime arbitration, see *London Maritime Arbitration*, 4th edn 2017, §14.11 and following).

The award

12. Much of the argument in the submissions to the tribunal focused on whether identified periods of delay had been inordinate and inexcusable, and whether the claimant was responsible for the delay. The tribunal found both these things established as to three periods, 20 March 2012 to 8 April 2014, 23 October 2014 to 26 January 2016, and end April 2016 to 20 January 2017. It accepted Hyundai's argument that during the third period, IVS's objective was obtaining security rather than progressing the arbitration.

13. The delay came to a total period of about four years. The tribunal found that but for the delay, the case would have come before it for decision in 2013, or 2014 at the latest. There neither is nor could be any challenge to these findings.

14. As to the second limb of s.41(3), that is as to the alternative requirements of unfairness or serious prejudice, Hyundai's contention was that as a result of the delay, witnesses' memories would have been diminished, that the master might not be available, that at least one potential expert witness had died, and that essential voyage records were not available. To allow the proceedings to continue in these circumstances would, Hyundai submitted, create unfairness.

15. The tribunal rejected Hyundai's contention, stating that it did not anticipate that the merits of the case would turn on the factual witness evidence. It expected that there would be valuable contemporaneous evidence, and that the experts would play a significant role in the outcome, concluding that: "We do not therefore consider that the inordinate delay we found to exist will have given rise to a substantial risk of unfairness. We are therefore satisfied that, despite the inevitable deterioration of the factual witnesses' recollection, we would be able to reach a safe decision, notwithstanding the delay".

16. Having rejected the risk of unfairness, the tribunal went on to consider the alternative "serious prejudice" ground in §62 of the Award as follows:

> "Serious prejudice is, however, a different matter. We are satisfied that the delay has already resulted in a significant increase in costs in defending the claim. Hyundai have also been obliged to put up substantial security for Island View's claim in terms of a cash deposit. We consider that this case ought properly to have come before us for a decision in 2013, or perhaps 2014 at the latest. As we suspect that Hyundai would not have been threatened with an arrest of one of their ships prior to their financial difficulties of 2016, we are therefore satisfied that there is a clear causal link between the delay and the substantial financial prejudice Hyundai have incurred in providing Island View with security for their claim. Island View's demand also came at a most inconvenient time for Hyundai, when they were restructuring their fleet and reorganising their financial affairs.

> The mere threat of the arrest of one of their ships exposed Hyundai to further prejudice as it might have had a disastrous effect on their restructuring programme. As we are satisfied that the inordinate and inexcusable delay has already caused serious prejudice to Hyundai, we have decided to exercise the power given to us by Section 41(3) of the Act and dismiss Island View's claim. We further award Hyundai their costs associated with this application and the costs of the arbitration."

IVS's challenge

17. Following the award, IVS issued challenges under both s. 68 (serious irregularity) and s. 69 (appeal on point of law) of the Arbitration Act 1996.

18. Hyundai invoked the procedure in section O8.5 of the Commercial Court Guide which enables the court to dismiss a challenge under s. 68 of the 1996 Act without a hearing if it considers that the claim has no real prospect of success. That request was dismissed on the papers by Cockerill J on 20 November 2017, who said that, "I am satisfied that the s. 68 application is arguable. There is an issue as to whether the question of serious prejudice based on the factors relied upon by the Tribunal was 'fairly in play' or 'in the arena' of the s. 41(3) debate (given the way the submissions proceeded and the context in which the factors ultimately relied on by the Tribunal were deployed) such that it was correct to proceed without offering the Claimant an opportunity to comment."

