



Neutral Citation Number: [2021] EWHC 2288 (Comm)

Case No: CL 2020 000770

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

IN THE MATTER OF THE ARBITRATION ACT 1996  
AND IN THE MATTER OF AN ARBITRATION

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/08/2021

**Before:**

**SIR NIGEL TEARE,**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between:**

**SPACE SHIPPING LTD**

**Claimant/**  
**Owners in the**  
**arbitration**

**- and -**

**ST SHIPPING AND TRANSPORT PTE LTD**

**Defendant/**  
**Charterers in**  
**the arbitration**

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**Steven Berry QC and Adam Board** (instructed by **Lax & Co. LLP**) for the **Claimant**  
**Sean O'Sullivan QC and James Hatt** (instructed by **Preston Turnbull LLP**) for the  
**Defendant**

Hearing dates: 29 July 2021  
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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE, SITTING AS A JUDGE OF THE HIGH COURT

**Sir Nigel Teare:**

Introduction

1. On 23 October 2010 Space Shipping Limited entered into a bareboat charter of the vessel CV STEALTH with Psara Energy Limited, “the Head Owners”, for approximately 5 years. Space Shipping Limited had an option to extend the bareboat charter for 1 or 2 years. On 10 April 2014 Space Shipping Limited, to whom I shall refer as “the Owners”, fixed the vessel on time charter to ST Shipping and Transport Pte Limited, to whom I shall refer as “the Charterers”, for a period of 8 months. The Charterers directed the vessel to Venezuela to load a cargo which proved not to be authorised for export. She arrived on 5 September 2014 and on 19 September 2014 the vessel was detained by order of the Venezuelan court. Despite several attempts to obtain her release the vessel was detained until 3 October 2017. Thereafter the Owners arranged for the vessel to be towed to Port of Spain, Trinidad, where she was redelivered to Head Owners on 24 March 2018 without having been drydocked. On 30 August 2018 the vessel was sold for scrap and on 21 October 2018 she sailed for Pakistan where she was broken up.
2. The detention of the vessel in Venezuela caused considerable losses and so the Owners commenced arbitration proceedings against the Charterers. The First Partial Final Award (PFA 1) was made in September 2015 but as events developed in Venezuela, and further losses were sustained, further awards were necessary. The arbitrator has made seven Partial Final Awards. A Final Award was made on 19 October 2020. The total sum awarded in favour of the Owners against the Charterers amounts to US\$24,468,621.91 (hire, sums claimed under the indemnity clause 13 and as damages for breach of clause 28 pursuant to which the vessel was not to be exposed to capture or seizure).
3. Both the Owners and Charterers have sought to challenge certain of the arbitrator’s awards. The Charterers sought to appeal PFA 1 and the Owners and the Charterers sought to appeal PFA 4. Those appeals failed.
4. This is an appeal by the Owners from one aspect of the Final Award, namely, the arbitrator’s deduction from the sums claimed by the Owners of the costs of drydocking. That deduction was made because the Owners had been saved the costs of the drydocking in the sum of US\$1,400,000 as a result of the detention of the vessel. This deduction has vexed the Owners. They resisted it being made in PFA 2 when it was first deducted. They sought to reverse the deduction in PFA 4. The deduction was

confirmed and the Owners sought and failed to persuade this Court that the deduction was wrong in law. When the arbitrator made his Final Award the deduction was again challenged on several new grounds. But the arbitrator confirmed the deduction. This appeal is the latest, and perhaps final, attempt by the Owners to remove the deduction and so recover a further US\$1,400,000.

### The nature of the appeal

5. Clause 41(c)(ii) of the time charterparty provides that either party may “appeal to the High Court on any question of law arising out of an award”. By reason of this clause and section 69(2)(a) of the Arbitration Act 1996 an appeal is permitted. No permission to appeal is required. Thus it is only necessary for the Owners to establish that the arbitrator erred on a question of law arising out of the Final Award.

### The earlier awards and the earlier appeals

6. Before considering the suggested errors of law it is necessary to recount what was decided in the earlier awards and in the earlier appeals because the drydocking issue featured in two of the PFAs and in one of the appeals.
7. By the First Partial Final Award (PFA 1) dated 23 September 2015 the arbitrator awarded the Owners sums in respect of hire, bunker conversion costs and damages in a total sum of over \$4,600,000 plus interest and costs.
8. The hire claimed was up to 1 April 2015 and damages were claimed from 1 April 2015. The claim for damages was in respect of lost earnings. At paragraph 4 the arbitrator said:

“Their claim for lost earnings is advanced at this stage only (simply as a matter of convenience) in respect of the period to 21 July 2015, and it has been agreed that their other damages claims are to be stood over. If the Owners are successful a further award may be necessary, if the parties cannot agree the position, in respect of their trading losses after 21 July and their other claims.”
9. The claim for damages was “based on the amounts CV STEALTH could have expected to earn in the market after that date” (see paragraph 66). After concluding that the Charterers were liable as alleged by the Owners (both in damages for breach and pursuant to an express indemnity) the arbitrator dealt with the assessment of damages, beginning at paragraph 128. He said that “the burden .... was on the owners to show what earnings they would in fact have achieved during the relevant period...”. The arbitrator concluded in paragraph 139 “that the average market rate to be used for the owner’s damages between 1 April and 20 July 2015 is \$34,000 per day. For 111 days that produces a figure of \$3,774,000, and that is what I have awarded.” My understanding of the award is that what the arbitrator referred to as “the average market rate” was a daily loss of trading income having taken into account such matters as bunkers and port charges (see paragraphs 135 and 136). Although, as appears from later awards, the vessel would have been drydocked by the Owners before 20 July 2015, no mention was made in PFA 1 of any saving in respect of drydocking costs. It appears from one of the later awards that no mention was made by the parties or their expert witnesses of any saving in respect of drydocking costs.

