IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
COMMERCIAL COURT

CL-2018-000613

[2019] EWHC 273 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 24 January 2019

Before:

MR JUSTICE BUTCHER

B E T W E E N :

J — Claimant

- and -

K — Defendant

MS P. HOPKINS QC (instructed by Clyde & Co LLP) appeared on behalf of the Claimant.

MR N. G. CASEY (instructed by Wikborg Rein LLP) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE BUTCHER:

1 These are applications by the Claimant, which I will call "the Builder", under s.67 and 68 of the Arbitration Act 1996, which I will call "the Act", relating to a sixth award dated 23rd August 2018 made by an arbitration tribunal appointed in respect of disputes between the parties, which I will call "the Tribunal".

2 In outline, the application concerns the question of whether the Tribunal has jurisdiction to revisit and to substitute its own determination for a determination made by an Independent Expert appointed pursuant to a yacht construction agreement made between the Builder and the Defendant, which I will call "the Purchaser", and dated 29th March 2012. I will call the agreement "the YCA". On these applications the Builder has been represented by Philippa Hopkins QC, and the Purchaser by Noel Casey. They each made clear, succinct and helpful submissions.

3 The present hearing forms part of a long-running dispute between the parties. It concerns the construction of a very large superyacht, which I will call "the Yacht". The Yacht was constructed by the Builder for the Purchaser pursuant to the YCA, and delivered to the Purchaser on 27th January 2017. Various disputes arose between the Builder and the Purchaser, both before and after delivery. The Tribunal was appointed pursuant to the arbitration agreement in the YCA in 2016.

4 One of those disputes related to the Builder's obligations concerning Outstanding Items, defined by reference to Clause 9.2.2 of the YCA as "Any Defects identified prior to the Actual Delivery Date", which were to be "shown in a list attached to the Protocol of Delivery and Acceptance". A Defect was defined as "a non-conformity in the design, materials or workmanship as assessed by reference to the requirements of the Specification".

5 The way in which the YCA treated Outstanding Items was firstly, by Clause 9.2.2:

> "…The Builder shall procure that the Outstanding Items are remedied as soon as practicable after delivery, subject always to the Purchaser's cruising plans for the Yacht; and in any event within the Warranty Period. The foregoing works shall be performed without cost to the Purchaser…"

I interpose that the Warranty Period is defined as "twenty-four months from the date of delivery". Secondly, by Clause 9.3:

> "As security for the Outstanding Items (if any), the Purchaser shall pay into an escrow account … such part of the final instalment [of the purchase price] as corresponds to the amount necessary to remedy the Outstanding Items (based on the *bona fide* market price prevailing in Northern Europe for the quality of workmanship required pursuant to this agreement) (the 'Retained Amount'). Should the Retained Amount exceed the amount payable … on delivery, the Builder shall pay the difference to the Escrow Agent upon delivery..."

6 Thirdly, "…Upon rectification of any Outstanding Item, that part of the Retained Amount which relates to such Outstanding Item shall be released from the Escrow Account to the Builder".

7 However, fourthly:

> "If despite the Builder having taken all reasonable but commercially prudent steps to perform its obligations pursuant to Clause 9.2, any Outstanding Item has not been rectified by the end of the Warranty Period, the Purchaser shall be entitled to receive such part of the Retained Amount that pertains to the relevant Outstanding Item."

8 Clauses 9.2 and 9.3 contemplated that on delivery a list of Outstanding Items would be attached to the Protocol of Delivery and Acceptance to which those clauses would then apply. However, by agreement between the parties, delivery of the Yacht was in fact effected pursuant to a separate instrument called "Addendum 6 to the YCA", and without any such list. A dispute arose in relation to the validity of Addendum 6, and the consequences of delivery thereunder which the Tribunal dealt with in its third award.

9 In that award the Tribunal held that notwithstanding the fact that the Yacht had been delivered with a clean Protocol of Delivery and Acceptance as stipulated by Addendum 6, the parties were obliged to prepare a list of Outstanding Items identifying Defects identified prior to delivery. Insofar as there was any dispute as to whether a matter was a Defect, the Tribunal would determine that dispute, and if a matter was held to be a Defect it would be added to the list of Outstanding Items. The Builder was obliged to rectify those Outstanding Items in accordance with Clause 9.2.2. Any dispute as to the calculation of the Retained Amount was to be determined by an Independent Expert. That was a reference to the last part of Clause 9.3 to which I will come.