19. Cockerill J refused permission to appeal under s. 69, saying that, "The question as formulated [*which was whether on the facts as the tribunal found them, there could in law be serious prejudice to Hyundai within the meaning of s. 41(3)(b)]* is essentially one of fact or at best mixed fact and law. The power under s. 41(3)(b) is one which bestows a wide discretion on the arbitrators. The challenge is to their conclusion on whether to exercise their discretion in the light of their factual findings. There is no legal test identified in the exercise of which they are said to have erred; the authorities as to non-trial prejudice are applications of the discretion to the facts. It is not suggested that any of the factors they rely on are in law incapable of giving rise to serious prejudice. Even if there were a rule of law (which does not seem to be established by the authorities) that non-trial prejudice will only exceptionally amount to serious prejudice that is not a rule of law such as error in law can be inferred in the way indicated in for example *The Dolphin*. The Tribunal's solution would fall within the range of permissible solutions open to the sole finders and assessors of fact under the parties' chosen dispute resolution mechanism".

IVS's case

20. IVS contends that the award was affected by a serious irregularity: the tribunal failed to comply with its core duties under s. 33(1) of the 1996 Act to act fairly, to give each party a reasonable opportunity of putting its case, and to provide a fair means for the resolution of the matters falling to be determined.

21. Specifically, the tribunal acted unfairly in finding that IVS's delay in pursuing the arbitration had caused "serious prejudice" to Hyundai and so satisfied one of the threshold requirements of the power to dismiss under s. 41(3). Although the tribunal rejected all the arguments of prejudice that had been relied on by Hyundai in support of its application, it nonetheless granted the application and dismissed the claim. The tribunal was only able to "square the circle" in this way by identifying and formulating for itself, of its own motion, three matters which it held had been caused by IVS's delay and had caused "serious prejudice" to Hyundai.

22. The identification of these matters and the suggestion that they established "serious prejudice"—and thereby fulfilled the threshold requirement to be established before any power to dismiss the claim could arise—were entirely of the tribunal's own devising. Those matters had never been relied on by Hyundai (or even hinted at) in support of its application. They had never been "fairly in play" or "in the arena". In view of the explicit basis on which Hyundai's application had been pursued and argued, they were not a matter that the parties could or should have been expected to deal with in their submissions.

23. It was incumbent on the tribunal in those circumstances to indicate to the parties that, whilst it rejected Hyundai's submissions on prejudice, it nonetheless wished to be addressed on the three matters before an award was issued: in particular, as to whether they constituted "serious prejudice" within the meaning of s. 41(3), and (if so) whether they justified complete dismissal of the claim or instead the imposition of some other procedural sanction.

24. The tribunal did not give the parties any opportunity to make submissions on the points of its own devising. Instead it proceeded directly to issuing an award that dismissed IVS's claim. That was unfair, contrary to s. 33(1), and constitutes a serious irregularity under s. 68(2)(a). It caused IVS substantial injustice by depriving it of an opportunity to make submissions as to the three alleged matters of prejudice devised by the tribunal—including submissions as to (i) whether they constituted prejudice caused by the delay, (ii) whether they constituted "serious prejudice" as required by s. 41(3), and (iii) whether they justified the making of an award dismissing the claim (as opposed to, say, the making of a costs order or a peremptory order). There were numerous new points that IVS could and would have made if these points had been "in the arena".

25. If the tribunal had acted fairly, and IVS given an opportunity to make submissions on these new points, the tribunal might well have reached a different view on Hyundai's application and declined to strike out the claim. As a matter of law, that is sufficient for the s. 68 challenge to succeed, and for the award to be set aside or remitted.

Hyundai's case

26. The debate relating to the s. 41(3) criteria of serious prejudice/substantial risk focused principally on the effect of the delays on the factual and expert evidence.

27. Prejudice arising from the provision of security was raised by Hyundai under the heading of "discretion". In response, IVS (i) argued that costs were an adequate remedy and (ii) picked up the topic of security and dealt with it under the "delay" heading, seeking to argue that Hyundai had unreasonably delayed in providing security, and that by providing security Hyundai had induced it to continue the proceedings. Hyundai in turn argued that the application for security was prompted by publicity surrounding its financial condition and, in that sense, was opportunistic and extrinsic to the arbitration, rather than a genuine attempt to progress the reference.