10. The Charterers sought to appeal PFA 1 but failed; see *The CV Stealth* [2016] EWHC 880 (Comm), [2016] 2 All ER (Comm) 1003.
11. In due course a Second Partial Final Award was required (PFA 2). It was made by the arbitrator on 8 August 2016. The Owners sought a further award in respect of their trading losses for the period 21 July – 23 September 2015. However, the claim failed save for the single day of 21 July 2016. This was because the Owners had failed to establish on the balance of probabilities that they would have exercised their option in January 2015 to extend the bareboat charter beyond 22 July 2015; see paragraphs 4 and 5. In fact the claim for the single day also failed because the Owners could not show that they would have traded her up to that day; see paragraph 6.
12. The Owners had further claims in respect of items of expenditure said to have resulted from the charterers' breach; see paragraph 1. (It appears from the Final Award (at paragraph 57) that these items of expenditure were incurred both before and after 20 July 2015.) Some of these items were agreed; see paragraphs 8 and 9. In relation to those items which were not agreed the Charterers disputed liability on the grounds of a failure to mitigate and remoteness. They also said that there were savings to be brought into account, in particular, the "saved costs of a drydocking that would have had to take place in the summer of 2015 for which the owners would had had to pay"; see paragraph 14. However, none of these arguments was determined. The arbitrator said in relation to the drydocking costs at paragraph 20:

"Further, similar considerations apply to the contention that the owners have saved the costs of drydocking. Whether or not that is the case cannot be known for the present: much may depend on the outcome of the bareboat charter arbitration and/or the question whether the ship is abandoned to underwriters, as well as the underlying question whether she will ever be released, and if so when. For the present I think it only fair to the charterers to assume (without deciding at all) that at the end of the day the owners will save and must give credit for such costs. On the other hand, the owners must be entitled in future to advance a claim for the costs of drydocking, if incurred, and I reserve jurisdiction in that regard."
13. For the purpose of "presently deciding" what allowance to make in the Charterers' favour the arbitrator adopted the figure of \$1.4m.; see paragraph 21.
14. Having determined the quantum of the Owners' claims in respect of expenditure (in some cases subject to further arguments) and noting that the Charterers were "provisionally entitled to set against their above liabilities \$1,400,000 in respect of possibly saved drydocking costs", the arbitrator declined "at this stage" to make any monetary award in favour of owners; see paragraph 35.
15. It is now necessary to consider the Fourth Partial Final Award (PFA 4) which was made by the arbitrator on 25 May 2017. At this stage the Owners sought an award in respect of their claim "to be indemnified in respect of hire and interest awarded to the head owners in the arbitration under the head (bareboat) charter and operating expenses as well as, incidentally, certain items held over from" PFA 2; see paragraph 1. The Charterers' defence to the claims in respect of hire under the head charter gave rise to

a central factual issue of causation; see paragraph 14. That defence failed. The Owners' claim for hire and interest therefore succeeded in principle; see paragraph 35. The arbitrator then turned to other matters and in particular the "potentially saved drydocking costs"; see paragraph 39. The Owners asked the arbitrator to reverse the credit he had given the Charterers. The arbitrator considered various arguments in this regard. In paragraph 40 the arbitrator held that although the bareboat charter had not been frustrated and that the vessel was not a CTL "there must still be a substantial possibility that the vessel will never, in her lifetime, be redelivered to the head owners and thus that the drydocking costs will never have to be borne by the owners here." In paragraph 41 he dealt with a further argument and it is necessary to set that paragraph out in full:

"In addition, though, the owners argued that but for the charterers' breach/orders, any drydocking expenditure would have been incurred prior to 21 July 2015, and I am not now being asked to deal with any claims arising before that date. Thus, said the owners, there is no basis for deducting from the present claims putative expenditure for a putative drydocking that would have taken place before 21 July 2015 but which did not. Regardless of such a drydocking, the expenses now claimed would have been incurred in any event. With respect, that seems to me a rather narrowly-focused argument that ignores the underlying risk that the costs may never be incurred, and the justice of allowing the charterers a provisional credit (failing which they would have to pay the owners \$1.4 million which the owners might never have to pay themselves, and which the charterers might not be able to recover)."

16. In paragraph 42 the arbitrator noted the Owners' argument that he was not entitled to take into account savings which have not yet occurred. It was said that actual savings could not be shown because the vessel was not a CTL. But the arbitrator concluded:

"These contentions, however, overlook the possibility of the vessel never being drydocked, for whatever reason, and again pay no regard to what seems to me to be the justice of the situation. If at some stage the owners do incur drydocking costs, they can come back for a further award in that respect. I do not think it fair to require the charterers to pay at this stage an amount for which they may never be liable."

17. The arbitrator concluded that the Owners were entitled to substantial sums of almost \$8m., but deducted "the provisional credit in respect of potentially saved drydocking costs of \$1.4m."; see paragraph 53.
18. The Charterers sought to appeal the arbitrator's finding on causation in relation to losses after July 2015 and the Owners sought to appeal the arbitrator's deduction of \$1.4m. in respect of potentially saved drydocking expenses. Both appeals failed; see *The CV Stealth No. 2* [2018] 1 Lloyd's Reports 276. It is necessary to set out Popplewell J.'s reasons for dismissing the Owners' appeal.

39. In the Fourth Partial Final Award, the Arbitrator's reason for the provisional deduction of an estimated US\$1.4 million for saved drydocking expenses was his assessment that "as matters stand there must be a substantial possibility that the vessel will never, in her lifetime, be redelivered to the head owners and thus that the drydocking costs will never have to be borne by the owners here." He referred to "the justice of allowing the charterers a provisional credit, failing which they would have to pay the owners \$1.4 million which the owners might never have to pay themselves, and which the charterers might not be able to recover." He made clear that this was merely a provisional credit and that if the disponent owners should hereafter incur the drydocking costs they could come back for a further award in that respect. In the meantime it would not be "fair to require the charterers to pay at this stage an amount for which they may never be liable".

40. Mr Croall QC for the disponent owners argued that it was not open to the Arbitrator to make this deduction. Giving credit for benefits received in consequence of breach was not a matter of "justice" but required the application of strict legal principles, relying on the recent Supreme Court authorities of *Lowick Rose LLP v Swynson* [2017] 3 All ER 785 and *Fulton v Globalia* (sup.) Deductions could only be made if there were a finding that there was a benefit and that the benefit was legally caused by the breach in accordance with the *Fulton v Globalia* principles. The Arbitrator had held that disponent owners had a present entitlement to the head charter hire and expenses incurred up to 31 March 2017, and there could not be deducted from those accrued rights a potential future saving which might never occur. In deducting a provisional sum for something which was not the subject of a decision, he was crossing the boundaries of what an arbitrator may properly do in an interim award, as formulated by Robert Goff J in *The Kostas Melas* [1981] 1 Lloyd's Rep 18, which is to decide issues.

41. I am unable to accept this argument. It is important to keep in mind that with the full agreement of the parties the Arbitrator has not been seeking to address the disponent owners' loss once and for all by reference to any date of assessment. He has adopted what Mr Southern described as a "wait and see" approach of considering loss by reference to events as they unfolded. This is a permissible approach to the date of assessment of loss where its extent may depend upon future contingencies. It enables account to be taken of the so called *Bwllfa* principle (*Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontyprydd Waterworks Co* [1903] AC 426) and for the assessment to take account of contingencies which have or have not eventuated and so are known at the date of final judgment: *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353. In this case the Arbitrator has chosen as a matter of case management to defer any final assessment of loss, but to determine issues and make partial awards on an interim basis. In doing so, and consistently with his functions, he has finally decided issues where he has been able to; where there are issues which he thinks are best resolved in the light of the eventuation of future contingencies he has deferred deciding them. This is entirely in keeping with his arbitral functions and the principles governing interim awards articulated in *The Kostas Melas*. There can be no legitimate criticism of that approach, which indeed has taken

place with the agreement of the parties. That case management decision, and its necessary consequences, cannot properly form the subject matter of an appeal under s. 69, nor fall within clause 41 of the charterparty.

