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Case No: 2012 Folio 808

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2012

Before :

MR JUSTICE ANDREW SMITH

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Between :

Petrochemical Industries Company (K.S.C)	**Claimant**
- and -	
The Dow Chemical Company	**Defendant**

- -
- -

Lord Grabiner QC, Sa'ad Hossain and Michael Watkins
(instructed by **Ashurst LLP**) for the Claimant
Joe Smouha QC, David Joseph QC, Ricky Diwan and Rupert Allen
(instructed by **Shearman & Sterling (London) LLP**) for the Defendant

Hearing dates: 2 and 3 October 2012

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Judgment

Mr Justice Andrew Smith:

1. Petrochemical Industries Company (K.S.C.) (to whom I refer as "PIC") apply under section 68 of the Arbitration Act 1996 for an order that there be remitted to the Tribunal for reconsideration two paragraphs of an award and the question whether, as the Tribunal determined at paragraph 4 of the dispositif, PIC should pay damages for consequential losses (or "loss of opportunity" damages).

2. The reference was before the International Court of Arbitration of the International Chamber of Commerce ("ICC"), and the Tribunal comprised Mr. Kenneth Rokison QC, Lord Hoffmann and Judge Charles Brower. The dispute referred to them was about PIC not completing an agreement (a Joint Venture Formation Agreement or "JVFA") dated 28 November 2008 with The Dow Chemical Company ("Dow") to enter into a joint venture, paying $7.5 billion for a 50% interest in certain petrochemical assets of Dow.

3. The arbitration agreement between the parties, which was in an Umbrella Arbitration Agreement also dated 28 November 2008, excluded any appeal from the Tribunal under section 69 of the Arbitration Act, both directly and by agreeing to ICC rules to that effect. It was suggested by Mr Joe Smouha QC, who with Mr David Joseph QC, Mr Ricky Diwan and Mr Rupert Allen represented Dow, that this should in some

way make the court less ready to accede to an application under section 68. I do not accept this; section 68 is a mandatory provision of part 1 of the 1996 Act, and it was not and could not have been excluded or modified by the parties.

4. The award that is challenged is a Partial Award dated 21 May 2012, in which the Tribunal concluded inter alia that PIC were in breach of contract in failing to close the JVFA on 2 January 2009 by paying Dow $7.5 billion (an amount sometimes called the "K-Dow proceeds", as the joint venture assets were sometimes called the "K-Dow assets"), and that Dow had established that they were entitled to damages for consequential losses (or so-called "loss of opportunity" damages) of some $2,050.95 million. The application, as I have indicated, is directed only against this second conclusion and the award of those damages: no complaint is made before me about the determination against PIC on liability or about an award of $110.1 million by way of wasted costs. More specifically, the criticisms concern the Tribunal's conclusion that PIC are liable for losses suffered by Dow because, after PIC had failed to complete the JVFA, Dow had to pay some $15 billion in order to complete an acquisition of Rohm & Haas ("R & H") under a commitment made in July 2008, some months before they concluded the JVFA. In their skeleton argument on this application, Lord Grabiner QC, Mr. Sa'ad Hossain and Mr. Michael Watkins, who together represent PIC, describe the position thus:

> "Dow hoped to use the K-Dow proceeds towards this acquisition but had arranged fully committed funding from leading investment banks to finance the entire amount in the event that the K-Dow proceeds were not available. This committed funding proved insufficient and Dow was forced to refinance the entire transaction in short order in an attempt simultaneously to complete the Rohm & Haas Transaction and maintain its previously safe investment grade credit rating."

They say that PIC argued before the Tribunal that, not least because of assurances given to them by Dow before the JVFA was concluded about the funding available to them and their financial position, "Dow's exceptional losses were not within the reasonable contemplation of the parties **and** that irrespective of what the parties knew about the risk of such losses, PIC could not fairly be said to have assumed responsibility for them given Dow's assurances. In short, Dow could not claim damages for the extraordinary consequences of refinancing the Rohm & Haas transaction when it had told PIC that it was fully funded and was not desperate for the K-Dow proceeds".

