



Neutral Citation Number: [2020] EWHC 2270 (Comm)

Case No: CL-2019-000741

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/08/2020

Before :

SIR ROSS CRANSTON SITTING AS A JUDGE OF THE HIGH COURT

Between :

ASA
- and -
TL
- and -
Ms Clare Ambrose

Claimant

Defendants

Paul Key QC & Benedict Tompkins (Instructed by Macfarlanes LLP) for the Claimant
Neil Hart (Instructed by Charles Russell Speechlys LLP) for the First Defendant

Hearing dates: 22 July 2020
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Approved Judgment

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Sir Ross Cranston

“Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:00 AM on 20 August 2020.”

SIR ROSS CRANSTON :

Introduction

1. This is an application under section 68 of the Arbitration Act 1996 (“the 1996 Act”). The charterer of a vessel contends that there was serious irregularity within the meaning of section 68(2)(a) in the way the sole arbitrator, Ms Clare Ambrose, dealt with two issues in the arbitration. The crux of its complaint is that she decided the two issues on the basis of points which it did not have a fair opportunity to deal with because they were not put forward by either party or their experts, and as well departed from common ground. Ms Ambrose took no part in the proceedings.

Background facts

2. The claimant charterer, ASA, was a company registered in Switzerland, with a focus on West Africa and on moving cargo for the on-shore and off-shore oil industry (“the charterer”). At the relevant time the charterer’s shares were held by Messrs RT (70 percent) and AV (30 percent). The charterer had a number of so-called managers, including RT and AV. The company was part of a larger group, controlled by RT, with associated entities in other parts of Africa.
3. In 2005 a landing craft/general cargo vessel was acquired for US \$1million. for ASA’s operations in West Africa (“the vessel”). A company, the defendant TL, was registered in the Isle of Man to be the vessel’s owner (“the owner”). TL’s shares were held by RT (40 percent), AV (40 percent) and two of the other managers.
4. In the ship’s particulars, prepared by the managers, the vessel was described as a landing craft/deck cargo vessel, built in China. The class society was named as Bureau Veritas, there was a class ID number, and the class notation was given as “+A1 +AMS”. Later the IHS Sea Web database gave the vessel’s description as a landing craft. Under “class history” the Sea Web database listed Bureau Veritas for June 2010 (“in class”). Under the heading “cargo overview”, there was a “0” alongside “liquid”. There were no details for the vessel’s tanks.
5. By a charter party on Supplytime 89 terms, the owner chartered the vessel to the charterer in December 2005 for a term of three years, with the charterer having an option for a one year extension (“the 2005 charter”). The hire rate was US\$ 3,250 per day. The area of operation was identified as West Africa.
6. Between 9 September 2008 and 31 January 2009, the vessel was mainly in dry dock. The process was more expensive than anticipated and repair costs were US\$1,314,845. The vessel returned to service in early February 2009.
7. The parties purported to enter a further charter party dated 1 February 2009, but entered somewhat later, again on the Supplytime 1989 form (“the 2009 charter”). It was for a period of 3 years, extendable for a further year at the charterer’s option. The hire rate was US\$ 6,500 per day. Although the charter was signed by the owner, it was never signed by the charterer.
8. There was a valuation of the vessel by Bayside in June 2009 at US\$1 million.

9. In 2012 there was a falling out between RT and AV, and RT dismissed AV from his position in the charterer. On 23 September 2013 the vessel was sold for US\$380,000. The following month it was redelivered under the 2009 charter. In November 2013 RT died. In mid-July 2014 AV sold his shareholding in the charterer for US\$380,000 to a company majority-owned by RT's family.
10. In an email to the owner dated 8 September 2015, the charterer asserted that a discount rate of US\$1,000 per day was applicable to the 2009 charter, such that a credit of US\$1,765,000 was owing to it.

Arbitration launched

11. On 13 March 2017 the owner issued a notice commencing arbitration notifying the charterer that it would seek a declaration that no discount rate was agreed in respect of the 2009 charter and that, accordingly, no sum was due to the charterer by way of reimbursement against the sums paid under that charter.
12. In June 2017 the shares in the charterer were sold to a third party.
13. The charterer served its defence and counterclaim to the owner's notice in early February 2018. In its counterclaim it sought a final award ordering that the owner should pay it US\$4,303,000. That was on the basis of overcharged hire of US\$3,250 for 1,324 days (3 years plus 228 days). The charterer's pleaded case was that the market rate of hire for chartering from 2009 should have been at the rate of US\$3,250 per day – the rate in the 2005 charter - not the US\$6,500 per day contained in the 2009 document.
14. The charterer's counterclaim was founded on a breach of fiduciary duty by the managers in acting for both owner and charterer in fixing the 2009 hire rate. The charterer consequently claimed (i) unjust enrichment - the 2009 charter party was void and that the owner had been unjustly enriched at its expense by payments whereby the hire paid from 2009 exceeded the market rate; (ii) knowing receipt - the owner held the amount of excessive hire on constructive trust as the proceeds of a breach of fiduciary duty; and (iii) dishonest assistance – that amount was held as a result of the owner's dishonesty assisting a breach of fiduciary duty owed to the charterer. The dishonesty of the managers was attributable to the owner.
15. In outline, the owner's case in the amended reply and defence to the counterclaim was that the 2009 rate of hire was the market rate since the vessel could and did carry marine gas oil ("MGO") cargoes. Its defences to the charterer's counterclaim were (i) estoppel by convention (since the charterer had proceeded with the hiring arrangements from 2009 for over three years) and (ii) the time bar arising from the Limitation Act 1980.