42. Against that background, the Arbitrator's deduction of a provisional sum for potentially saved drydocking expenses is principled and sound. If he is not to decide at this stage, and on knowledge of current events, whether such a deduction will fall to be made or not, and how much it will be, he is bound to award disponent owners a current amount which deducts an estimate for such saving unless he can be satisfied now that disponent owners' losses will never be reduced by such amount. This is because in an interim Partial Award, an arbitrator may only award a sum which a party is bound to recover as a minimum in the light of the issues which he has decided: see *The Kostas Melas* at p. 25 col 2 to 26 col 1. It is a commonplace in cases where there is a large claim which is undisputed save that it is sought to set off a smaller counterclaim, that tribunals issue at an early stage an interim partial award for the difference, so that the claimant is awarded the minimum he will receive, without waiting for the dispute on the counterclaim to be resolved. That fulfils the policy in sections 1(a), 33(1)(b) and 47 of the Arbitration Act 1996. What the Arbitrator has done in this case is no different in kind, albeit that the deferred issue in question in this case will fall to be decided in the light of future events rather than by reference to past events.

43. Mr Croall characterised drydocking costs as a potential *future* saving. In my view they are better characterised as a current saving: disponent owners have not yet incurred the expenditure and have for the time being avoided paying the drydocking expenses which they would have had to pay in or around June 2015 but for the detention. They are a current saving. The future contingency is not that they will be saved but that they will be paid. If and when they are paid the disponent owners will be out of pocket for a sum which is now in their pocket. But my decision does not depend upon such characterisation of the saving as a current or future one. In either event it is not possible to say now whether at the (future) date at which the Arbitrator decides to make a final assessment of loss they will have been saved or not. Whilst it remains, as the Arbitrator found, a substantial possibility that they will be saved, and whilst it is at least arguable, at the lowest, that such a saving will have to be deducted from the sums which the Arbitrator has held disponent owners would otherwise be entitled to recover, an argument not yet addressed or disposed of, it would be impossible for the tribunal to award payment of sums without such deduction, because on the issues which it has determined it could not be satisfied that a greater sum would be recovered as a minimum.

44. Accordingly the disponent owners' challenge is unfounded. Since it is not on a point of law but in substance an impermissible challenge to the Arbitrator's agreed case management decision, it does not fall within clause 41 of the charterparty and permission to appeal should be refused.

19. This brings me (at last) to the Final Award of the arbitrator which was made on 19 October 2020 and is the subject of the present appeal by the Owners. The Owners had sought a further award in respect of head charter hire and certain operating expenses

“as well as the \$1.4million provisional deduction in respect of saved drydocking costs” (see paragraph 1). The Owners succeeded in relation to head charter hire and operating expenses but failed with regard to the drydocking deduction. The arbitrator dealt with the latter between paragraphs 52 and 77.

20. By this time the vessel had been redelivered to the Head Owners without having been drydocked and the Head Owners had sold her for scrap. Nevertheless several arguments were advanced as to why the credit given in respect of the saving of drydocking costs should be reversed.
21. The arbitrator first dealt with an argument that because PFA 1 had decided the Owners’ lost profits claim up to 20 July 2015, and because the drydocking would have taken place by about 27 June 2015 (so that the costs would have been costs of earning the notional revenue), the Charterers were now estopped by *res judicata* from claiming the saved costs because the arbitrator must have decided that no such cost would have been incurred or had been saved as a result of the detention; see paragraphs 52-54. The arbitrator did not find this argument attractive and dismissed it for reasons given between paragraph 56 and 61. He accepted the Charterers’ submission that “the avoided cost of the drydocking was not a matter taken into account in working out the daily earnings rate which was determined in PFA 1, but was rather a separate saving, just as the owners’ claims for additional costs [in PFA 2] were conceptually distinct matters.”
22. The arbitrator said that it was “possibly right” that if at the hearing leading up to PFA 1 the Charterers had said that the claim for profits must be reduced to take account of the drydocking deduction, he would have acceded to that argument. But he said he would have done so  

“not because I would have concluded that the owners’ profits up to 20 July 2015 should have been at a lower daily rate than what I in fact awarded, but simply because it would not have seemed appropriate to me not to take account of that deduction, although on a provisional basis only, as I did subsequently.”
23. The arbitrator further said that if there was any issue estoppel it worked against the Owners because of what had been determined in PFA 4 and had not been appealed; see paragraph 62.
24. The arbitrator next dealt with an argument that there had in fact been no saving to the Owners because their failure to drydock had caused an immediate and continuing liability upon them to the Head Owners for breach of the bareboat charter, in that they failed to drydock and redelivered without drydocking and that the Owners’ liability to the Head Owners equalled or exceeded the cost of a drydocking. This was rejected at paragraph 65 on the grounds that the Head Owners were not claiming the cost of the drydocking from the Owners. “The claim which the ead owners are (or were – the position is not clear) bringing against the owners relates to the condition of the vessel on redelivery and is put on the basis of a CTL, that is for the alleged market value less the scrap value.”.



25. The arbitrator then considered an argument that even if there was a saving it was not caused by the detention but by the Owners' independent decision to be in breach of the bareboat charter by not drydocking. The arbitrator did not accept this argument; see paragraphs 68-69.
26. In paragraphs 70-71 the arbitrator rejected an argument that the Charterers were not entitled to set off the saving of drydocking costs against the hire and expenses claims because the saving was not sufficiently closely related to those claims. The argument was rejected on the basis that the principles of set off were irrelevant when no claim was being brought in respect of saved drydocking costs. The Charterers were merely saying that money had been saved and that credit should be given for that.
27. Finally, in paragraphs 72-73 the arbitrator dismissed the Owners' argument that, whilst the saving in drydocking costs could be deducted from a claim in damages, it could not be deducted from a claim for an indemnity under the employment and indemnity clause.
28. The arbitrator concluded as follows:

“74. What I have been doing in making the previous awards in this matter is one continuous exercise, as shown by the fact that, for example, in PFA2 I dealt with some expenses that related to the earlier period covered by PFA1. Therefore if there is any credit to be taken into account (as I consider there is) it matters not that it relates to a period different from that with which I am presently occupied.