10 Before the delivery of the Yacht, a dispute had already arisen between the parties in relation to the Yacht's draught and lightship weight. In the present case the Purchaser's complaint was, and is, that the Yacht is too light. The objection is, or at least includes, that because of her lack of weight a portion of the Yacht's bulbous bow which is intended to sit below the water line in fact shows above it, which is unsightly.

11 The Purchaser's original position was that the Defect in relation to the draught and lightship weight justified it in refusing to take delivery of the Yacht. However, by the time of the hearing in relation to those Defects in early February 2017, the Yacht had in fact been delivered. The Tribunal issued its award in relation to the draught and lightship weight issues on 13th June 2017. It held that there were indeed Defects in the Yacht as regards her lightship weight and draught. She was too light, and not able to meet her design draught of 8 metres at level trim.

12 It followed that in view of the findings in the third award described above it was necessary, if the method and cost of rectification of those Defects could not be agreed, for there to be a referral to the Independent Expert.

13 At this point it is necessary to refer to the terms of the two clauses in the YCA which are of most relevance to the present application. They are Clauses 9.3 and 22.2.1(b). Clause 9.3 makes specific provision for a referral to an Independent Expert. It states:

> "In case of dispute between the Parties about the calculation of the Retained Amount and/or about rectification of Outstanding Items, the Independent Expert shall make a final and binding determination thereon."

14 The Independent Expert is defined in Clause 1.1 as "A suitably qualified expert appointed in accordance with Clause 22.2.1(b)".

15 Clause 22.2 is headed "Disputes". It provides, so far as material:

22.2.1 If any dispute, controversy or difference shall arise between the Parties out of or in relation to or in connection with this Agreement which cannot be settled by the Parties themselves, it shall be resolved as follows:

(a) any dispute concerning the Yacht's compliance or non-compliance with the rules and regulations of a Regulatory Body shall be referred to the principal or other appointed surveyor of such Regulatory Body (acting as assessor and not as arbitrator), the decision of whom shall be final and binding upon the Parties. If the Regulatory Body declines or fails to appoint a surveyor to act as above or if the surveyor fails to make a determination of disputes referred to him in a period of twenty one (21) days the matter shall be referred for determination in accordance with Sub-clauses (b) or (c) below;

(b) save as provided for in paragraph (a), any dispute relating solely to technical matters concerning the construction, material or quality of work under this Agreement or the Specification as well as any other matters specifically mentioned in this Agreement in this regard shall be referred to a suitably qualified expert who (if the Parties cannot agree on his identity) shall be appointed by the President for the time being of the Royal Institution of Naval Architects, London. Notwithstanding the foregoing, the Parties agree that (i) John Winterbotham and Partners LLP and (ii) Patton Marine, Inc. are the preferred experts. The chosen expert shall act as assessor and not as arbitrator and shall publish his determination of the dispute in writing. Such determination shall include findings as to any required extension of the Target Delivery Date and any increase or decrease of the Contract Price by reason of the dispute and may also include a finding as to payment of costs incurred in the proceedings. For the avoidance of doubt, any determination, if still in dispute, shall be subject to further arbitration;

(c) save as provided for in paragraph (a) and (b) above, all disputes shall be submitted to and settled by arbitration by three (3) arbitrators, one to be chosen by each Party, and the third to be chosen by the two arbitrators thus chosen. Such arbitration shall be conducted in London in accordance with the Arbitration Act 1996 or any re-enactment or statutory modification thereof for the time being in force and pursuant to the terms then in force of the London Maritime Arbitrators' Association. The Party requiring arbitration of any dispute, difference or claim as aforesaid shall serve upon the other Party written notice thereof specifying the issues to be arbitrated and the name of the arbitrator it shall have appointed. Within twenty one (21) days after receipt of the notice of such demand for arbitration, the other Party shall in turn appoint an arbitrator and give notice in writing of such an appointment to the party demanding arbitration. If such other Party fails to appoint an arbitrator as aforesaid within twenty one (21) days following receipt of demand for arbitration by the other Party, such other Party shall be deemed to have accepted and appointed as its own arbitrator the arbitrator appointed by the Party demanding arbitration, and the arbitration shall proceed before this sole arbitrator who alone in such event shall constitute the arbitration tribunal. The arbitrator or arbitrators so appointed shall determine which Party, or the proper proportion which each Party shall pay of the expenses and legal and other costs of such arbitration, and the cause and the extent of any adjustment to the Target Delivery Date due to the impact of such dispute, if any. The arbitrational award shall be final and binding on the Parties. The arbitration tribunal shall be instructed by the Parties that its award and reasons are to be kept strictly confidential…"