The expert reports on market charter rates

16. For the purposes of the arbitration, there were expert reports on market charter rates for the vessel at the relevant time. In her first report of February 2018 the expert for the charterer, JR, described the vessel as a landing craft/general cargo vessel. JR went on to assess the market rate of hire by considering comparable vessels. JR's conclusion was that the market rate for hire was US\$3,500 per day. JR appended to

the report the ship's particulars, referred to earlier, which had been prepared by the managers.

17. The expert for the owner, ML, described the vessel in his first report of November 2018 in the same terms as JR, in other words, a landing craft/ general cargo vessel. ML added that it could carry petroleum products in fairly decent quantities, about 600MT per trip. For the purposes of valuation ML referred to tanker indices and to vessels with fuel carrying capacity. ML concluded that the market rate for hire was US\$6,500 per day.
18. In a supplementary report of January 2019, JR commented on the notion that the vessel would attract a higher rate of hire because it could transport oil. JR said:

“There is no evidence, that I am able to see, that this would be the case since there is nothing in the vessel description which suggests any liquid cargo tank capability.”

JR appended to this report the data published by IHS Sea-Web, referred to earlier.

19. There was a supplementary report by ML in July 2019. ML stated that if it were correct that the vessel had the capacity to act as a short sea tanker carrying gasoil cargoes of around 600MT, any valuation of the vessel should take that into account.

The Award

20. A sole arbitrator was appointed. There was a four-day hearing and she issued her Award.
21. After setting out the procedural background, a summary of the claims and issues and the factual background, the arbitrator proceeded to her findings. In a general introduction to these she explained that the foundation of the charterer's claims was that the managers concluded the 2009 charter party in breach of fiduciary duty, as a result of which the owner wrongly received hire for chartering the vessel above the market rate.
22. The central legal disputes, she continued, were the effect of the 2009 charter (in particular, whether it was binding) and the payments made under it. The central factual disputes were whether the managers had acted dishonestly and whether the hire agreed was above the market rate as at 1 February 2009.
23. As to the 2009 charter, the arbitrator found that the parties had agreed to enter it on the same terms as the 2005 charter, but with a hire rate of US\$6,500 per day. There had already been discussions dating back to late 2007 where it was agreed to increase the hire rate, the arbitrator said, but the catalyst for firm action to agree a new charter with a higher rate was the unexpected level of dry dock costs following the vessel's return to service around 6 February 2009.
24. After some discussion of quantum, the arbitrator turned to the 11 issues the parties had identified.
25. *Issue 1* was the market rate of hire for the vessel as at 1 February 2009. The arbitrator noted that in this regard the charterer had identified four important aspects in dispute:

the effect of the 2008 financial crisis on the relevant charter market in West Africa, whether a premium was payable in the region, whether the vessel should be valued as a tanker, and whether the Bayside valuation of US\$1 million in June 2009 was the best evidence of the market rate of hire: paragraph [61] of the Award.

26. The arbitrator added in paragraph 62 that in closing submissions the parties had raised further matters relating to Issue 1: (i) was the vessel in class to carry MGO; (ii) were other vessels identified by the experts useful comparators given its unusual nature, and how did it compare to them; and (iii) what were the vessel's key characteristics.
27. After setting out the common ground between the parties on what she described as important basic aspects of the evidence, the arbitrator summarised at paragraph [64] the evidence of JR, the charterer's expert on market rates. She then added that in JR's oral evidence, JR had indicated

“that there was nothing in the evidence to suggest that the vessel was in class to carry MGO. [JR] indicated that [JR] had had a conversation with one of American Bureau of Shipping (“ABS”) surveyors in Greece who said that as far as he could see the vessel was not classified to carry hazardous cargoes”: [65]

28. The arbitrator then summarised ML's expert evidence for the owner: [66].
29. The arbitrator stated that both market experts had very impressive experience and had given their evidence honestly and even-handedly, but that ML's experience was more helpful on the question of the market rate because ML had more specific experience of the market in West Africa and had better market data for that region: [67]-[68]. In her view JR's approach failed to reflect the West African market and the unusual nature of the vessel, which could carry parcels of MGO, a valuable feature for trading in the West African offshore industry: [69]. The arbitrator then said:

“70. [The charterer] raised an issue as to whether the vessel was in class to carry MGO. This issue had not been clearly raised prior to the hearing. A vessel's class for specific operations is a technical question with serious consequences. It was not a matter within the expertise of the market experts and their opinion on it was of limited relevance.