75. The charterers suggested that the justice of the situation requires that the deduction be maintained whilst the owners argued the opposite. I am with the charterers on this. As a matter of fact the owners are better off than they would have been if they had not been prevented from complying with their contractual obligations by the charterers' breach. Simple logic suggests strongly that the improvement in their position should be taken into account in measuring their resultant loss.”

#### The grounds of appeal

29. The issue of law which is said to arise from the Final Award is “whether a “possible saving” in drydocking costs or even a ‘saved’ drydocking cost should have been deducted from the award of bareboat hire and OPEX actually incurred by Owners and caused by Charterers’ orders and breach?”
30. Four reasons were given for suggesting that the arbitrator’s decision was wrong in law.

#### *Res Judicata*

(a) The non-deduction of the drydocking cost was *res judicata* in Owners’ favour after the First Partial Final Award finally determined Owners’ loss of profits claim without deduction of the drydocking cost.

#### *Charterers failed to prove a saving*

(b) The drydocking cost did not generate a saving or benefit for Owners because it caused an immediate and, at least, equal legal liability on Owners to Head Owners for

breach of the Bareboat Charter for failure to drydock and thus redelivery without drydocking.

*Any 'saving' lacks a sufficient causal nexus with the breach*

(c) Alternatively, if there was a 'saving' there was insufficient causal nexus with the breach. The 'saving' was not sufficiently caused by the detention of the vessel and the detention did not render it necessary for Owners never to drydock the vessel, or for the Head Owners to declare the vessel a CTL. The 'saving' was caused by an independent decision to break the Bareboat Charter by not drydocking and by redelivery without drydocking, and to bear the burden of the attendant liability for damages, and/or an independent transaction of Head Owners' decision to declare the vessel a CTL, which are *res inter alios acta*. Further, if there was any 'saving' it was not connected at all, or not sufficiently connected, with the bareboat hire and OPEX to permit a deduction from the bareboat hire and OPEX as a matter of law.

*Any 'saving' cannot be deducted from Owners' claim for indemnity*

(d) In the further alternative, a deduction for 'saving' of the drydocking cost is only permissible in theory as a deduction from Charterers' liability to Owners for damages, not from Owners' claim under the express right of indemnity. There is an express right to indemnity against consequences and no express right to deduct or provision for deduction of savings.

31. It seems to me that the logical order in which to consider the arbitrator's alleged errors of law is this:
- (i) Ought the arbitrator to have held that the Charterers had failed to prove a saving ?
  - (ii) If there was a saving, ought the arbitrator to have held that there was no sufficient causal nexus with the breach ?
  - (iii) If there was a saving which was caused by the breach ought the arbitrator to have held that the Charterers were estopped by *res judicata* from alleging such a saving ?
  - (iv) If the Charterers were not so estopped ought the arbitrator to have held that such a saving could not be deducted from the contractual claim for an indemnity ?
32. It is well established that the court should read arbitration awards as a whole in a fair and reasonable way, rather than looking to pick holes in the reasoning; see, for example, an earlier appeal in this arbitration, The CV Stealth [2016] 2 All ER (Comm) 1003 at paragraph 36. I shall of course do so. Counsel for the Owners criticised the arbitrator's reasons as laconic. If they were at times short and to the point that can hardly be criticised.

Ought the arbitrator to have held that the Charterers had failed to prove a saving ?

33. Counsel for the Owners submitted that non-payment of the drydocking cost did not generate a saving because the failure to drydock caused an immediate and at least equal legal liability of the Owners to the Head Owners for breach of the bareboat charter. It was said that the arbitrator ignored the Owners' liability and that this was an error of law. (The Owners' written submissions from time to time say that the arbitrator was "wrong" to make a finding or that there was an "insufficient basis" for a finding. I assume that these are all references to the same alleged error of law because findings of fact cannot of course be challenged.)
34. The arbitrator considered and rejected the Owners' argument in paragraphs 64 - 66 of his Final Award. Although I have summarised these paragraphs above I should perhaps quote them in full.

64. The owners' first point under this heading was that there was in fact no saving, because their failure to drydock had caused an "immediate and continuing liability" upon them to the head owners for breach of the bareboat charter, in that they failed to drydock and redelivered without drydocking. That liability, they said, must equal or exceed the cost of a drydocking, and that liability probably exceeded the "saving". As the owners pointed out, the head owners had advanced a claim against them in this respect in the bareboat charter arbitration as part of their claim for damages for redelivery in damaged condition, that claim including the fact that the vessel had not been drydocked. Whilst, the owners said, they made no separate claim against the charterers in that respect, that did not affect the question whether there was a net saving as a result of the failure to drydock.

65. I do not accept that case. The reality is that there can be no valid claim by the head owners against the owners (which is why the owners have expressly disclaimed advancing any such claim in this arbitration before it concludes). The head owners have declared the vessel as a CTL and, along with the owners, are now suing their hull underwriters and their war risk underwriters on that claim. The head owners are not claiming from the owners the cost of a drydocking, since there never was one. The claim which the head owners are (or were – the position is not clear) bringing against the owners relates to the condition of the vessel on redelivery and is put on the basis of a CTL, that is for the alleged market value less the scrap value.

66. In these circumstances there was only a saving to the owners, whose own earlier submissions as well as evidence at this hearing confirmed that, but for the detention, the drydocking would have taken place in 2015. Any suggestion that, absent the detention, they might still not have drydocked the vessel cannot, in these circumstances, be sustained.

35. The reference in the second sentence of paragraph 65 to the Owners having expressly disclaimed advancing any claim by the Head Owners in this arbitration is explained by the opening paragraphs of the Final Award.

2. The owners asked me to make a further partial final award in respect of bareboat charter hire and OPEX as well as the \$1.4million provisional deduction

in respect of saved drydocking costs. They agreed, following an exchange of correspondence in March 2020, that I might proceed to an award that would be final in respect of all matters save costs, although they reserved their right to make an application to amend their claims as they were then being advanced, but only if any such application was made before my award determining the claims they were then seeking to pursue. (The concern here was in relation to the possibility that the head owners might bring further claims – in particular one relating to the condition of the vessel on redelivery to them – against the owners, in respect of which the owners would seek an indemnity from the charterers.)

3. Directions were agreed and complied with, and a hearing took place on 5-9 October 2020 at the International Dispute Resolution Centre, 70 Fleet Street, London EC4 1EU, without the owners making any application to amend their claims, which are accordingly dealt with in this award. Save for questions of costs and interest I am now functus officio.