16 The Independent Expert is Mr David Cannell of David M. Cannell & Associates. He was appointed by agreement between the parties on 4th November 2016 even though at that point no disputes had been referred to him. Following the issue of the fourth award on 14th July 2017 the parties issued the Independent Expert with a joint letter of instruction, which I will call "the Instruction Letter". It stated in paragraph 3 that:

> "Disputes have now arisen between the Parties about the calculations of the Retained Amount and the rectification of Outstanding Items. Accordingly, the Parties would be grateful if you could now make a final and binding determination in respect of those issues, pursuant to Clauses 9.3 and 22.2.1(b) of the YCA."

17 The letter went on to set out the procedure which the parties and the Independent Expert were to follow. Paragraph 13 then stated that, "The determination shall be final and binding".

18 Thereafter, both parties made several proposals, and there were several rounds of submissions to the Independent Expert as to the appropriate method and costs of rectification for Defects. There were significant differences between the parties, including as to the price of rectification of the Defects. One reason for the difference as to price was that the Builder's proposal proceeded on the basis that the fourth award only required the Yacht to meet the 8 metres design draught in her departure condition. The Purchaser on the other hand contended that the proper effect of the fourth award was that the Yacht should be able to meet the 8 metre draught in all loading conditions.

19 The Independent Expert issued his Determination on 22nd March 2018. He found that: firstly, rather than adopting either party's proposal in its entirety as to the type and position of ballast needed to correct the draught, he determined that a mixture of Eurolest in the skeg and lead ingots or shot elsewhere be used. Secondly, he estimated the cost, and thus set the Retained Amount in relation to this Defect, at €895,000. Thirdly, that determination was made upon the express basis that the effect of the fourth award was that the Yacht should meet the 8 metre draught in all loading conditions. And fourthly, the Independent Expert found that the costs of the determination process should be borne as to 60 per cent by the Purchaser and 40 per cent by the Builder.

20 It is now common ground that when assessing the amount of fixed ballast required to rectify the Defect, and to achieve the design draught, the Independent Expert made a mistake. He calculated the ballast required by reference to the Yacht's displacement as envisaged by the YCA at the start of the project, and not by reference to her actual displacement as built. This caused him to underestimate the required ballast to rectify the Defect by approximately 115 tonnes, and accordingly to underestimate the amount of security that the Builder is obliged to provide.

21 There followed correspondence between the parties and the Independent Expert in which the Purchaser invited the Independent Expert to revisit his Determination to correct this mistake, but the Independent Expert declined to do so. As a result the Purchaser served on 25th April 2018 what it described as "the Purchaser's application to review the Determination". At that stage the relief sought from the Tribunal by the Purchaser was not a rehearing of all matters before the Independent Expert, but was "a declaration that the Determination… is not final and binding because it is premised on a manifest error", and an order that the Tribunal "remit the Determination to the Independent Expert for further consideration". The Builder resisted the application thus made on the ground that the Tribunal lacked jurisdiction to intervene.

22 The Purchaser's application was heard by the Tribunal on 4th July 2018, and the sixth award was issued on 23rd August 2018. Its key findings were firstly that the Tribunal did not accept the Builder's contention that it had no jurisdiction. It found that it had jurisdiction to entertain the application which had been made by the Purchaser. Secondly, the Tribunal found that it did not have jurisdiction to remit the matter to the Independent Expert; rather it considered that in the absence of an ad hoc agreement to remit the matter to the Independent Expert, it would rehear the disputed issues.

23 The Builder says that the second of those findings was one which did not accord with the Purchaser's stance going into the hearing in front of the Tribunal, but was essentially suggested by the Tribunal itself.