5. I need to explain in a little more detail the legal and factual basis of PIC's complaint. Their legal contention, based on the speeches in Transfield Shipping Inc v Mercator Shipping Inc (The "Achilleas"), [2008] UKHL 48, as developed and explained by the Court of Appeal in Supershield Ltd v Siemens Building Technologies FE Ltd, [2010] EWCA Civ 7, was in the reference and is on these applications that the question whether losses resulting from a breach of contract are too remote for a contract breaker to be liable in damages for them does not depend entirely or ultimately upon what I shall (perhaps loosely) label "foreseeability" but also upon whether he is reasonably to be regarded as having assumed responsibility for losses of that kind, what I shall call an "assumption of responsibility" test. By "foreseeability" I refer to the question (or questions) whether the losses were of a type that would have been

within the parties' reasonable contemplation as a not unlikely result of the breach either as arising naturally or in the usual course of things so as to be covered by the so-called "first limb" of the principles explained in Hadley v Baxendale, [1854] EWHC Exch J70, or in light of special circumstances known to both parties so as to be covered by the "second limb". Thus, before the Tribunal PIC argued (in their First Memorial) at paragraph 491 that:

> "The correct approach to remoteness therefore requires the following questions to be answered:
>
> a. At the time of making the contract, would a reasonable person in the position of the contract-breaker have considered the type of loss that has occurred to be not unlikely:
>
> 1) in the ordinary course of things, or
>
> 2) as a result of special circumstances communicated to him?
>
> b. If the answer to question a. is "yes", should liability nevertheless be excluded because it could not fairly be said that the contract-breaker had assumed liability for the type of loss?
>
> c. If the answer to question a. is "no", should liability nevertheless be included because the contract-breaker assumed responsibility for the type of loss?"

On this application PIC contend that, having answered question a "yes", the Tribunal failed to deal with question b.

6. As for the considerations that would be relevant in this case to the question whether they "assumed responsibility for the type of loss" (or whether liability was excluded under question b), PIC said this at paragraph 533 of their First Memorial:

> "Even if it could be said that the incremental costs of the but-for and incremental funding were not unlikely to occur in the event of the JVFA not Closing, it could not fairly be said that PIC assumed responsibility for such kinds of loss having regard to: the purpose of PIC's obligation; the pre-existing nature of Dow's ROH commitment; the manner in which the special circumstances alleged to render the loss foreseeable were communicated to PIC; the lack of control by PIC in respect of such losses; and the detailed terms of the JVFA."

(I explain the term "incremental" at paragraph 9 below. In argument, Mr Smouha emphasised that paragraph 533 is in a part of the memorial directed to one part of the contentious claim for consequential damages, the "funding costs", but, as I read it, this point is effectively incorporated in passages dealing with the two other parts of the contentious claim, those concerning "incremental expenses" and "general business

losses", and so directly or indirectly is applied to all the damages with which I am concerned.) The consideration that Lord Grabiner particularly emphasised before me was "the manner in which the special circumstances alleged to render the loss foreseeable were communicated to PIC", and PIC's case about this was expanded at paragraph 536 of the memorial:

> "Beyond the timing of the ROH commitment, the circumstances in which ROH was mentioned by Dow to PIC negated any assumption of responsibility by PIC. This point has been addressed above already … in considering limb (2) of the foreseeability test but is of equal relevance here. Put shortly having indicated that the funding of ROH was not dependent on the PIC proceeds, Dow cannot now assert that PIC assumed responsibility for any of the claimed losses relating to ROH (and that would be so even if such losses were in fact foreseeable by PIC)."