36. The arbitrator was unable to accept the Owners' argument because, on the arbitrator's findings, the Head Owners were not claiming from the Owners the cost of a drydocking because there never was one. The claim which they were bringing (though the evidence was not "clear") related to the condition of the vessel on redelivery and that claim was put on the basis of a CTL, that is, for the alleged market value less the scrap value. However, the Owners did not seek to pass on to the Charterers such liability, if any, which they had to the Head Owners.
37. There is no doubt that the costs of a drydocking had not been incurred or that they would have been incurred had there been no detention in Venezuela. In that sense the Charterers had established that there was a credit to be deducted from the additional operating expenses claimed by the Owners. The question is whether the costs of a drydocking which were not incurred in 2015 by the Owners should be deducted from the additional operating expenses incurred by the Owners as a result of the Charterers' breach or payable pursuant to the express indemnity in the charterparty. The submission was made that no such saving had been made by the Owners because they had an at least equal liability to the Head Owners and it is well established that a liability is a loss which can be claimed as damages; see Total Liban SA v Vitol Energy SA [2001] QB 643. However, no claim by the Head Owners against the Owners was being passed on as damages to the Charterers.
38. Thus in circumstances where the Owners were not seeking to pass on to the Charterers such liability, if any, as they had to the Head Owners they were nevertheless seeking to say that that they had made no saving of the drydocking costs because they had a liability to the Head Owners in at least that amount. The difficulty facing the Owners, as it appears to me, is that because they were not seeking to pass to the Charterers their liability to the Head Owners there was no way in which in the arbitration between the Owners and the Charterers the liability of the Owners could be assessed. Nevertheless, counsel for the Owners submitted (in writing) that there was "an unassailable claim by Head Owners for the cost of the absent drydocking and, if more, diminution in value of the vessel." In oral submissions it was said that the arbitrator had made a clear finding that the Owners owed an obligation to drydock the vessel following redelivery (see PFA 4 at paragraph 39). But the arbitrator made no finding that the Owners were liable to

the Head Owners in an amount at least equal to the cost of drydocking. Such a liability would have to be established by evidence and the evidence before the arbitrator was not even “clear” that the Head Owners were making such a claim against the Owners. Indeed it appears from the first sentence of paragraph 65 that the arbitrator did not consider that the Head Owners had a valid claim, though this may reflect the arbitrator’s view that there was no claim for the cost of a drydocking. What is clear is that the arbitrator made no finding that the Owners were liable to the Head Owners in an amount at least equal to the cost of drydocking.

39. Thus, there being no finding that the Owners were liable to the Head Owners in an amount at least equal to the cost of drydocking, it seems to me that no error of law can be detected in the arbitrator’s approach or in his finding that there was a saving to the Owners.
40. In his oral submissions counsel for the Owners criticised the arbitrator’s reference to the Head Owners declaring the vessel to be a CTL and submitted that the arbitrator’s “imprecision about a CTL” vitiated his conclusion. I do not consider that this criticism is justified.
41. In an earlier award, PFA 4, the arbitrator had held (see paragraphs 36-38) that the vessel was not a CTL. It seems that the Charterers had suggested that the vessel was a CTL pursuant to the vessel’s Nordic Insurance Plan by reason of the assured having been deprived of the ship by intervention by foreign state power for more than 12 months. That proposition was not accepted by the Owners. The arbitrator found that the vessel was not a CTL. That finding was made because a Commentary on the insurance provision in the Nordic Insurance Plan made clear that it did not apply to interventions made “as part of the enforcement of customs”.
42. Counsel for the Owners submitted that the reference to CTL in the Final Award at paragraph 65 must be to the form of CTL referred to in PFA 4. This appears unlikely. Paragraph 65 refers to a declaration by the Owners that the vessel was a CTL, whereas in PFA 4 the Owners submitted that the vessel was not a CTL. Moreover, the sense of paragraph 65 is that the form of CTL being referred to is that which arises where the cost of repair exceeds the sound value of the vessel. It is unlikely that the arbitrator was confused about the concept of a CTL as suggested by counsel for the Owners. On a fair reading of both PFA 4 and the Final Award the arbitrator appears to have been addressing different species of CTLs in the two awards. I therefore do not accept the submission that the arbitrator’s reasoning was confused or that it was vitiated by “imprecision about a CTL” or, more importantly, any error of law.
43. In my judgment the arbitrator’s conclusion in paragraph 66 of the Final Award that there was a saving to the Owners by reason of the drydocking not having taken place is, in this court, an unassailable finding of fact. No error of law can be established.

Ought the arbitrator to have held that there was no sufficient causal nexus between the breach and the saving ?

44. Counsel for the Owners submitted in writing that the detention of the vessel did not render it necessary for the Owners not to drydock the vessel or for the Head Owners to declare the vessel a CTL; it merely provided the opportunity of context for those events. “The legal cause of the saving was “Owners’ commercial decision at [their] risk to

capitalise on the opportunity not to comply with their obligation and to redeliver without drydocking, in circumstances where Head Owners had declared the vessel to be a CTL”. Counsel submitted orally that if there was a saving it was not caused by the detention of the vessel but by the way the vessel was treated by the Head Owners and Owners.

45. This argument was rejected by the arbitrator. He noted the Owners’ argument that the saving had not been caused by the detention but by the Owners’ independent decision to be in breach of the bareboat charter by not drydocking and by redelivering without drydocking. He then said:

68. The fallacy underlying this argument is that there was some “independent decision” on the owners’ part. The fact is that, as a result of the detention, there was no possibility of drydocking the vessel on any sensible basis before she was redelivered. There was a physical impossibility as long as she was detained. And by the time she was at Port of Spain the head owners had already declared her a CTL.

69. Moreover, if the owners had drydocked her before redelivering her, the charterers would have had a complete defence to any claim for such drydocking costs on the basis that they were unreasonably incurred, the expenditure being pointless in view of the head owners’ abandonment of the vessel. Thus in my view the failure to drydock was an inevitable result of and was caused by the detention, for which the charterers are liable.