24 Following the issue of the sixth award on 23rd August 2018, on 5th September 2018 the Purchaser withdrew its offer to enter into an ad hoc agreement to remit the determination back to the Independent Expert. Accordingly, subject to the outcome of this hearing, there will be a hearing in front of the Tribunal next week.

25 Against that background, I turn to consider the Builder's applications to the Court, and first, what it describes as its principal application which is made under s.67 of the Act. As to the applicable principles there is no dispute that an application under s.67 proceeds by way of a full rehearing, not simply by way of a review; and that the Court will not approach it with a preconception that the arbitrators reached the correct conclusion.

26 That does not however mean that the reasoning of the Tribunal can be of no assistance to the Court. As Males J put it in *The Kalisti* [2014] 2 Lloyd's Report 449, "The decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) the reasoning will inform and be of interest to the court".

27 The Builder's primary case on its s.67 application is that the Tribunal had no jurisdiction to rehear, review or otherwise interfere with the Independent Expert's Determination at all. The Builder contends that this is because the determination was one made under Clause 9.3 of the YCA, was "final and binding", and not susceptible to challenge before the Tribunal.

28 The Purchaser's case to the contrary, which prevailed before the Tribunal, is based on the wording of the last sentence of Clause 22.2.1(b), namely, "For the avoidance of doubt any determination that is still in dispute shall be subject to further arbitration".

29 The Builder's first answer to reliance on that provision in clause 22.2.1(b) is that a reference to the Independent Expert under Clause 9.3 of the YCA is not a reference under Clause 22.2.1(b), and therefore not subject to the last sentence of that clause. The basis on which the Builder so contends is that clause 22.2.1(b) states that any dispute relating solely to technical matters concerning the "*construction, material or quality of work under this Agreement or the Specification as well as any other matters specifically mentioned in this Agreement in this regard"* is to be referred to the Independent Expert.

30 The Builder contends that a reference under Clause 9.3 does not relate to "technical matters concerning the construction, material or quality of work under the Agreement or the Specification". It is, says the Builder, not concerned with whether or not there is a Defect or Outstanding Item but arises only once a Defect or Outstanding Item has been agreed to be such, or found by the Tribunal to be such. Once that agreement or finding is made, the referral to the Independent Expert under Clause 9.3 is in respect of the method of rectification of the defect in question, and the cost of rectification.

31 Nor, says the Builder, does a reference under Clause 9.3 relate to any other matters "specifically mentioned in this agreement in this regard". It is right that Clause 9.3 specifically mentions a reference to the Independent Expert, but the Builder says the words "in this regard" only make sense if they refer back to the technical matters concerning the construction, material or quality of work under the Agreement or Specification, and a reference under Clause 9.3 is not such a reference.

32 I do not consider that this argument of the Builder is correct. Even if it is right that the determination of a method of rectification and an assessment of the cost of rectification is not a technical matter concerning the construction, material or quality of work under the Agreement or the Specification, and thus not within the first limb of the Independent Expert's remit as described in the first sentence of clause 22.2.1(b), I consider that it is within the second limb. That is to say it is "another matter specifically mentioned in this Agreement in this regard".

33 As I have said, the Builder contends that this cannot be the case because the words "in this regard" refer back to the first limb and the words "technical matters concerning the construction, material or quality of work under the Agreement or Specification". I do not consider that that is the correct construction of those words. That argument appears to me to overlook the fact that the second limb of the Independent Expert's remit begins with the words "as well as". It is therefore expanding the remit of the Independent Expert beyond the compass of the disputes envisaged by the first limb. The Builder's construction would not give to the second limb any application to matters which were not covered by the first, and would be surplusage.

34 The Builder seeks to say that the reference to "matters specifically mentioned in the agreement in this regard" is explicable and is a reference to clauses 1.3 and 16.3.2 of the YCA. It does not seem to me that this meets the Purchaser's point. Those clauses can undoubtedly be said to refer "technical matters concerning the construction, material or quality of work under the Agreement or the Specification" to the Independent Expert. There would be no need for the second limb to refer only to matters covered by those clauses; they would be covered by the wording of the first limb.