71. [JR] accepted that the vessel had an unusually high fuel oil carrying capacity (around 720mt) for her size. In early February 2009 she had just come out of dry dock and the ABC report issued in May 2009 made clear that her fuel tanks were now suitable for carrying marine gas oil. AV gave evidence that she had been used to carry parcels of around 600mt of MGO bunkers in West Africa for ENI under the 2009 Charter and such business was very profitable in West Africa where logistical difficulties meant it was useful. It was not alleged that this trade was illegal.

72. I take into account that the Bayside valuations did not treat the vessel as a tanker or having fuel carrying capacity, and this was surprising since Bayside would have ordinarily noted this feature. I also note that the SeaWeb data did not mention her as an oil carrier and she did not have an oil carrier class notation. However, the Bayside valuation involved a relatively cursory investigation and the information relied upon did not rebut the evidence that she had actually been

offered and used for carrying MGO parcels in 2009. The absence of a class notation as an oil carrier was unsurprising and a neutral factor since on the class information available the oil carrier notation would only be available for a vessel designed primarily to carry oil. Accordingly, I accept that the vessel could have been marketed and used to carry parcels of MGO and this would have been a valuable feature for operators in the West African market. [The charterer] failed to show that the vessel was not in class for the carriage of MGO that took place.”

30. In the following paragraphs the arbitrator referred to the charter rates for comparable vessels, underlined the vessel’s niche characteristics, and concluded that despite the 2008 global financial crisis the West African market had not fallen in early or mid-2009. She added:

“75. ML was frank in accepting that the vessel’s market rate was as high as US\$6,500 because of her ability to carry parcels of MGO. I accept that this feature would have made her significantly more valuable for chartering. This meant that her market rate was substantially higher than [two comparable vessels]. This supported the conclusion that US\$3,250 per day did not reflect what she could achieve on the market.

76. The attempt to fix a single figure as representing the market rate for this vessel cannot be treated as a precise science...I note that [the charterer’s] pleaded case was that the market rate was no more than US\$3,250 and it was part of [its] case that there will be a market range since they put this case to [ML].

77. I am asked to identify a precise market rate and I accept ML’s assessment of the relevant market conditions and find that the market rate for this vessel at 1 February 2009 was US\$6,500 per day.”

31. *Issues 2-5* went to the validity of the 2009 charter. It was common ground that under Swiss Law the managers were acting in breach of their duty to avoid a conflict of interest when they acted for both the owner and charterer, but in light of their common ownership at the time the arbitrator held that the charterer had ratified the breach as a matter of Swiss law. However, she went on to hold that the 2009 charter party was void under Swiss law because it was not in writing signed by both sides.
32. Turning to the charterer’s arguments on unjust enrichment, *Issue 7*, the arbitrator concluded that consideration for the 2009 contract had not failed completely because the charterer had had the benefit of performance through service of the vessel for its entire duration. Further, hire payments had not been made under an operative mistake of fact or law because the owner and charterer were not concerned whether there was a valid and binding contract between them. The unjust enrichment claim failed.
33. As regards *Issue 8*, the knowing receipt counterclaim, the arbitrator held that the knowledge of AV was attributable to the owner. He and the other managers had management and control of decisions relating to the charter. However AV, and accordingly the owner, did not know that the 2009 charter was concluded in breach of fiduciary duty under Swiss law. Thus the owner did not accept the charter payments knowing, wilfully overlooking, or deliberately failing to make enquiries as to the possibility of that breach. The owner was not at fault in receiving hire payments such

as to make it unconscionable for it to retain their benefit. The knowing receipt claim therefore failed.

34. As to *Issue 9*, the dishonest assistance counterclaim, the arbitrator cited the test for dishonesty contained in *Ivey v Genting Casinos (UK) t/a Crockfords* [2017] UKSC 67, [2018] AC 391, [74]: the fact-finder must first ascertain (subjectively) the actual state of the individual's mind as to knowledge or belief as to the facts, and then decide whether their conduct was dishonest by applying the (objective) standards of ordinary decent people. The arbitrator held that the charterer had failed to establish the requisite dishonesty of the owner for a dishonest assistance claim.
35. The arbitrator's reasoning was that, as she had already held, the managers' actions (including AV's) were attributable to the owner. As to AV, many of the criticisms of him were either overstated, unfounded or of limited weight in establishing the alleged dishonesty: [146]. In relation to the costs of dry-docking in 2009, the arbitrator said:

“147. Significant criticism was placed on AV having lied in evidence about a shareholders' loan of US\$1.2m to cover the cost of the dry docking in 2008/2009 and that this was inconsistent with his statement that [the charterer] had paid for the dry dock works through the hire increases since otherwise [it] or its shareholders would have had to pay for them separately in cash. I do not accept that this evidence regarding these costs showed dishonesty. [AV]'s evidence of a shareholders' loan reflected the commercial reality even if there was no loan documentation

(a) There was limited evidence to show the precise source of payments for the dry dock repairs. However, it was clear that the dry dock's charges had been paid for (in whole or part) in order for the Vessel to leave dry dock and re-start trading (this is invariable practice and reflected [AV]'s evidence and also correspondence of 18 March 2009 showing that US\$ 738,994 had been paid by [the owner] by that stage).