7. As is apparent from this, PIC referred to matters that, they said, had been "indicated" by Dow both (i) in relation to "foreseeability" under the "Second Limb", and (ii) in relation to an assumption of responsibility test. One argument of PIC was that on both questions account should be taken only of knowledge of PIC that they had acquired from Dow and not of what they had been told by others, specifically by their advisers, JP Morgan. As is apparent from paragraph 145 of the award (which I set out at paragraph 12 below), that argument was rejected by the Tribunal and PIC do not seek to resurrect it on this section 68 application.

8. PIC submitted before me that the (uncontroversial) evidence at the hearing before the Tribunal was that Dow, through senior executives, gave indications (or assurances or disclaimers) relevant to the assumption of responsibility question along these lines:

   i) "there was nothing to worry about because the two deals [the joint venture and the R&H acquisition] were distinct";

   ii) The R&H acquisition "was already fully funded by leading investment banks";

   iii) "Dow was not desperate for the money";

   iv) "Dow would be happy to hold on to the [K-Dow assets] regardless of whether [the R&H acquisition] went ahead"; and

   v) "Dow was a good company with a strong financial outlook and that it was not reliant on the K-Dow proceeds".

9. Although Dow had arranged (short-term) finance to enable them to complete the R&H acquisition without the K-Dow proceeds, in the event they were unable to use these arrangements because they did not satisfy and would not satisfy their requirements as to debt equity ratio or investment grade or both. They had to make new arrangements not only to replace the $7.5 billion that they did not receive from PIC but much of the rest of the funding required to complete the R&H acquisition, and this involved them in issuing shares and bonds, reducing capital expenditure, divesting assets and postponing the R&H acquisition. Dow confined their claim to

what was called the "incremental cost of funding", the additional costs of having to raise funding in the difficult circumstances that, they said, resulted from PIC's failure to complete the JVFA, making allowance for what might be called the "normal cost" of funding, and the Tribunal assessed the incremental cost of funding at $2.05 billion.

10. PIC's argument on the assumption of responsibility question might not be straightforward if I remitted it for reconsideration. As for its factual basis, Mr Smouha challenged whether, even taken at face value, the statements upon which PIC rely amount to or imply assurances of the kind that PIC assert, and whether they were still applicable when the JVFA was concluded. As for their legal argument, there might be room for debate about whether, given the rule in Prenn v Simmonds and given an entire agreement provision in the JVFA, the content of negotiations (in contradistinction to the knowledge common to the parties or attributed to them) is relevant to determining the parties' secondary obligations. But I need not, and therefore on an application of this kind should not, engage with those questions. I can, and do, determine it on the basis that PIC's position on the assumption of responsibility question would be at least well arguable.

11. The paragraphs of the award that PIC say should be remitted for re-consideration are paragraphs 145 and 146, which are in a section of the award entitled "Quantum of Damages" and are under a heading "Remoteness" and a sub-heading "The Applicable Law". This section of the award is introduced at paragraph 141 with the description by the Tribunal of "a further subsidiary issue". They state it in these terms:

> "According to PIC, losses such as these were unlikely to arise in the ordinary course of events and therefore do not fall within the First Limb of the remoteness rule. Moreover, PIC says that they do not meet the Second Limb rule either, because Dow must show that it communicated the relevant special circumstances to PIC in such a way as to show that Dow thought it important that PIC should know what matters depended on PIC's fulfilment of the contract. For its part, Dow maintains that its consequential losses are recoverable *either* as First Limb *or* as Second Limb losses. As for the First Limb, Dow says that its intention to use K-Dow proceeds to fund acquisition of Rohm & Hass was known by the market in general, which is enough to meet First Limb foreseeability requirement. Even if applying a Second Limb standard, Dow argues that PIC's knowledge of the "*special circumstances"* is sufficient to satisfy this limb, regardless of whether or not the knowledge was communicated to PIC by Dow itself, directly."