35 In my judgment the correct construction of the second limb is that it is a reference to all cases in which the YCA specifically provides for reference to the Independent Expert, whether or not they concern matters which fall within the category "technical matters concerning the construction, material or quality of work under the Agreement or Specification". A better reading is that the words "in this regard" refer to the regime for referring disputes to the Independent Expert.

36 It is, as I see it, of some significance that an Independent Expert appointed to make a Determination under Clause 9.3 will have been appointed in accordance with clause 22.2.1(b), as is plain from the terms of the definition of Independent Expert, and of the use of that term in Clause 9.3 itself. It appears to me to be a perfectly natural way to refer to a dispute which gives rise to the need for a Determination under Clause 9.3 as being an "other matter" specifically mentioned in this agreement in this regard, where "this regard" means the regime established by clause 22.2.1(b), and where an Independent Expert appointed to determine an issue under clause 9.3 is appointed under, and in accordance with, clause 22.2.1(b) as well.

37 Furthermore, I do not consider that the Builder's construction gains any assistance from the fact that in Clause 22.2.1(b) it is provided that, "Such determination shall include findings as

to any required extension of the Target Delivery Date, and any increase or decrease of the Contract Price by reason of the dispute". The Builder's contention here is that a determination of the method and cost for rectification of a Defect will never require an adjustment to the Target Delivery Date or to the Contract Price, and that accordingly Clause 22.2.1(b) is not concerned with that species of determination. The clause however does not state that the determination will always include adjustments to the Target Delivery Date or to the Contract Price, rather it provides that it will include "any" required adjustment. To the extent that an adjustment is not required, it may be omitted.

38 The Builder's second argument to the effect that the Tribunal had no jurisdiction at all to interfere with the Independent Expert's determination, if the first is wrong, is that the "final and binding" wording in Clause 9.3 has the result that even if Clause 9.3 determinations do fall within Clause 22.2.1(b), the last sentence of Clause 22.2.1(b) is disapplied. There is no "subject to further arbitration" in the case of a Clause 9.3 determination. The Builder contends that to hold otherwise gives no effect to the "final and binding" wording which appears in Clause 9.3 but not in other clauses relating to the Independent Expert; and that its construction is borne out by the fact that where similar wording is used in Clause 22.2.1(a), which is concerned with a dispute between the Builder and the Purchaser as to whether the Yacht complies with the rules of a regulatory body, that dispute is to be referred to a surveyor appointed by that regulatory body whose determination is to be "final and binding" upon the parties. The Builder points out that it is common ground that there is no right of recourse to the Tribunal in relation to a decision by such a person.

39 In my judgment that argument places more weight on the “final and binding” wording in Clause 9.3 than it can bear. The provision that a determination is "final and binding" does not necessarily exclude the possibility of oversight. Thus Clause 22.2.1(c) of the YCA also provides that the Tribunal's decision on any matter referred to it is to be "final and binding" on the parties. That does not exclude the supervisory jurisdiction of the court. Similarly in my judgment the provision in Clause 9.3 that the determination of the Independent Expert is to be "final and binding" does not exclude oversight if it is provided for elsewhere. It is provided for elsewhere, namely in the last sentence of Clause 22.2.1(b), which applies to any determination by the Independent Expert including, as I have held, a determination under Clause 9.3.

40 Furthermore, I consider that the words at the beginning of the last sentence of Clause 22.2.1(b), "For the avoidance of doubt" are there to make it clear that there is to be further arbitration notwithstanding any provisions of the YCA which might perhaps suggest otherwise. They therefore show that the last sentence prevails over the "final and binding" provision in Clause 9.3 even if it might otherwise have been regarded as inconsistent with further arbitration.

41 This, as Mr Casey effectively recognised, means that the "final and binding" wording in Clause 9.3 does not achieve much. It does emphasise, as he says, that the determination of the Independent Expert is binding on the parties, and that they can act upon it unless and until it is disputed in an arbitration. More generally however it bears remarking that these words appear in Clause 9.3 and do not appear in Clauses 1.3 or 16.3.2. It did not seem to me that there was any very obvious reason why the parties would have wished an expert determination under Clause 9.3 to be more final and binding and not susceptible to arbitration than one under Clause 16.3.2, yet the Builder accepts that a determination pursuant to Clause 16.3.2 will indeed be susceptible to further arbitration.