28. The s. 68 application focuses on the tribunal's decision that the delay had resulted in serious prejudice, consisting of a significant increase in the costs in defending the claim and, in particular, "substantial financial prejudice" in providing the claimant with security for their claim. The timing of the request for security, in February 2016, meant that the defendant was exposed to the threat of arrest, which was potentially disastrous.

29. IVS seeks to characterise the sentence in §62 of the Award referring to the arrest ("The mere threat of the arrest…") as separate or free-standing, but this is an artificial reading. Viewed in the context of the submissions (and as a matter of common sense), the tribunal was explaining how the timing of the request for security had exerted particular pressure on Hyundai, effectively requiring it to put up security. As such, the point is inextricably linked with the principal point relating to the provision of security.

30. Similarly, the tribunal does not expressly explain whether the word "costs" in the first sentence of §62 is intended to include the costs of security, or whether they intended to refer solely to costs in some narrower sense – e.g., legal costs.

31. On any sensible reading, it is plain that the tribunal's decision rests principally upon the financial prejudice to Hyundai arising from the provision of security.

32. It is not correct – and is unfair to the tribunal – to suggest that it "devised" points. These matters were addressed in submissions and IVS had an opportunity to deal with them. The real complaint is that these matters were presented under different legal labels or headings to those adopted in § 62. But they were all very much in play.

33. The key issue, therefore, is whether, for the purposes of s. 68, it is enough for IVS to show that submissions raised and responded to under one heading were addressed by the tribunal under a different heading.

34. In short, the application raises a complaint of form, not substance. The complaint falls outside the scope of s. 68 both because it discloses no breach of duty on the part of the tribunal, and because IVS is unable to establish any substantial injustice. It is a thinly-disguised attempt to challenge the tribunal's exercise of discretion and to have a second bite at the cherry.

The applicable legal principles

35. There is no dispute as to the applicable legal principles, which I can take largely from the submissions of counsel for IVS.

36. Under s. 68(2)(a) of the Arbitration Act 1996, a failure by the tribunal to comply with s. 33 (the "general duty of the tribunal") may constitute a serious irregularity.

37. Section 33(1) imposes obligations on the tribunal to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent", and to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined".

38. An important element of these duties is that the parties have the right to be given a reasonable opportunity to deal with any issue that will be relied on by the tribunal when writing its award. As it is put by the editors of *Russell on Arbitration* (24th edition, 2015), at para. 5-050:

> "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 based 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…"

39. In *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at 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…It is not right that his decision should be based on specific matters which the parties have never had the chance to deal with. Nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance."

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.

40. An analysis of the leading authorities and the legal principles to be derived from them is to be found in the recent judgments of Popplewell J in *Terna Bahrain Holding Co. WLL v. Bin Kamel Al Shamzi*

[2013] 1 Lloyd's Rep 86, at [85] and *Reliance Industries Ltd and another v. The Union of India* [2018] EWHC 822 (Comm), at [12]–[15]):

> "(1) In order to make out a case for the Court's intervention under section 68(2)(a), the applicant must show:
>
> > (a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;
> >
> > (b) amounting to a serious irregularity;
> >
> > (c) giving rise to substantial injustice.
>
> (2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.
>
> (3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected.
>
> (4) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.
>
> (5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity.
>
> (6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.
>
> (7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

Discussion and conclusion

(i) The Award

41. As has been explained above, in §62 of the Award, the tribunal found that the delay had not given rise to a substantial risk that it would not be possible to have a fair resolution of the issues, but found that it had caused serious prejudice to Hyundai.

42. There was some debate at the hearing as to whether the tribunal's reference to the delay resulting in a significant increase in costs in defending the claim included the costs of the security put in place in by Hyundai in 2016. IVS's evidence filed in support of this application asserts that such costs are costs within the arbitration. On that basis it was argued on behalf of IVS that the appropriate order would

have been to make IVS liable to pay those costs in any event, rather than dismiss a claim in respect of which a fair disposal was possible.