(b) There was no contemporaneous evidence to support [the charterer's] case that it provided the funds at the time. The main evidence [the charterer] put forward were some [owner] accounts produced by auditors in around November 2012.

(c) The contemporaneous documents suggested that the funds used to pay for the dry dock in 2008/2009 had been advanced by way of loan from funds that [AV] and [RT] controlled. This was consistent with the 2012 accounts and also the contemporaneous documents from 2009, including [RT]'s expression of anger at the cost of the dry dock, and the fact that 'the loss regularisation project' proposed on 27 July 2009 gave credit to various... agencies... that were controlled by [RT] and [AV].

(d) The funds used to pay for the dry dock had been made available as a loan, not a gift (whether under [the charterer's] or [AV]'s explanation). From [RT] and [AV]'s point of view it may not have made much difference whether the funds were treated as coming from [the charterer] or its shareholders as they were [the charterer]'s owners.”

36. The arbitrator then explained at some length, and by reference to the contemporaneous correspondence, why in her view the arrangements for the charterer paying the dock charges through increased hire were commercially realistic, were in the charterer's interests as well as the owner's, and did not exhibit dishonesty: [148]-[155]. As she summarised:

“156. [RT] and [AV]'s decision to raise charter rates in 2009 enabled the owner to cover the cost of the dry dock over the following couple of years, and [the charterer] to continue using the vessel for [its] business in West Africa. It was made believing it was in the commercial interests of both companies. The managers' dominant purpose for concluding the 2009 Charter at the rate of US\$6,500 per month was not to enrich themselves or to reverse [the owner]'s losses. I do not find that these actions were dishonest by decent and ordinary standards.”

37. For completeness, and although given her other findings it was unnecessary, the arbitrator also considered *Issue 10* and determined that the owner was estopped from contending that the 2009 charter was void. With *Issue 11* she concluded that the counterclaims were in the main time-barred under the Limitation Act 1980.

The law

38. Section 68(1) enables an award to be challenged on the ground of serious irregularity affecting the tribunal, the proceedings or the award. Section 68 (2) provides that a serious irregularity is one in which the court considers has caused or will cause substantial injustice to the applicant by (a) failure by the tribunal to comply with its duty under section 33 of the Act. Section 33(1)(a) obliges the tribunal to act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent.
39. The principles applicable to a section 68 challenge of the kind in issue in this case were recently summarised by Carr J in *Obrascon Huarte Lain SA v. Qatar Foundation for Education, Science & Community Development* [2019] EWHC 2539 (Comm), [2019] 2 Lloyd's Rep 559:

“45. Determining whether or not the duty of fairness has been breached will always be a question of fact and sometimes degree. However, the relevant broad legal principles are uncontroversial and can be summarised for present purposes as follows:

- (i) There will generally be a breach of section 33 of the Act where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. It is not right that a 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 the decision against him.
- (ii) If a tribunal considers that the parties have missed the point and/or contemplates a completely different basis for a decision, the parties need to be given notice and a proper opportunity to consider the position and respond. This does not mean that every nuance or inference which the

tribunal wishes to draw needs to be put to the parties if it differs from that which has been precisely contended for in the arbitration.

...

(v) In determining whether there has been substantial injustice, the applicant does not need to show that the result would necessarily or even probably have been different. He simply has to show that the tribunal might well have reached a different view and produced a significantly different outcome. It is enough for the applicant to show that the arbitrator reached a conclusion unfavourable to him which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is reasonably arguable.”

Ground 1: market rate of hire; valuation and class

The charterer's case

40. The first irregularity the charterer identified causing it substantial injustice occurred in the context of the arbitrator's determination that the hire of US\$6,500 per day for the 2009 charter was the market rate. Its expert, JR, valued the hire on the basis that the vessel was a general cargo vessel and not a tanker (which would have attracted a higher rate) by reference to published information for the vessel. That did not include a tanker class notation. In the charterer's submission an important live issue in the arbitration was whether, when determining the market rate of hire for the vessel, it should be valued as a tanker, since it was common ground between the parties' valuation experts that if the vessel was not permitted to carry MGO the market rate of hire would be considerably less than the rate for the 2009 charter.
41. The arbitrator's error, the charterer contended, was that she decided the issue on her own reading of the class documentation. Her decision on the market rate of hire appeared to have been based on the finding at paragraph [72] of the Award that, although there was no evidence that the vessel had the class notation to act as an oil tanker, that was “unsurprising” since the class information available indicated that such a notation would only be available for a vessel primarily designed to carry oil. Because there was nothing in the ship particulars or the IHS Sea Web data on this, the charterer submitted that the arbitrator had had to create this evidence herself. It was not evidence, argument or analysis which either party had advanced, nor was it raised by the arbitrator with them or their experts.
42. Rather, JR, the charterer's expert, had given unchallenged evidence that the publicly available documents supported the conclusion that the vessel should not be valued as one having the capability to carry MGO cargoes or otherwise as having a tank cargo-carrying capability. The arbitrator had reached her decision on the basis of her own opinion of the class documentation without inviting submissions. She used it to suggest that the class information available indicated that class notation to carry oil would only be available for a vessel primarily designed to carry oil.
43. Moreover, the charterer contended, the arbitrator was wrong in including in her determination of market value whether the vessel was in fact in class for the carriage of MGO, which was not an issue before her and which the charterer did not have a