46. In the light of these conclusions it was submitted by counsel for the Charterers that the arbitrator had found that the Owners’ argument failed as a matter of fact. The failure to drydock was an inevitable result of and was caused by the detention of the vessel.
47. Counsel for the Owners submitted that the question of causation was a question of law or alternatively a question of mixed law and fact. If a question of law he submitted that the cause in law was not the detention but the later actions of the Owners or Head Owners. If a question of mixed law and fact he submitted that the arbitrator’s erroneous reasoning by reference to the vessel being declared a CTL vitiated his decision. He further submitted, if it was necessary to do so, that the arbitrator’s decision was one which no reasonable tribunal, properly directed in law, could have reached.
48. Much reliance was placed on *The New Flamenco* [2017] 1 WLR 2581. Indeed it was submitted by counsel for the Owners that the present case was very similar or analogous to the facts of *The New Flamenco*. It is therefore necessary to note what that case decided.
49. For this purpose the facts of the case and the issues to which they gave rise can be taken from the headnote. The charterers of a vessel redelivered the vessel to the owners two years before the charterparty was due to come to an end. That was a repudiatory breach of contract which the owners accepted as terminating the charterparty. Since there was no available chartering market at that time, the owners sold the vessel for \$23.7m. They claimed damages for loss of profits during the remaining two years of the charterparty. The arbitrator held that the charterers ought to be given credit for the difference between

the amount for which the vessel had been sold and her putative value of only \$7m at the end of the charterparty if early delivery had not occurred. The judge allowed an appeal by the owners, holding that their decision to sell the vessel had not been caused by the charterers' breach in redelivering the vessel two years early but was independent of it, so that it was not necessary to take the benefit into account. The Court of Appeal allowed the charterers' appeal on the grounds that where a charterer had been in repudiatory breach of contract at a time when there was no available chartering market, and the owners decided to mitigate their loss by selling the vessel, there was no reason why the benefit secured thereby should not be brought into account in the assessment of damages in the same way as the benefit secured by chartering the vessel during the unexpired period of the charterparty would be.

50. The Supreme Court allowed the appeal. Lord Clarke, with whom the other members of the court agreed, held (i) that in determining whether a benefit received by a claimant was to be brought into account in assessing the damages payable for a defendant's breach of contract, the essential question was whether there was a sufficiently close link between that benefit and the loss caused by the breach, the relevant link being causation; and that, therefore, such a benefit would be brought into account only if it had been caused either by the breach or by a successful act of mitigation. (ii) Since nothing about the premature termination of the charterparty had made it necessary to sell the vessel, either at all or at any particular time, and since in deciding to sell the owners had made a commercial decision at their own risk which had nothing to do with the charterers, the premature termination of the charterparty had at most been the occasion for the sale and not its legal cause; that, therefore, the benefit to the owners which had arisen from selling the vessel at the time of the breach of contract, rather than when the contract would have ended, had not been caused by the repudiation of the charterparty, which had resulted only in a prospective loss of income to the owners for a period of two years, and the fall in value of the vessel over that period was irrelevant because the owners' interest in the vessel had nothing to do with the interest injured by the repudiation; and that, accordingly, there was no relevant causal link which required the owners to bring that benefit into account. (iii) The measure of the owners' loss in the absence of an available charter market was the difference between the contract rate and what was, or ought reasonably to have been, earned from employment of the vessel under shorter charterparties on the spot market or otherwise; that, had there been an available charter market, the measure of loss would have been the difference between the actual charterparty rate and the assumed substitute contract rate; that, either way, the relevant mitigation was the acquisition of an income stream alternative to that under the original charterparty; and that, accordingly, the sale of the vessel was not itself an act of successful mitigation because it was incapable of mitigating the loss of the income stream, and so was irrelevant. (iv) It followed that the charterers were not entitled to have taken into account, as diminishing the loss sustained by the owners, the benefit consisting of the avoidance of a drop in the capital value of the vessel by having sold it at the time of the repudiation rather than after the performance of the contract; and that, accordingly, the judge had been correct to hold that the arbitrator had erred in principle.
51. It is apparent from the arbitrator's reasons in the present case that he considered the required test of causation in accordance with the decision in *The New Flamenco*, though he did not refer to that decision in terms. Thus the arbitrator concluded that "as a result of the detention there was no possibility of drydocking the vessel on any sensible basis

before she was redelivered”. The arbitrator’s reasons for this conclusion were that there was a physical impossibility so long as the vessel was detained and by the time she was at Port of Spain the Head Owners had already declared her a CTL.

52. No challenge was made to the first reason. The second reason was challenged. The basis of this challenge was that the declaration of the vessel had been rejected by the underwriters (a fact which did not, I think, appear in any award but was evidenced by the Owners’ solicitor in support of a section 68 challenge which was not pursued) and was thus “writ in water”. The arbitrator’s conclusion was said to be a non-sequitur because the fact that the declaration of the vessel as a CTL had been rejected “would not and did not prevent Owners from reaching an “independent decision” whether or not to drydock the vessel and repair her.”
53. The reason why the arbitrator considered the declaration of the vessel as a CTL relevant in this context is apparent from paragraph 68. It would be “pointless” to drydock the vessel “in view of the Owners’ abandonment of the vessel”. It was common ground that the “abandonment” referred to the declaration of the vessel as a CTL. The arbitrator was saying that in circumstances where the Head Owners had formed the view that the costs of repairing the vessel exceeded her value it was “pointless” to incur the costs of drydocking her.
54. Counsel for the Owners challenged this conclusion on the basis that until such time as the underwriters accepted the notice of abandonment the Head Owners would act as any prudent owner would do, which would involve asserting its contractual rights against the Owners, and the “point” in the Owners drydocking the vessel would have been to perform their legal obligation and reduce their potential liability to Head Owners. It was said that Owners took an “independent decision in relation thereto.”
55. The arbitrator is a most experienced maritime arbitrator who was in a very good position to judge whether the circumstances of this case were those in which there was a point in drydocking vessel or in which there was not. He took the view that in circumstances where the Head Owners had declared the vessel to be a CTL (and where, I assume, there was evidence before him that the notice of abandonment had been rejected by the underwriters) there was no point in drydocking the vessel. It may be that in other cases where a declaration of a CTL had been rejected there would be, in the circumstances of the case, a point in drydocking the vessel but the arbitrator formed the clear view that in this case drydocking would be pointless. That is a finding of fact which does not give rise to any point of law. The Owners may disagree with the finding but on matters of fact the arbitrator’s decision is final.
56. Counsel submitted that the arbitrator had misunderstood the legal effect of an unaccepted notice of abandonment and that therefore there was an error of law. However, I am unable to accept that this experienced arbitrator misunderstood the legal effect of an unaccepted notice of abandonment. His reasoning, on a fair reading of it, does not manifest any such misunderstanding.
57. I am therefore unable to accept the submission that the arbitrator erred in law in finding that the declaration of a CTL was relevant, alternatively decisive, in precluding drydocking.