43. On this issue, I think that there is force in the submissions of Ms Karen Maxwell, counsel for Hyundai, that though it is not clear from the words used in §62, these experienced LMAA arbitrators may have been proceeding on the basis that the costs of putting up the security would not be recoverable as costs of the arbitration (see London Arbitration 5/04, Lloyd's Maritime Law Newsletter, 17 March 2004).

44. In any case, and whatever the position in that regard, I agree with her that on a sensible reading of §62, it is clear that the tribunal's decision rests principally upon the financial prejudice to Hyundai arising from the provision of security, in the circumstances of the financial sensitivity existing in 2016 when the security was provided. This has to be read with the finding that the case ought properly to have come before the tribunal for a decision in 2013, or perhaps 2014 at the latest.

45. The question therefore is whether the tribunal was entitled to reach this conclusion without further reference to the parties, and particularly IVS.

(ii) The parties' submissions to the tribunal

46. The way the matter proceeded was as follows. Hyundai made its striking out application by letter dated 20 January 2017. There followed an exchange of written submissions, namely, IVS's response dated 17 February 2017, Hyundai's reply submissions dated 18 April 2017, and IVS's rejoinder dated 12 May 2017.

47. These letters were structured with headings under which points were made and references given, and came with what are described in IVS's submissions as "somewhat voluminous" attachments. Both parties have helpfully analysed the letters in their skeleton arguments for this hearing.

48. As has been noted above, much of the content of the submissions concerns delay, and the responsibility for the delay.

49. As IVS says, Hyundai's application letter of 20 January 2017 relied on the same facts and matters as constituting both a "substantial risk of unfair resolution of the dispute" under s. 41(3)(a) and "serious prejudice" under s. 41(3)(b). These points all went to diminution of the evidence over time. This is the essential point on which IVS relies in the s. 68 application.

50. However, the letter also referred to the bond at various points, and under the heading, "Whether to exercise discretion to dismiss claim" referred to "prejudice" suffered by Hyundai in terms that explicitly referenced the bond:

> "Further, whatever prejudice would be suffered by Charterers [i.e. in having the claim dismissed] is overwhelmed by the prejudice which would be suffered by [Hyundai], in:
>
> (a) Having to defend this very stale claim, notwithstanding the likely diminution in value of the evidence (see above); and
>
> (b) The need to maintain a bond in the amount of US1,600,000 issued by Aspen Insurance UK Limited as security for the Charterers' claim (pages 43-44), the necessary continuation of which is wasteful of [Hyundai's] resources as [Hyundai] have had to deposit US$580,000 in cash with Aspen Insurance UK Limited and have to pay a bond fee of US$23,000 per year to maintain the security."

51. The prejudice identified here relating to the bond is clearly the prejudice referred to by the tribunal in §62 of the Award. In this regard, IVS says that the key point is that such prejudice was never relied on in relation to the "serious prejudice" requirement in s. 41(3) Arbitration Act. This is sufficient, it submits, to have ruled out reliance on it by the tribunal in the context of "serious prejudice", at least without giving IVS the opportunity to comment.

52. Whether this is a good submission in law is considered below. However, I do not accept IVS's contention that the case was "entirely of the tribunal's own devising" and had "never been relied on by Hyundai (or even hinted at) in support of its application". In my view, the case was raised by Hyundai, albeit in the context of discretion.

53. In IVS's response dated 17 February 2017, to quote its submissions, "The only case advanced by the Defendant [i.e. Hyundai] , and the only case to be responded to by the Claimant [i.e. IVS], was that because of an alleged deterioration in the availability and quality of the evidence caused by delay, there was both a "substantial risk that it is not possible to have a fair resolution of the issues" (s. 41(3)(a)) and the Defendant would suffer "serious prejudice" (s. 41(3)(b))".

54. Under the heading, "A fair resolution of the issues is possible and there is no prejudice to Disponent Owners", IVS dealt with, and rebutted, Hyundai's case as to the effect of deterioration of the evidence, submissions that were accepted by the tribunal in its Award.

55. The response dealt at some length with the factual position as regards the 2016 bond, including as to press coverage of Hyundai's deteriorating financial position.