The references to the "First Limb of the remoteness rule" and the "Second Limb rule" are, of course, references to Alderson B's judgment in Hadley v Baxendale, [1854] EWHC Exch J70. The award then turns to "the standard to apply", and states that in particular this is to be determined "with respect to the question whether, in order to meet the Second Limb standard, Dow need show only that PIC knew of its intentions for the proceeds, or whether Dow need show that it itself communicated those intentions directly to PIC". The Tribunal decided that a claimant need not himself have communicated "special circumstances" or that at least it is "a case-specific

inquiry" whether he needed to do so, referring to the House of Lords authorities of The "Achilleas" (cit sup) and C Czarnikow Ltd v Koufos (The "Heron II"), [1969] 1 AC 350, 385 and to Chitty on Contracts, (30th Ed, 2008) paragraph 26-063. They go on to cite from the judgment of Robert Goff J in Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The "Pegase"), [1981] 1 Lloyd's Rep 175, 183 his observation that "[i]n some cases, the Courts appear to be prepared to take into account knowledge of special circumstances (i.e., circumstances outside the ordinary course of things) although such knowledge was not communicated by the plaintiff to the defendant - such as knowledge of the nature of the plaintiff's business …; … [i]n other cases, however, the Courts appear to have considered that the special circumstances should have been specifically drawn to the attention of the defendant by the plaintiff … ."; and his conclusion that:

> "[T]he test appears to be: have the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach. The answer to that question may vary from case to case, taking into consideration such matters as, for example, the nature of the facts in question and how far they are unusual, and the extent to which such facts are likely to make fulfilment of the contract by the due date more critical, or to render the plaintiff's loss heavier in the event of nonfulfilment."

12. This leads to the two paragraphs of the award that PIC specifically criticise:

> "145. On the facts before us, there seems to be no reason to place a burden on Dow to show that it or its agents directly communicated to PIC the would-be "s*pecial circumstances*" of this case *(i.e*., that Dow was counting on applying the US$7.5 billion it was to receive from PIC toward its purchase of Rohm & Haas) in order to satisfy the Second Limb. To the contrary, it seems to us, this was a sophisticated transaction involving sophisticated parties who were all well aware of the commercial circumstances surrounding the transaction, including Dow's intention to apply the funds to be received from PIC at closing to the Rohm & Haas deal.
>
> 146. Accordingly, PIC reasonably should have expected to be held liable for costs associated with its failure to close, thus forcing Dow to secure elsewhere substitute funding for the purchase of Rohm & Haas. PIC's knowledge was not gained, as Chitty warns, in a "purely casual way," but rather through hired professionals, its financial advisers JP Morgan, through whom PIC was made well aware that Dow would be put in a distressed position without the K-Dow proceeds. PIC acquired this information through serious study, had access to reliable

> and compelling information, and was no doubt relying on this information when entering into the Contract, and negotiating a more than US$1 billion reduction in the price it would pay. It was in early November 2008 that PIC and JP Morgan drafted a presentation to SPC in which they explained that "*Dow needs cash"* for the Rohm & Haas acquisition and that PIC "*desire[d] to take advantage of the current situation to achieve a price reduction*"; and indeed, it was in this same month that PIC pushed for and received the more than US$1 billion price reduction. This is precisely the kind of situation in which a breaching party may be held liable for the consequential damages of its breach. In any event, there is evidence that Dow *did* communicate to PIC and its agents the link between the K-Dow transaction and the Rohm & Haas acquisition, such that PIC was aware of it, without Dow's presenting it in a way that would threaten the negotiations. Either way, it appears to us that Dow satisfies the Second Limb."

13. PIC put their application in two ways:

i) That there was a serious irregularity by way of a failure by the Tribunal to deal with all the issues that were put to it (section 68(2)(d) of the 1996 Act), and this has caused (or will cause) PIC substantial injustice.

ii) That there was a serious irregularity by way of a failure by the Tribunal to comply with its general duty under section 33 of the 1996 Act (section 68(2)(a)), which has caused (or will cause) PIC substantial injustice.