42 The correct inference from this, in my judgment, is that it is the last sentence of Clause 22.2.1(b) which was intended in this regard to be the governing clause, and the parties considered that there was a consistent regime across the various determinations by the Independent Expert by reason of the inclusion of that clause.

43 The third argument which the Builder makes to the effect that the Tribunal had no jurisdiction at all to interfere with the Independent Expert's determination is to say that even if the supervisory jurisdiction of the Tribunal is not ousted by Clause 9.3 of the YCA, it is in effect ousted by the Letter of Appointment which, as I have said, provides at paragraph 13 that, "The Determination shall be final and binding". I do not consider that this argument succeeds either. Its premise is that the words "final and binding" in Clause 9.3 do not oust the supervisory jurisdiction of the Tribunal but that they do when used in the Letter of Appointment: I do not see how this can be so. All that the Letter of Appointment does is to echo the language of the YCA. It is not, in my judgment, purporting to vary the rights of the parties under the YCA.

44 Furthermore the letter of appointment states that the appointment is pursuant to Clause 9.3 and Clause 22.2.1(b). It therefore expressly preserves the supervisory jurisdiction of the Tribunal, as provided for in the latter clause, as I have found it to be.

45 The Builder makes an alternative case to the effect that if the Tribunal did have jurisdiction to intervene in relation to the Determination of the Independent Expert, by reason of the last sentence of Clause 22.2.1(b) of the YCA, its jurisdiction was nevertheless more limited than it has found it to be. This depends on the meaning of the words "subject to further arbitration". The Builder says that they are unclear, and that it is for the Court to decide whether they imply the possibility of a full rehearing or a more limited review. As to this, the Builder suggests that a full rehearing on all Independent Expert Determinations is unlikely to have been what the parties intended. It is said that that would make the Independent Expert effectively redundant as simply adding an extra layer of complexity and cost, and in relation to technical matters it would entail the substitution of the views of the less technically qualified Tribunal for those of the technically qualified Independent Expert on technical matters.

46 It is usual, the Builder says, for Independent Expert determination clauses to admit of intervention by the court in limited circumstances only, and against that background the Builder submits that the words "subject to further arbitration" must have been intended to connote only a limited review power, enabling the Tribunal to intervene only to review cases where (a) the Independent Expert's Determination is tainted by fraud or collusion; (b) where he has answered the wrong question; (c) where he has departed from his instructions in a material respect; or (d) where he has misinterpreted the contract from which his authority is derived. In the alternative, the Builder submits that the Tribunal's review power extends, in addition to cases (a) to (d), to cases where the Independent Expert has made a manifest error. The Builder's submission is that in any case the Tribunal has power only to review and correct the relevant error and to remit the Determination back to the Independent Expert rather than to substitute its own view.

47 The difficulty with the Builder's submission here is that it is not supported by anything in the unusual terms of the last sentence of Clause 22.2.1(b). That sentence submits, "Any determination, if still in dispute, to further arbitration". The reference to "any" determination is wide, and does not indicate that it is only some determinations which will be subject to further arbitration. Furthermore, the reference to "still in dispute" is of significance. That indicates that the dispute is one which still exists, in other words it is a

reference to a dispute which predated the determination but which is still in issue, rather than being confined to a dispute arising out of the determination itself.

48 Furthermore the clause does not suggest that the further arbitration will result in remission. On the contrary, it implies that the matter will be resolved by the further arbitration. This is also supported by the fact that the reference to further arbitration must be to an arbitration under Clause 22.2.1(c). That refers to all disputes being submitted to "and settled by" the Tribunal of three. It does not envisage that there will be a remission of some disputes referred to the Tribunal back to the Independent Expert or anyone else. On the contrary, it envisages that the disputes will be settled by the Tribunal.

49 I have therefore concluded that the clause permits for a full hearing before the Tribunal of the matters which are subject to the Determination which are still in dispute. This conclusion accords with that of the Tribunal in paragraph 27 of the sixth award, which I have found cogent on this point.

50 The Builder contends that there is a further point which it says arises if the Court finds, as I have, that the Tribunal had jurisdiction to entertain the Purchaser's application to it, and that the Tribunal can rehear all matters arising out of the Determination which are in dispute.