56. It did not explicitly deal with the assertions made by Hyundai which I have quoted above as to prejudice in relation to the bond in the subsequent section headed "Should the Tribunal exercise its discretion".

57. However, in this section, which was presumably a response to Hyundai's section "Whether to exercise discretion to dismiss claim", IVS submitted that "While it is Charterers' position that there is no basis for a costs award against Charterers in this instance, the Tribunal is reminded that should it be minded to impose a penalty on Charterers that falls short of the dismissal of the action, it does of course have a general discretion in relation to costs".

58. IVS contends that this only concerns the costs of the application, but Hyundai contends that it is the answer to the substance of the points raised by Hyundai as to prejudice in the section on discretion in its application, to the effect that prejudice (including as to the bond) could be dealt with under the tribunal's general discretion as to costs. The latter seems to me to be the correct reading of this submission.

59. In any case, whether it took it or not, IVS had the opportunity to answer Hyundai's case as to prejudice in relation to the bond.

60. Hyundai's reply submissions dated 18 April 2017 reiterated its case as to deterioration of the evidence at some length. Under the heading "Overview", it expanded on its case as to the bond, saying that the request for security in February 2016 had been made against the background of its deteriorating financial position, and pointing to the potentially "disastrous" effect on the restructuring discussions of the arrest of one of its ships. As has been seen, this was one of the matters referred to in §62 of the Award.

61. Under the heading, "Conclusion", Hyundai submitted that "Ultimately, the question facing the Tribunal is whether it considers that there is a substantial risk that it will not be able to determine the dispute in accordance with the requirements of natural justice". It then repeated its points as to deterioration of the evidence.

62. IVS relies heavily on this passage, submitting that this "left no doubt as to the "prejudice" that was being relied on, nor as to the grounds on which the tribunal was being invited to dismiss the claim". It submits that this overtakes the assertion of prejudice relating to the bond made in the discretion section of the application letter of 20 January 2017.

63. However, I agree with Hyundai that this is not a fair reading of this passage in the letter. It was replying to a response letter that did not explicitly respond as regards the prejudice asserted in relation to the bond, and dealing with the points that had been made in that letter. There is in my view no reason to treat Hyundai as narrowing its case as set out in the application letter.

64. Asserting that Hyundai had attempted to recast its application in the reply, IVS put in a rejoinder dated 12 May 2017 which largely expands on what had gone before with additional citation of authority. The bond is referred to again in the context of responsibility for delay (there is a brief reference to "external financial stress").

65. As IVS says, the issues and arguments before the tribunal—and the question of what was "in play" or "in the arena"—were those framed by these four sets of written submissions.

66. As IVS says, again correctly, the matters relied on by Hyundai in relation to s. 41(3)(a) and (b) were solely concerned with the availability and quality of the evidence now available, the contention being that as a result of the delay "there is a substantial risk that [the tribunal] will not be able to determine the dispute in accordance with the requirements of natural justice".

67. That in summary is the position as regards the submissions made to the tribunal in respect of the application to dismiss the claims brought in the arbitration on the grounds of inordinate and inexcusable delay so far as relevant to the s. 68 application.

(iv) The authorities

68. As noted above, "… a tribunal does not have to refer back to the parties its analysis or findings based 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" (*Russell on Arbitration* at para. 5-050).

69. There are two cases which are particularly relevant in this regard. In *ABB AG v. Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 arguments were advanced to the tribunal in support of an argument about "bad faith", and were relied upon by the tribunal in relation to a separate argument concerning "nullity of contract".

70. The cases are not entirely parallel, and in *ABB*, as IVS points out, an alternative case had been foreshadowed by a question from the chairman of the tribunal to an expert witness during the oral hearings. But the principle upon which Tomlinson J rejected the s. 68 challenge is important – this was that all the material relevant to the "nullity of contract" argument was "in play in the context of the bad faith argument and the parties had a full opportunity to address the tribunal on the implications thereof" (see at [72]).