For completeness, I set out the relevant parts of section 68 (the relevant parts of section 33 being at paragraph 34 below):

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> …
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –
>
> (a) Failure by the tribunal to comply with section 33 (general duty of tribunal); ….
>
> (d) Failure by the tribunal to deal with all the issues that were put to it; …
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

Failure to deal with an issue

14. PIC complain that the Tribunal did not deal with this issue (which I shall label the "assumption of responsibility" question): whether, in particular because of assurances given by Dow about having funds to complete the R&H purchase regardless of whether they were paid under the JVFA, PIC should not be taken to have assumed responsibility for loss to Dow resulting from having to pay for the R&H purchase without receiving what PIC should have paid them. This is my own formulation of the issue but in oral exchanges Lord Grabiner accepted that such a formulation properly states PIC's complaint. The precise issue was variously stated in PIC's evidence and other documents prepared for the application, and Mr Smouha made much of the differences between the various formulations, arguing that they reflected and evidenced that in fact there was no identifiable issue ignored or overlooked by the Tribunal, or at least that no such issue had been "put to" the Tribunal. I do not find this argument persuasive: the thrust of the various formulations is, to my mind, essentially the same and the minor changes reflect, at most, refinements of the kind that usually and almost inevitably occur in the court process, and possibly reflect only the linguistic preferences of different lawyers. Unsurprisingly there was no issue of primary fact between the parties about what was "put to" the Tribunal and in these circumstances I do not consider that changes in the precise formulation of the issue are material to anything that I have to decide.

15. The general question whether there was a serious irregularity within sub-section 68(2)(d) in turn raises these more specific issues:

i) Whether the assumption of responsibility question was an "issue" within the meaning of the sub-section.

ii) If so, whether it was "put to" the Tribunal.

iii) Whether the Tribunal failed to "deal with" it.

If the answer to all these specific issues is "yes", a further issue arises: whether the failure has caused or will cause PIC substantial injustice. If it did, I should, in accordance with PIC's application, remit the award for reconsideration under sub-section 68(3)(a): Dow did not argue that I should exercise any residual discretion that I might have under the sub-section to refuse such relief. I deferred argument about the precise terms of any order, and in particular whether, if I acceded to the application in principle, the award should by remitted in whole or in part, and if in part, in what part.

16. A distinction is drawn in the authorities between, on the one hand "issues" and, on the other hand, what are variously referred to as (for example) "arguments" advanced or "points" made by parties to an arbitration or "lines of reasoning" or "steps" in an argument (see, for example, Hussman (Europe) Ltd v Al Ameen Development & Trade Co, [2000] 2 Lloyd's Rep 83, 97 and Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The "Pamphilos"), [2002] 2 Lloyd's Rep 681, 686). These authorities demonstrate a consistent concern to maintain the "high threshold" that has been said to be required for establishing a serious irregularity (see Lesotho Highlands Development Authority v Impergilo SpA and ors, [2005] UKHL 34 paragraph 28 and the other judicial observations collected by Tomlinson J in AAB AG v Hochtief Airport GMBH and anor, [2006] EWHC 388 paragraph 63). The concern has sometimes been emphasised by references to "essential" issues or "key" issues or "crucial" issues (see respectively, for example, Ascot Commodities NV v Olam International Ltd, [2002] 2 Lloyd's Rep 277,284; Weldon Plant v Commission for New Towns, [2001] 1 All ER 264, 279; and Buyuk Camlica Shipping Trading and Industry Co Ltd v Progress Bulk Carriers Ltd, [2010] EWHC 442 (Comm.)), but the adjectives are not, I think, intended to import a definitional gloss upon the statute but simply allude to the requirement that the serious irregularity result in substantial injustice: Fidelity Management SA v Myriad International Holdings BV, [2005] EWHC 1193 at paragraph 10. They do not, to my mind, go further in providing a useful test for applying section 68(2)(d).