51 What the Builder says is that there was a dispute between the parties canvassed before the Independent Expert as to whether the effect of the fourth award was that the Yacht had to meet an 8 metre draught in all loading conditions or only in her departure condition. As I said, the Independent Expert concluded that the former interpretation was correct. The Builder says that it did not challenge that conclusion, but it says that if the matter is to be dealt with afresh by the Tribunal, then the position will be different. It says however that the Tribunal has already by the sixth award and paragraphs 31 to 36 purported to find that the fourth award required the Yacht to meet the 8 metre draught in all loading conditions. The Builder says that it is to be inferred that the Tribunal will proceed on that basis when considering the Purchaser's application to redetermine all those matters considered in the Determination. The Builder says, however, that what the fourth award says is what the fourth award says, and it is not open for the Tribunal to interpret it to mean something else.

52 The Builder referred me to *Hashwani v Jivraj* [2015] EWHC 998 (Comm) per Walker J at paragraph 92. The Builder says that two paragraphs in the fourth award on an ordinary reading indicate that what was found was that the Yacht had to meet an 8 metre draught in her departure condition only. The Builder refers to paragraphs 47 and 37 of the fourth award. It submits that it is not open to the Tribunal now to take a different view. The Builder says that, if that is right, then in fact the Determination method laid down by the Independent Expert, if adopted, will rectify the Defect because it will mean that the Yacht achieves an 8 metre draught in her departure condition and other, but not all, loading cases; and so there is no basis for interfering with it.

53 The Builder says that this is a matter which goes to the substantive jurisdiction of the Tribunal as it concerns the Tribunal's authority to make further findings. It says that the Tribunal cannot make findings that are not consistent with the fourth award, it has no jurisdiction to do so.

54 I doubt that this issue does go to the question of the Tribunal's jurisdiction to make the sixth award. What was actually the subject of that award, as a matter of decision, and as set out on pages 15 to 16 of the award, was that the Tribunal had jurisdiction to hear the Purchaser's application to review the Independent Expert's Determination, and did not have

jurisdiction to remit it. What was said about the fourth award was to assist the Independent Expert in the event of a remission, which will not now occur. Insofar as the Builder is contending that the Tribunal exceeded its jurisdiction by including paragraphs in the reasons for its award, which interpreted its fourth award, it appears to me that that is not an issue which goes to jurisdiction.

55 Even if that is wrong, however, I consider that the Tribunal's finding in the fourth award that the Yacht was to be able to meet her design draught was not limited to a particular condition. Paragraph 47 was not seeking to define the circumstances in which the Yacht should be able to meet her design draught, but was instead seeking to identify the most significant consequence of the failure to achieve the required lightship weight and draught. The Defect actually found by the Tribunal is set out on p.21 of the fourth award, namely that the Yacht was not able to reach her design draught at level trim, and that was not limited to one condition. Furthermore, I consider that the Tribunal's analysis of the effect of the fourth award given in paragraphs 31 to 36 of its sixth award, while not binding on me, is cogent and persuasive. I agree with it. On that basis, the Tribunal was not in the sixth award doing more than abiding by the fourth award.

56 I now turn to the Builder's s.68 challenge. As I have said, the Builder's primary case was that the matters which it raises, and which I have addressed, go to jurisdiction, and are thus susceptible to a s.67 challenge. However it makes an alternative case that, insofar as any part of its arguments do not go to jurisdiction, the Tribunal exceeded its powers, and that this is a serious irregularity within s.68(2)(b) of the Act. In particular, the Builder raises this challenge to deal with the situation where the court considers that the Tribunal did have jurisdiction to intervene in the determination, and that the findings relating to the fourth award do not go to jurisdiction.

57 That, as I have explained, I do regard to be the case. The Builder contends, in that situation, that the Tribunal nevertheless exceeded its powers because it was not permitted either to interpret or to add to its fourth award, and that substantial injustice has thereby been caused to the Builder. I reject that argument and this application for the reasons I have already given. The fourth award did not find that the design draft had to be met in the Yacht's departure condition only. The Tribunal has not exceeded its powers by interpreting the fourth award as saying that it made no such finding, and there is no substantial injustice in its having done so. For those reasons these applications are dismissed.

CERTIFICATE

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