fair opportunity to address. What the arbitrator seemed to be doing, submitted the charterer, was to identify as the issue whether the vessel had the physical capacity to meet a classification society's rules. In paragraph [70] she had said that a vessel's class for specific operations was a technical question with serious consequences, but it was not a matter within the expertise of the market experts and their opinion on it was of limited relevance. To the contrary, submitted the charterer, JR had expertise but was never asked. The irregularity in the arbitration was compounded because from paragraph [72] of the Award it was clear that the arbitrator placed the burden of proof upon the charterer, which she held it had not discharged.

Class notation before the arbitrator

44. It is instructive to consider how the issue of class notation arose in the arbitration.
45. It will be recalled that at the start of the hearing the parties were agreed on a list of 11 issues. Issue 1 was: "What was the market rate of hire for the [the vessel] as at 1 February 2009?" In its skeleton argument for the hearing, the charterer referred to whether the vessel should be valued as a tanker as an issue going to valuation for the purposes of identifying the market rate of hire. It added that upon conducting a review of the vessel's certification from the relevant time, its description and the valuations prepared in 2009 and 2012 its expert, JR, was of the opinion that it was not in class to act as a tanker (and thus was not permitted to do so) and there was no evidence that it had such a capacity.
46. Neither party made reference to vessel class in their opening oral submissions.
47. In the course of cross-examination, JR was asked whether the vessel was capable of carrying fuel cargoes of up to 720MT. She replied that she had absolutely no doubt that it did carry fuel cargoes, but it was not described in any of the documents as having tank cargo-carrying capability and was classified as something quite different. Counsel for the owner summed up this part of the cross-examination as follows: "So I think in fact we are agreed that [the vessel] did do so and therefore she could do so, but query whether she should do so." To this JR replied: "Correct."
48. A little later JR was asked in cross-examination about the chance that the vessel was designed with big fuel tanks with the intention that it could be a fuel tank carrying vessel. She replied that it was a single hull vessel, and therefore the fact that it had large tank capacity did not designate it, when valuing it, as a short sea tanker. None of the documents, including the ABS surveyor in Greece, described it as such. There was considerable discussion of whether the vessel was in class and able to carry MGO, and at one point JR said: "I have seen nothing to say that she was classed to carry hazardous oil cargo. Later JR summed up her evidence this way:

"[The vessel] is described as a general purpose landing craft and in none of the documents is she described with the capability to act as a short sea tanker, neither is she classed to act as a short sea tanker...At the point where the markets, all the markets were declined, my best approach to the valuation of what this ship could earn does not include a capability to carry oil cargoes where she would not have been in compliance in any event with local regulations."

49. The owner's expert, ML, gave evidence of his expertise from working in the West African market all the time. Those in international markets did not touch vessels not in class, he said, and this vessel must have been in class. ML put it this way:

“I can't believe for one second that ENI with some vetting process would receive cargoes, whatever it is, would even deal with a ship which is not in class. So where is this information that she is not in class, she is not compliant? I don't know where it is coming from.”

ML said that his view turned in part on the consequences of the vessel not being in class, for example, insurance. ML accepted that there were no references to fuel carrying capacity in the publicly available documents relating to the vessel's valuation. Counsel for the charterer asked whether ML agreed that the vessel's class certification was not for a fuel oil carrier vessel. ML answered: “That isn't what I see in the remarks of the class, I would say, yes.”

50. After counsel for the charterer had finished cross examining ML, the arbitrator asked: “Do you know whether these notations are decisive as to the vessel's actual class?” ML expressed a lack of expertise in class notations and declined to offer a view. The arbitrator then referred to an American Bureau of Shipping (“ABS”) guide to class notations, which the charterer had placed in evidence. She observed that the guide suggested that the oil carrier notation would be for a vessel designed and constructed primarily for the transportation of oil. She asked ML, “would you have expected this vessel to have had the oil carrier notation?” Again ML declined to answer through a lack of expertise in class notations. In reply to a further question from the arbitrator about assuming that the vessel was trading lawfully, ML stated: “I am convinced she is trading in line with the law, absolutely convinced.”
51. In his written closing submissions, the charterer's counsel stated as the first critical issue between the experts: “Was the vessel in class to carry MGO?” The submissions said that, as explained by JR, there was nothing in the underlying evidence to suggest that the vessel was in class to carry MGO, and it did not have the relevant class notations to carry MGO.
52. In oral closing, the owner's counsel stated that, contrary to what the charterer had said in its written closing submissions, “the class issue” could not be a critical issue between the experts when neither JR or ML had mentioned it in their expert reports. The arbitrator commented that it was doubtful that the experts could give evidence about the matter. Counsel for the owner replied that it was probably for a naval architect or some such person, rather than a broker.
53. At that point the arbitrator invited the charterer's counsel to address the issue, which he later did. He said that JR had pointed out that there was no evidence in public descriptions of the vessel, contemporaneous documents and so on, that the vessel could carry fuel oil. The arbitrator asked why, if the vessel was said to be trading illegally, had the charterer not made the case and put the issue to AV. Counsel replied that in accordance with JR's evidence, market rate depended on the publicly available descriptions, and that whether the vessel was trading illegally was no more relevant than whether it had a fuel oil business with ENI; rather, valuation depended on the different type of evidence that JR had addressed.