17. I do not attempt the impossible task of defining what is an "issue", but I reject three suggested yardsticks: First, in the Fidelity Management case (at paragraph 9) it was suggested that the answer to whether something is an issue "should normally be obvious" if it is considered whether what has not been dealt with by a tribunal is "capable of being formulated as an essential issue of the nature of what would be included in an agreed list of issues being prepared for the purpose of a case management conference". I do not find this helpful: what is appropriate for a case management list of issues varies enormously depending on the nature of the case, but there is no standard or recognised criterion for their formulation.

18. Secondly, it was suggested by Mr Smouha that the lists of issues submitted by the parties cast light, or at least that submitted by PIC casts light, upon what questions in the arbitration are "issues" for the purpose of sub-section 68(2)(d). He cited observations by HHJ Humphrey Lloyd QC in the Weldon Plant case at paragraph 34, by Morison J in the Fidelity Management case at paras 13 and 18 and by Colman J in World Trade Corp v C Czarnikow Sugar Ltd, [2005] 1 Lloyd's Rep 422 at paragraph 16. The Tribunal ordered that the parties exchange "proposed lists of definitive issues in the arbitration" and they did so. Both lists had a question about remoteness of damages, Dow's being "Are any of Dow's claims too remote to be recovered?" and PIC's being "As a matter of law, are any of the damages claimed by Dow too remote?". Neither party broke down its general remoteness question into sub-questions that arose from it or steps that should be taken in order to resolve it. I can understand that a list of issues of this kind might assist to determine whether an issue was "put to", and I come to that later: as I read them, this is what was meant in the authorities cited by Mr Smouha and referred to above. I do not accept that it helps to decide whether a question is an "issue" within the meaning sub-section 68(2)(d). Otherwise parties would be able to modify the application of the

mandatory provisions of section 68 by their formulation of issues in the course of a reference and I cannot accept that they can.

19. There might be another answer to Dow's reliance on the lists of issues. There was in the reference a difference between the parties about whether and if so how liability for damages was affected by the terms of the JVFA, specifically clauses 10.4 and 13.9. Dow did not carve out of their general remoteness question the issue about whether the prima facie position was affected by the parties' contract, whereas PIC's list included as an issue, "As a matter of law, does clause 13.9 of the JVFA exclude any of Dow's consequential loss claim?". Mr Smouha's submission on the application was that "the issue was whether Dow's damages were too remote at common law, *separately from* the issue of the effect on remoteness of clauses 10.4 and 13.9 …" (emphasis added). If this is so, Dow's own list of issues did not separate out each issue, or distinguish the issue about the prima facie position and the issue about the impact of the contractual terms upon it. This seems to me to make it more difficult for them to maintain that PIC's list of issues should be taken to have done so. However, since this was not an argument explored at the hearing before me, I say no more about it.

20. The third point is associated with the second: Mr Smouha submitted that, as is reflected in the definitive lists of issues, there was an "issue" between the parties whether the losses suffered by Dow were too remote to be recoverable, and, as I understand it, that this identifies the proper place to draw the line between what is an "issue" (within the meaning of the sub-section) and what is not an "issue" but merely a sub-question or a line of argument. This reasoning seems to me fallacious: general issues can often be broken down into more specific issues. An "issue" of remoteness, itself an aspect of the "issue" whether damages are recoverable, might well embrace sub-issues, and I think that sub-section 68(2)(d) can cover sub-issues of this kind.