71. The second case is *Reliance Industries Ltd v Union of India* [2018] EWHC 822 (Comm) in which the arbitration concerned the construction of Production Sharing Contracts in relation to the development of oil fields off the west coast of India. The facts were unusual in that the dissenting arbitrator himself considered that the "net effect" point upon which the decision was reached was a new point and had not been put to the parties.

72. This led to a s. 68 challenge to the award, the claimants contending that what the majority of the tribunal did was seriously unfair to them because they had no opportunity to address in argument the reasoning which was fundamental to the conclusion.

73. At [10], Popplewell J referred to the fact that the award addressed the disputes under various headings, and said in terms that seem relevant in the present case that, "It is important to bear in mind that the definition of these issues, and the arrangement of the Award in this way, was of the Tribunal's making. The argument of the parties was not addressed or compartmentalised under the headings which the Tribunal used to structure its reasons in relation to the many disputes between the parties."

74. Rejecting the s. 68 challenge, Popplewell J said at [32]:

> "It is always important to keep in mind the distinction between a lack of opportunity to deal with a case and a failure to recognise or take such opportunity. It is commonplace in judicial decisions on points of construction that a judge may fashion his or her reasoning

> and analysis from the material upon which argument has been addressed without it necessarily being in terms which reflect those fully expressed by the winning party. There is not perceived to be, and is not, anything which is unfair in taking such a course. It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated. To use the language of Tomlinson J, as he then was, in *ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1 at [72], a party will usually have had a sufficient opportunity if the "essential building blocks" of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s. 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case. That applies to points of construction as much as to other points in dispute."

75. It follows from these authorities that a party will usually have had a sufficient opportunity to meet the case if the "essential building blocks" of the tribunal's analysis and reasoning were "in play" or "in the arena" in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. As it was put by counsel for Hyundai, the heads under which the parties present their contentions cannot place those contentions within silos. It comes down to a matter of fairness in the conduct of the arbitration, which "will always be one of fact and degree which is sensitive to the specific circumstances of each individual case".

(iv) IVS's submission

76. As has been shown above, prejudice in relation to the bond was raised by Hyundai, but under the head of discretion, rather than under the unfairness or serious prejudice head of s. 41(3) which is where the tribunal relied on it. The argument of IVS in this regard, powerfully advanced by Mr Benjamin Parker, is as follows.

77. He submits that the tribunal decided Hyundai's application on a basis that had not been argued before it, and was not "in play" or "in the arena". An essential building block of its conclusion that the claim should be dismissed was that the threshold requirement of "serious prejudice" under s. 41(3)(b) was satisfied by the three matters identified in §62. However, the suggestion that any of these matters could constitute "serious prejudice"—or indeed were in any way relevant to satisfying the statutory threshold, or otherwise provided a basis for dismissing the claim—had never been made by Hyundai and was never raised before the tribunal. Indeed, it had not even been hinted at as a possible line of argument.

78. On the contrary, it was common ground before the tribunal that the only basis for satisfying both of the statutory criteria was an alleged deterioration in the quality and/or availability of evidence caused by delay. IVS submitted that this prevented the tribunal from resolving the dispute fairly and in accordance with natural justice. That was the "arena" of the dispute on which the tribunal was being asked to rule.

79. What the tribunal did was to rely on matters from outside that arena, which did not relate to the tribunal's ability to resolve the dispute fairly and in accordance with natural justice. It devised and formulated those matters of alleged "serious prejudice" for itself, without inviting the parties to comment on them. That was unfair and in breach of its duty under s. 33. Further, having privately identified these points of alleged "serious prejudice" it then treated them in a conclusory and pre-emptive way. It simply assumed, without argument or explanation, (i) that they were "serious prejudice" under s. 41(3)(b), (ii) that IVS could have no answer to them, and (iii) that they justified the dismissal of the claim (as opposed to the imposition of some other sanction). That was equally unfair, and a further breach of s. 33.