54. In the course of this part of counsel’s submissions, the arbitrator observed that both JR and ML had taken into account what the vessel was doing. Counsel agreed but said that JR had stressed that on the publicly available information the vessel did not have an MGO capability. A little later there was this interchange between the arbitrator and counsel for the charterer:

“Arbitrator: You say it is a critical issue whether [the] vessel was in class and that wasn’t an issue either of these experts were really qualified to form a conclusion on, or asked to, for that matter.

[Counsel]: Well, it may in that case be that the Tribunal simply doesn’t need to decide that issue. The way it actually arose, obviously, for the first time, was in the course of [JR] being cross-examined and so it may be that my written closing overstates that position [that it was a critical issue].”

Discussion

55. The arbitrator made a finding, set out in paragraph 77 of the Award, that the rate of hire under the 2009 Charter was not above the market rate. That was on the basis of evidence that the vessel was significantly more valuable because of its ability to carry parcels of MGO, which it had done, including for one of the oil majors, ENI. The reality was that she found, as she was entitled to, that ML’s experience was more helpful than JR’s regarding market rates for the vessel because ML had more specific experience of the West Africa market as well as better market data on rates for the region.
56. Part of the arbitrator’s reasoning was that, as she expressed it at paragraph 71 of the Award, it had not been alleged that the vessel’s carriage of MGO was illegal. She had raised the issue with the charterer’s counsel in closing submissions, when she had pointed out that he had not advanced a case of illegal trading and the allegation had not been put to AV. Counsel for the charterer had replied that whether or not the vessel was trading illegally was not relevant to valuation. As mentioned earlier in the judgment, ML was emphatic in oral evidence that the vessel was trading lawfully.
57. The issue of carriage of MGO within class arose for the first time, in effect, in the course of the hearing although there had been a reference to it in the charterer’s skeleton argument. JR’s evidence was that the information available about the vessel did not include any liquid cargo tank capability, and it was not designated as a short sea tanker. Although JR accepted that the vessel could and did carry MGO parcels, her evidence was that the best approach to valuation was not to include this factor.
58. Then in oral closing, counsel for the charterer modified his earlier position: it might well be, he said, that the arbitrator need not decide the issue of class, despite his written closing submission that it was a critical issue. Earlier he had reiterated JR’s position that there was nothing in public descriptions or contemporaneous documents that the vessel could carry fuel oil and added that, whether or not the vessel was doing so, was irrelevant.
59. Against this background - including the arbitrator’s preference for ML’s evidence about the market rate for hire, how neither the charterer nor the owner had placed class at the centre of their case, and what charterer’s counsel had said in his oral

closing submissions about not needing to decide the class issue – it is unsurprising that the arbitrator concluded that the vessel’s class notation was a neutral factor in its valuation. In stating this in paragraph 72 of the Award, she returned to a point she made in the course of ML’s evidence, based as she said on the class information available, that an oil carrier notation would be for a vessel designed and constructed primarily for the transportation of oil and not for this type of vessel. The reference to “class information available” was a reference, as described earlier, to the ABS guide to vessel notations, which the charterer itself had placed in evidence.