58. It follows that I reject the submission that the arbitrator's reasoning was erroneous such that his conclusion was vitiated.
59. Counsel next submitted that if the declaration of a CTL did preclude any decision to drydock by the Owners then any benefit or saving would have been caused by the Head Owners' decision to declare the vessel a CTL. It was "an independent transaction."
60. Counsel submitted orally that the Head Owners' decision was analogous to the decision of the owners of *The New Flamenco* to sell her. In my judgment, however, the arbitrator's finding that as a result of the detention there was no possibility of the drydocking the vessel on any sensible basis explains why the facts of the instant case are not similar or analogous to those of The New Flamenco. In that case there was no causal connection between the early redelivery of the vessel and the sale of the vessel. The vessel could have been sold at any time. The early redelivery did not require the owners to sell the vessel. The owners elected to sell the vessel in the context of the early redelivery but the early redelivery did not cause the sale. The benefit obtained by selling when the owners did, instead of at the contractual expiry of the charter, was therefore not be credited against the owners' losses. In the instant case there was, as found by the arbitrator, a clear causal connection between the detention of the vessel and the saving made by the Owners by not drydocking her. The detention of the vessel rendered it impossible to drydock the vessel and once the Head Owners had declared the vessel as CTL it was pointless to drydock her. I therefore do not consider that the owners' decision to sell in *The New Flamenco* was analogous to the Head Owners' declaration of the vessel as a CTL.
61. The submission made on behalf of the Owners was that the Head Owners' declaration that the vessel was a CTL was an "independent decision" such that there was no causal link between the detention and the saving of the drydocking expenses. But the arbitrator had regard to the declaration and nevertheless found that the "failure to drydock was an inevitable result of and was caused by the detention". On a fair reading of the award it is necessarily to be inferred that the arbitrator considered that the declaration was caused by the detention. In circumstances where the vessel had been detained for over three years that is an understandable finding. In my judgment there is no factual support in the award for the Owners' submission that the Head Owners' declaration of the vessel as a CTL was a decision independent of the detention of the vessel.
62. Counsel for the Owners also submitted that the difference in kind between the loss claimed by the Owners (hire and additional expenses) and the saving (drydocking costs not incurred) is indicative that the saving was not caused by the breach. Reliance was placed upon paragraph 64(8) of Popplewell J's judgment in *The New Flamenco* quoted by Lord Clarke at paragraph 16 of his judgment and approved by him at paragraph 30. However, it is necessary to note that Popplewell J. also said that there was no requirement that the benefit must be of the same kind as the loss being claimed or mitigated. Lord Clarke said at paragraph 30:

"As I see it, difference in kind is too vague and potentially too arbitrary a test. The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation.

The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation.”

63. The arbitrator considered the question of causation and thus applied the correct test.
64. I must finally consider the submission that the arbitrator’s decision on causation was one which no reasonable tribunal, properly directed in law, could have reached. If it was then there must have been an error in either failing to identify the correct principles or in failing to apply them.
65. I am unable to say that the arbitrator’s decision on causation was one which no reasonable tribunal, properly directed in law, could have reached. His finding that drydocking was impossible whilst the vessel was detained was not challenged and his finding that it was pointless to drydock the vessel once the Head Owners had declared the vessel a CTL cannot be shown to have been vitiated by an error of law. In those circumstances his decision on causation appears to be unexceptional and understandable.
66. I therefore conclude that it cannot be shown that the arbitrator ought to have held that there was no sufficient causal nexus between the detention of the vessel and the saving of drydocking expenses.

Ought the arbitrator to have held that the Charterers were estopped by *res judicata* from alleging such a saving ?

67. Counsel for the Owners submitted that in circumstances where (i) the arbitrator had finally decided the trading profits lost up to 20 July 2015 in PFA 1, (ii) the drydocking costs would have been incurred by about 27 June 2015 and (iii) the drydocking costs were not taken into account in the calculation of lost trading profits the Charterers were estopped on the basis of *res judicata* from asserting after PFA 1 that credit should be given for the saving of drydocking costs. “The Tribunal had finally decided that there was no counterfactual drydocking cost and therefore no saving thereof to be taken into account in assessing the loss of profits claim.” It was said that “the Charterers, having failed to seek the deduction of the drydocking costs in the relevant hypothetical lost trading profits calculation, could not capriciously seek their deduction from other unrelated costs”.
68. This argument was raised before the arbitrator; see paragraphs 52-54 of the Final Award. The arbitrator accepted that the question of drydocking had not been raised at the hearing leading to PFA 1, whether by accident or design he could not say; see paragraph 56. The arbitrator accepted the Charterers’ argument that when meeting the Owners’ claim for additional costs caused by the detention of the vessel (in PFA 2 and PFA 4) the Charterers were entitled to say that the detention had also resulted in a saving of costs by preventing the drydocking which should have taken place. This was a “separate saving” just as the Owners’ claims for additional costs (incurred before and after 20 July 2015) were “conceptually distinct matters”; see paragraphs 59-61. The arbitrator accepted that it was “possibly right” that if the Charterers had said at the hearing leading to PFA 1 that the claim for profits must be reduced to take account of the drydocking deduction he would have acceded to that argument. But he said that he “would have done so not because I would have concluded that the owners’ profits up to 20 July 2015 should have been at a lower daily rate than what I in fact awarded, but

simply because it would not have seemed appropriate to me not to take account of that deduction, although on a provisional basis only, as I did subsequently.”

69. The Owners’ submission only has force if the saving of the drydocking costs could only have been taken into account when assessing the claim for lost trading profits up to 20 July 2015. But the arbitrator did not consider that he would have assessed the lost profits at lower daily rate had the saving been considered at the hearing leading up to PFA 1. Rather, he considered that he would have given credit against the claim “on a provisional basis”. One can understand why he would have done that. The drydocking saving can be described, as Popplewell J. did when dealing with the appeal against the deduction in PFA 4, as a “current saving”. But however it is described

“.....it is not possible to say now whether at the (future) date at which the Arbitrator decides to make a final assessment of loss they will have been saved or not. Whilst it remains, as the Arbitrator found, a substantial possibility that they will be saved, and whilst it is at least arguable, at the lowest, that such a saving will have to be deducted from the sums which the Arbitrator has held disponent owners would otherwise be entitled to recover, an argument not yet addressed or disposed of, it would be impossible for the tribunal to award payment of sums without such deduction, because on the issues which it has determined it could not be satisfied that a greater sum would be recovered as a minimum.” (see paragraph 43. of Popplewell J’s judgment)

70. Thus at the time of PFA 1 it was not certain that there would ultimately be a saving. In those circumstances any allowance made at that time would have had to have been on a provisional basis. For that reason it was different in kind from the calculation of lost trading profits which was final. The arbitrator’s comment that he would not have concluded that the Owners’ profits up to 20 July 2015 should have been at a lower daily rate than that which he had found, but that he would have made a deduction on a provisional basis against the Owners’ profits as assessed, therefore makes sense, as it appears to me. For the same reason I do not consider that the drydocking cost was a saving which could only have been taken into account when assessing the claim for lost trading profits up to 20 July 2015 and so reducing the amount of the lost trading profits. It could have been taken into account, as the arbitrator said he would have done, had the point been raised at the hearing leading to PFA 1, by not reducing the level of lost profits but making a deduction on a provisional basis. Taking it in account in that way would have been consistent with the assessment of the Owners’ damages being “one continuous exercise” (see paragraph 74 of the award) spread over several awards.