(v) Conclusion on serious irregularity

80. This is not an altogether easy point to decide. IVS's foundational argument that Hyundai's case on s. s. 41(3)(a) and (b) was the same, namely diminution in the value of the evidence and the impact that would have on the fair disposition of the claim, is correct. Further, it has been held that where a case is

decided on the papers, arbitrators have to be particularly careful not to raise new points without giving the parties a chance to respond (*Pacol Ltd v. Joint Stock Co. Rossakhar* [2000] 1 Lloyd's Rep 109, 115, Colman J).

81. However, despite IVS's contention that the case was "entirely of the tribunal's own devising" and had "never been relied on by Hyundai (or even hinted at) in support of its application", it is indisputable that prejudice resulting from the bond was raised as an issue by Hyundai. It was the last substantive point in the application letter. It was raised as an issue going to the discretion of the tribunal in the remedy it granted rather than in the context of the "serious prejudice" threshold, but the tribunal was not bound by the head under which the parties raised a point. That is particularly true in the case of an issue such as prejudice.

82. It is correct to say that the issue of prejudice relating to the bond was raised in the application letter quite briefly, the other points on prejudice going to the effect of the delay on the evidence. However, the basic prejudice complained of so far as the bond was concerned was clear, namely the cost that Hyundai had incurred in having to maintain the bond both in terms of the cash deposit and the annual fee. The tribunal made clear its view that this was caused by the delay because the case should have been before it for decision by 2013 or 2014 at the latest, but in fact was still on foot in 2016 when publicity as to Hyundai's financial difficulties prompted IVS's demand for the bond.

83. In its skeleton argument, IVS has set out a number of points which it says it would have made in response to that proposition had the tribunal's breach of the duty of fairness not prevented it from doing so. However, IVS was not prevented from doing so. As noted above, its response at the time to this section of the application letter was to refer to the tribunal's general discretion as to costs. All the points it now raises could have been raised then. I do not accept the validity of the submission that it had no reason to do so on the basis that such points were irrelevant because of the basis on which the striking out application was made. They were raised in the context of, and were relevant to, discretion.

84. It is also important to note that though the passage as to prejudice relating to the bond is brief, the bond itself is referenced on numerous occasions sometimes at length in each of the four sets of submissions. It was a significant part of the case, and must have loomed large in the eyes of the parties and the arbitrators since it had taken up a large part of the year before.

85. As already noted, in its reply submissions dated 18 April 2017, Hyundai contended that the request for security in February 2016 had been made against the background of its deteriorating financial position, and the potentially "disastrous" effect on the restructuring discussions of the arrest of one of its ships. This was one of the points made by the tribunal in §62 of the Award, and is on the face of it a reasonable point.

86. In its skeleton argument IVS asserts that this concern was speculative and as a matter of fact unfounded, but it does not say why this should have been so. It says that Hyundai achieved a successful restructuring in June 2016 and the security was not in place until September, by which time the threat of arrest would have lost its force. But negotiations with IVS for security commenced in February 2016, and there is no reason to suppose that this point would not have been obvious to the tribunal. In any case, IVS had the opportunity to make this point at the time had it wished to do so.

87. Applying the above authorities, I accept Hyundai's submission that the points made in the tribunal's reasoning were (to use the language of the case law) "in play", and were "in the arena", among the other arguments on the striking out. An issue as to prejudice is not a technical one, and standing back, the question is whether fairness required the tribunal to indicate to the parties that it wished to be addressed on the matters set out in §62 before an award was issued. I do not think that fairness required this, or that the tribunal behaved unfairly in not doing so. As Tomlinson J put it in *ABB* (above), the parties had a fair opportunity to address arguments "on all the essential building blocks in the tribunal's conclusion".

(vi) Substantial injustice

88. As noted above, the requirement of substantial injustice is additional to that of serious irregularity, and in order to make out a case for the court's intervention under section 68(2)(a) Arbitration Act 1996, the

applicant must establish both.

89. IVS makes a number of submissions under this heading some of which have already been dealt with above and need not be repeated. They go to what it says it would have submitted to the tribunal, had it been invited to make submissions on the matters identified in §62 of the Award as it contends fairness required.