60. In other words, the arbitrator was drawing an inference, as she was entitled to, on an issue which the charterer itself had raised during the course of the hearing through its expert’s evidence, and on the basis of other evidence which the charterer itself had adduced in the form of the ABS guide (see *World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2004] 2 All E.R. (Comm) 813). This was not a case, as the charterer suggested at one point, where the arbitrator had used “special knowledge...so as to provide evidence on behalf of the [party] which they have not chosen to provide for themselves”: *JD Wetherspoon Plc v Jay Mar Estates* [2007] EWHC 856 (TCC), [10(a)], per HHJ Peter Coulson; *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84, [32], citing *Fox v Wellfair Ltd* [1981] Lloyd’s Rep 514, 520, per Lord Denning; [10]. Rather, this in my view was the type of case described by the editors of *Russel on Arbitration*: “It will not amount to a serious irregularity if the tribunal decides the case on the basis of a point not strictly argued or pleaded by a party; it will be enough that the issue was “in play or, to use a different expression, ‘in the arena’ in the proceedings”: D. Sutton, Gill & Gearing (eds), London, 24th ed, #8-092.
61. Although the arbitrator’s expression at this point in the Award is infelicitous, in my view her comments on class notation cannot be used to undermine under section 68 of the 1996 Act what her conclusions were about market valuation. In short these were that the vessel could carry MGO lawfully, and that this was a valuable feature in setting its hire in the West African context: *The “Pamphilos”* [2002] 2 Ll L Rep 681,687, per Colman J; *New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc* [2014] EWHC 4358 (Comm), [14], per Cooke J. In other words, the arbitrator was not, to use Carr J’s language in *Obrascon Huarte Lain SA v. Qatar Foundation for Education, Science & Community Development* [2019] EWHC 2539 (Comm), [2019] 2 Lloyd’s Rep 559, “decid[ing] the case on the basis of a point” – class notation – “which one party has not had a fair opportunity to deal with.” She was deciding the case on the different basis just summarised. Oil tanker notation or its absence had nothing to do with it.
62. The charterer’s other challenges on this point consequently fall away. In any event, as to the arbitrator’s conclusion at paragraph 70 that neither JR nor ML had relevant expertise whether the vessel was in class to carry MGO, she had foreshadowed this conclusion during the closing address of charterer’s counsel. That prompted his response, not that her assessment of the charterer’s expert was incorrect, but that maybe she did not need to determine the issue.
63. I would simply add that the arbitrator had heard a considerable amount of evidence from JR about class notations, once JR had raised the specific issue in evidence at the hearing, in other words not only about whether the vessel was physically able to carry MGO but whether it was in class to do so. That included JR’s evidence about the

conversation with the ABS surveyor in Greece. In my judgment this is one of those cases where the arbitrator came to an assessment – rightly or wrongly - about JR’s expertise on the evidence she had heard and section 68 does not allow the court to review it: *K v S* [2019] EWHC 2386 (Comm), [2020] Bus LR 337, per Sir Jeremy Cooke.

64. As to what the charterer contended was the arbitrator reversing the burden of proof in the last sentence of paragraph 72 of the Award, there is in my view a simple answer. The arbitrator began the discussion of class notation at paragraph 70 by recalling that the charterer had raised the issue whether the vessel was in class to carry MGO, and finished her consideration of the issue in the last sentence of paragraph 72 with a summing up that the charterer had failed to show that the vessel was not in class to do so. In other words, the arbitrator described how JR had raised class for the first time in cross-examination, made some remarks about it and then simply concluded that the charterer had not made the point good. In my view what the arbitrator said had nothing to do with reversing the burden of proof.
65. Thus in my view none of these issues regarding class notation as regards the vessel discloses an irregularity, certainly no serious irregularity by causing the charterer substantial injustice as required by section 68(2)(a). The arbitrator came to her conclusion about the market rate for the vessel by taking account of what she found it did lawfully carrying MGO in the niche market of West Africa. There would have been no material difference to this outcome in the light of additional evidence on the vessel’s class. I accept the owner’s submission that the charterer would not have conducted its case any differently, and that since it has not identified the material submissions it would additionally make (including what JR would say), it cannot show that any loss of the opportunity to advance them caused substantial injustice: *Kalmneft v Glencore International AG* [2002] 1 All ER 76, [92], per Colman J. In my view there is no reasonable prospect that the arbitrator might have reached a different conclusion on the issue of the market rate of hire upon further evidence regarding class notation or JR’s expertise.

Ground 2: honesty in the context of the dry dock charges

The charterer’s case

66. The charterer’s challenge to the arbitrator’s conclusion on dishonesty revolved around the legitimacy of AV and the other managers increasing the hire rate for the vessel in 2009 to pay for the unexpectedly high costs of its drydocking in late 2008/early 2009. The charterer’s complaint was that the arbitrator relied on AV’s oral evidence as to payment for the drydocking, through a shareholders’ loan, which was contrary to the parties’ pleaded cases and what AV had said in his witness statement. In its submission, it did not have a fair opportunity to address the point and consequently there was a serious irregularity.
67. At paragraph 147 of the Award the arbitrator determined that AV was honest by reference to what he had said about a shareholders’ loan. That point only emerged, the charterer submitted, in AV’s oral evidence and was not adopted by the owner in its submissions. There was also unfairness when the arbitrator had asked about contemporaneous evidence concerning who had actually paid the dry dock charges so the vessel could be released, when this was not in dispute prior to AV’s cross-

examination. The charterer had no opportunity to investigate. Further, the arbitrator's conclusion that it might not have made much difference from AV's perspective whether the funds came from RT and himself, or from the charterer, had not been evident in anything the parties said and was so unexpected that the charterer should have been given the opportunity to address it.