71. That being so, the Owners’ argument of estoppel falls away. For it cannot be said that in finally deciding the quantum of the lost profits claim the arbitrator had necessarily decided that there was no saving of drydocking costs to be taken into account when assessing the quantum of the lost profits claim.

72. There is a further point. The assumption underlying the Owners’ argument is that a periodic drydocking is an expense which is necessarily, as a matter of law, to be taken into account when assessing trading profits. Counsel for the Charterers submitted that such costs are different from “an everyday cost of trading a vessel (like buying bunkers or paying port costs)”. Consistently with this submission neither quantum expert suggested that drydocking costs be taken into account when assessing the trading profits

(see paragraph 58 of the award). That supports the Charterers' submission. That submission is also supported by the fact that when the Charterers first sought a deduction in respect of drydocking costs in the hearing leading to PFA 2 the Owners did not at that stage suggest that the Charterers were estopped from raising the point because of PFA 1 (see paragraphs 20-22 of PFA 2). The point appears to have been taken for the first time in the hearing leading to PFA 4; see paragraph 41 of PFA 4. The arbitrator thought this a "narrowly-focussed argument that ignores the underlying risk that the costs may never be incurred, and the justice of allowing the charterers a provisional credit". On appeal the point does not appear to have been pursued; see paragraph 40 of the judgment of Popplewell J. I am not persuaded that there was any error of law involved in assessing the trading profits lost before 20 July 2015 without taking into account periodic costs of drydocking. The quantum experts assessed the lost profits without doing so. In the absence of an error of law it is not, I think, possible to say, as the Owners do, that "the Tribunal had finally decided that there was no counterfactual drydocking cost and therefore no saving thereof to be taken into account in assessing the loss of profits claim."

73. For both of these reasons I do not consider that the arbitrator erred in law when failing to hold that the Charterers were estopped from contending that credit should be given for the saved costs of drydocking against the Owners' claims for additional expenses.
74. In these circumstances it is not necessary to lengthen this judgment yet further by considering the Charterers' argument (upheld by the arbitrator) that the Owners are themselves estopped from raising this point by reason of PFA 4.

**Ought the arbitrator to have held that such a saving could not be deducted from the contractual claim for an indemnity ?**

75. Clause 13 of the charter provided that the Charterers were to "indemnify the Owners against all consequences or liabilities that may arise from any irregularities in papers supplied by Charterers or their agents." The Owners claimed under this clause as well as claiming for damages for breach of the Charterers' obligation in clause 28 that no voyage shall be undertaken "that would expose the vessel to capture or seizure by rulers or governments."
76. The submission made on behalf of the Owners was that a credit or deduction in respect of the saving of drydocking costs was only permissible from the claim in damages. There was no express or implied right to deduct such a saving from the claim for an indemnity.
77. This argument was rejected by the arbitrator. At paragraph 73 he referred to the assessment of "consequences" which is what clause 13 concerns. He said:

"The charterers said I should assess what the overall consequences or liabilities arising from the detention are in the round. The owners objected to the word "overall" but that does not seem to me of any relevance. With or without that word the result seems to me to be the same. A consequence of the detention is the fact that the owners were effectively – and unavoidably - saved the costs of drydocking and it must be right, in my view, to take that saving into account in assessing what were the consequences generally."

78. It was submitted on behalf of the Owners that this was “obviously wrong”. But it was not explained why. In my judgment it was obviously right to focus upon the assessment of consequences because the indemnity was in respect of consequences. The consequences of the detention caused by irregularities in papers supplied by Charterers or their agents will obviously include additional costs incurred by the Owners. But when the consequences also include savings it makes sense to include them because otherwise the Owners will receive more than an indemnity. In my judgment there was no error of law in the arbitrator’s decision or reasoning. His reasoning followed the language of the indemnity clause and his decision was consistent with the notion of an indemnity.
79. Reliance was placed by the Owners on the decision of Burton J. in *Tullow Uganda Ltd. V Heritage Oil and Gas Ltd.* [2014] 1 AER (Comm) 22 at paragraphs 109 and 110. However, that case concerned a clause which was not an indemnity against “consequences” but a clause which imposed an obligation on the seller to pay to the buyer an amount equal to certain taxes paid by the buyer (see clause 7.2 set out at paragraph 4 of the judgment). Moreover, the argument advanced was that the buyer was disentitled from claiming under the clause where the payment of the taxes by the buyer caused him to obtain valuable benefits (see paragraph 109) and the argument required an implied limitation into the wording of clause 7.2 which the judge considered unarguable (see paragraph 110). It was a very different case from the present.
80. Reliance was also placed by the Owners on the decision of Rix J. in *The Eurus* [1996] 2 Lloyd’s Reports 408 at p.422 where Rix J. said that there were distinctions between damages and an indemnity such as the rules relating to penalties and mitigation which apply to damages but not to an indemnity. However, that case also did not concern an indemnity against “consequences”. Indeed it was held that the clause in question was not an indemnity; see holding no.1 in the headnote (which was upheld on appeal, see [1998] 1 Lloyd’s Reports 351 at p.361 lhc per Staughton LJ and p.363 rhc per Sir John Balcombe). In any event Rix J. was of the view (at p.432 lhc) that one should not “contemplate a difference in overall responsibility under the clause. It would be odd in such circumstances if owners were legally liable to indemnify a loss which was not recoverable for breach of contract, and vice versa.” The arbitrator’s comment in paragraph 72 of the award that “it would be a strange conclusion if the amount of the owners’ damages for the breach that resulted in the detention here was different from the amount payable under indemnity” echoes the approach of Rix J. It seems to me that this is so *a fortiori* when one is dealing with an express indemnity against “consequences”.
81. The arbitrator considered that when assessing the “consequences” of the detention of the vessel caused by irregularities in the papers supplied by the Charterers it was appropriate to view the consequences generally and in particular to include those which provided the Owners with a saving. That approach is consistent with the notion of an indemnity and betrays no error of law.
82. Other authorities were referred to by counsel for the Charterers (in particular *Endurance Corporate Capital Ltd. v Sartex Quilts & Textiles Ltd.* [2020] Lloyd’s Reports IR 397) but it is unnecessary to lengthen this judgment any further by commenting upon them.

## Conclusion

83. I have now considered the four grounds upon which it is alleged that the arbitrator erred in law when concluding that the drydocking costs were to be deducted from the award of bareboat hire and expenses incurred by the Owners and caused by the Charterers' orders and breach. None of the alleged errors of law has been established. It follows that the appeal must be dismissed.