90. As to the point that that "the delay has already resulted in a significant increase in costs in defending the claim", it says that it would have submitted that there was no evidence before the tribunal on which it could satisfactorily come to this conclusion.

91. I do not accept this. This is a matter on which the tribunal was entitled to draw inferences, and specifically to infer that delay had given rise to a significant increase in costs in defending the claim. It seems to me to be very unlikely that had IVS made this point, the tribunal might well have reached a different view.

92. IVS accepts that there were significant additional costs incurred in obtaining and maintaining the bond, but submits that this should not be regarded as serious prejudice where the tribunal has concluded that a fair hearing is possible, and moreover that would not justify dismissing the claim: instead, the appropriate order would be to make the claimant liable to pay those costs in any event.

93. However, these two grounds under s. 41(3) are alternative, and it was a matter for the tribunal what weight it gave to the costs issue in deciding on the appropriate remedy. It would in my view be a retrograde step in international arbitration for the court effectively to rule out the cost of delay as a ground for striking out a claim on the basis that it could always be compensated for in an order for costs at the end of the day.

94. As to the second point, namely that Hyundai was required put up security for the claim, I have dealt with much of this already. IVS says that it would have submitted that the tribunal should find that any prejudice caused by putting up security was not caused by the delay (and therefore would not qualify under s. 41(3)) because IVS would have sought security in any event.

95. However, the request IVS made for security had been made in October 2011 (see above) but not pursued. It was not renewed until Hyundai's financial difficulties in 2016. The tribunal's finding is that but for the delay on the part of IVS, the arbitration would have been heard in 2013, or 2014 at the latest. It was in a good position to assess whether the prejudice was modest as IVS suggests, to weigh it against the possibility that Hyundai could have lost the case in 2013 or 2014, and whether in the circumstances striking out was disproportionate.

96. As to the final point, that Hyundai was restructuring its fleet and reorganising their financial affairs, and the mere threat of arrest "might have had a disastrous effect on their restructuring programme", IVS says it would have submitted that this concern was speculative and as a matter of fact unfounded, the evidence showing that the threat of arrest did not prejudice Hyundai's restructuring programme.

97. I have already explained why I do not accept this submission. In any case, this issue was raised by Hyundai in its reply in very clear terms, reminding the tribunal of the financial condition of major Korean shipowners at this time, and the fate that occurred to Hanjin Shipping in August 2016. All this would have been very familiar to an experienced maritime tribunal. The points that IVS makes now could have been made at the time in its rejoinder, but it is very unlikely in my view that it would have made any difference to the tribunal's view.

98. To summarise, IVS correctly points out that the court does not have to conclude that these points would in fact have been upheld by the tribunal and caused it to reach a different outcome on Hyundai's striking out application. All that the claimant must do is "to show…that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome" (Popplewell J in *Terna Bahrain v. Bin Kamel* [2013] 1 Lloyd's Rep 86, at [85] point (7), quoted above).

99. But I agree with Hyundai that it is unlikely that this experienced tribunal, familiar with the relevant legal principles, and with the detailed background, might have been persuaded to change its mind on the basis of these submissions. As was pointed out in argument at the hearing, it is not suggested that any additional evidence or legal authority would now be put before the tribunal. Even had I found for IVS on the serious irregularity issue, therefore, I would not have found for it on the substantial injustice issue.

Overall conclusion

100. I have already said that this is not an altogether easy case, and the fact that IVS clearly feels that the tribunal decided it on a basis that was not before it is unfortunate in itself. The case is a reminder of the importance of the underlying principles in this regard. But ultimately the points were all in play, and I am satisfied that there was no injustice. For the reasons set out above, therefore, IVS's challenge to the Award is dismissed. I should add that had I allowed the challenge, I would not have accepted IVS's invitation to set aside the Award, but would have remitted it to the tribunal. I am grateful to the parties for their assistance, and will hear them on any consequential directions.