Payment of dock charges in the arbitration

68. In its voluntary further particulars the charterer's case was that the 2009 charter rate was set too high because RT and AV were dishonest in moving funds from it to the vessel's owner for the purpose of funding indirectly the cost of the dry dock works, which ought to have been borne by the owner and/or by reducing the losses which it had suffered from the vessel being off-hire during that period. In his witness statement AV asserted that the increase in the hire rate was not unfavourable to the charterer since if the charterer had not paid for the dry dock works through the hire increase, it or its shareholders would have had to pay for them separately in cash. "[The charterer] could not expect its own SPV [i.e. the owner] to fund itself indefinitely from the pockets of its shareholders."
69. The owner's written opening submitted that it was not in dispute that RT and AV increased the rate of hire to help fund the owner after the vessel's dry docking. In his oral opening, counsel for the charterer made the case for AV's dishonesty, in line with the objective test in *Ivey v Genting Casinos (UK) t/a Crockfords* [2017] UKSC 67, [2018] AC 391, as regards the arrangements for paying for the vessel's dry dock works.
70. When cross-examined on the first day of the hearing, AV said that the dry dock charges were for the owner, that the charterer had not paid the US\$1.2 million through the increase in the hire for the vessel from 2009, and that he and RT paid US\$1.2 million to the owner in order to cover the dry dock charges. It was put to him that the accounts did not show any loan from shareholders, but a loan from the charterer to the owner. AV did not accept the point. He claimed that the loan was made using funds received from the charterer's associated entities. (The charterer's case was that those funds were the charterer's own receivables.) In cross-examination AV gave evidence at length about the moneys he and RT were entitled to receive from the charterer's associated entities and how they were used to pay for the dry dock charges.
71. In his closing submissions, counsel for the charterer submitted that it had paid the dry dock charges and that there was no hint in the underlying documents of any shareholders' loan to the owner so that it could pay. During the course of his closing submissions, the arbitrator asked counsel a number of times for evidence of how payment was made to release the vessel from the dry dock. Counsel's response was that the best evidence was the charterer's audited accounts for 2012, which showed a loan by the charterer to the owner for 2009 of almost the same amount as the cost of the dry dock works. During closing submissions of counsel for the owner, the arbitrator explored how the charterer's associated entities contributed to the dry dock works.
72. Having made inquiries, counsel for the charterer accepted in closing that the charterer did not know who paid the charges to have the vessel released from the dry dock; its contemporaneous accounts, when the company was under different ownership, were

difficult to follow, although there was evidence from bank accounts that the owner had made no relevant payments which could have constituted payment for the works prior to June 2009. In closing submissions, counsel for the charterer said that the main point was the indicia that what had been done concerning payment for the dry dock charges was not above board and was objectively dishonest.

Discussion

73. The short answer to the charterer's submissions on the dry dock charges is that it did have the opportunity to deal with the issue at the hearing. If it had considered it needed more time to investigate how the dry dock charges were paid to secure release of the vessel it could, at the very least, have sought permission to adduce further evidence on the matter after the hearing: cf. *K v P* [2019] EWHC 589 (Comm), [28]. When the point about the shareholders' loan emerged from AV on the first day of the hearing, counsel for the charterer cross-examined him at some length about it. In closing submissions on the fourth day of the hearing, he submitted that the charterer paid for the dry dock charges and that there was nothing in the underlying documents to support the suggestion of a shareholders' loan to the owner. Whatever the owner's stance on the matter, the charterer took the opportunity to challenge the notion of a shareholder's loan in order to pay the dry dock charges. Indeed, it adduced the 2012 accounts to demonstrate that it, the charterer, was the source of the moneys.
74. What the charterer is seeking to do in the current proceedings is to challenge findings where the arbitrator has taken a view of matters contrary to its submissions. The arbitrator accepted AV's evidence about how the works were paid for so that the vessel could be released from the dry dock – moneys not from the charterer itself, but from its associated entities, to which he claimed that he and RT were entitled - albeit that given the state of the evidence the arbitrator did not make any finding about how precisely payment was effected.
75. Looking at the commercial realities, as she was entitled to do, the arbitrator then accepted AV's evidence of what was described as a shareholders' loan; commented that given the ownership of the charterer it might not have mattered much from RT and AV's point of view whether the moneys were treated as coming from the charterer or its shareholders; and that AV's description of payment for the dry dock charges correctly reflected the business reality. Against this background, the arbitrator rejected the charterer's case and found that the arrangements were not evidence of dishonesty on the part of RT and AV. That finding was a matter within her province as arbitrator.
76. In my view the charterer's case on this ground is an attempt to challenge the arbitrator's findings of fact and her assessment of the evidence on the funding of the dry dock charges, when it had ample opportunity to advance its case following AV's evidence on the first day of the hearing. The unfortunate fact for the charterer is that, having heard the evidence, the arbitrator concluded that AV was honest in the *Ivey v Genting* sense in relation to the dry dock charges. There is no need to consider the substantial injustice point since in my view there was no irregularity.

Conclusion

77. The grounds the charterer has advanced do not in my view constitute the procedural unfairness necessary for the purposes of section 68(2)(a) of the 1996 Act. This is one of those cases Flaux J referred to in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm), [50] where a party, in this case the charterer, is seeking to attack an arbitrator's findings of fact and her evaluation of the evidence on the basis of procedural unfairness when there was none. The application fails.