21. The assumption of responsibility question, as it was identified and presented by PIC on this application is, to my mind, an "issue" within the meaning of sub-section 68(2)(d). It is not simply a way of presenting the question of foreseeability, and not simply an argument in support of a contention that losses were not within the First Limb or the Second Limb of Hadley v Baxendale. It can be difficult to decide quite where the line demarking issues from arguments falls, but here almost the whole of Dow's claim could have depended (and on the Tribunal's other conclusions did depend) upon how the assumption of responsibility question was resolved. I accept PIC's submissions about whether it was an issue because this accords with what I consider to be the ordinary and natural meaning of the word, and I find support for this conclusion in that, as I see it, fairness demanded that the question be "dealt with" and not ignored or overlooked by the Tribunal, assuming it was put to them.

22. I come to whether the assumption of responsibility issue was "put to" the Tribunal. Before evidence was heard, both parties submitted two memorials setting out their cases, and I have already set out enough of PIC's First Memorial (which as respondent in the arbitration they served in response to Dow's First Memorial). It was followed by Dow's Second Memorial and then PIC's Second Memorial. In their Second Memorial, PIC said this (at paragraph 396):

> "In its Second Memorial Dow does not address the fact that Dow disclaimed the dependence of the ROH transaction on the PIC proceeds. This disclaimer is fatal to any assumption of responsibility. Even if, which is denied, PIC appreciated that the kinds of loss suffered by Dow in relation to ROH could result if PIC chose not to Close, Dow's repeated assurance that it was able to close the ROH transaction without PIC's proceeds would lead a reasonable person in PIC's position to conclude that it was not assuming responsibility for such losses".

This passage is in a section of the Second Memorial about "Consequential Losses". That section first deals with the submission "Dow's consequential losses are too remote", and after an Introduction (to which I refer at paragraph 30 below) has separate sub-headings about (i) "Dow's consequential losses are not recoverable under the First Limb"; (ii) "Dow's consequential losses are not recoverable under the Second Limb"; (iii) "PIC did not assume responsibility for Dow's losses"; and (iv) "Dow's losses cannot be characterised as a single type of loss". Paragraph 396 of the memorial, that I have set out, is under the third sub-heading.

23. As matters stood after the exchange of pre-hearing memorials, I consider that PIC had "put to" the Tribunal that assumption of responsibility question. Thereafter, very shortly before the hearing, the parties presented lists of issues. As I have said, neither Dow nor PIC separated out the assumption of responsibility question in its list.

24. Mr Smouha pointed out that in oral submissions to the Tribunal PIC presented the assumption of responsibility question as an aspect of remoteness of loss, and indeed on a couple of occasions in oral exchanges Lord Grabiner presented it as an aspect of the question whether they were within the Second Limb of Hadley v Baxendale. The exchanges that Mr Smouha seized upon are these:

    i) On the second day of the hearing, before evidence was called, Lord Grabiner referred to the evidence that was to be adduced about conversations between Dow and PIC and said "So in my submission, when you have seen the relevant bits of evidence, there is going to be no scope for the proposition that this was ever something we undertook". To Lord Hoffmann's question, "Under the second rule [in Hadley v Baxendale]", Lord Grabiner replied, "Yes".

    ii) In closing oral submissions Lord Grabiner in his reply said, "Assumption of responsibility is built into the second limb of Hadley v Baxendale on reasonable foreseeability. That is where the debate is to be had." (As it seems from the transcript, Lord Grabiner had only three minutes to shoot off succinct points of reply. I am wary about pouring over what was said in such circumstances.)

25. These points are to be considered against the background of the pre-hearing memorials and together with PIC's written Closing Submissions in which they separated the submission (at paragraph 70) "Dow's consequential losses do not fall within the second limb of the remoteness rule" from the submission (at paragraph 71) "PIC did not assume responsibility for Dow's losses". Certainly on the facts these

questions were indeed closely connected, PIC relying upon the same factual material in their submissions on foreseeability under the Second Limb and the assumption of responsibility question. I cannot accept that either by their list of issues or by Lord Grabiner's oral remarks or in any other way PIC withdrew or qualified the assumption of responsibility issue that they had put to the Tribunal in their pre-hearing memorials.

26. Sub-section 68(2(d) is about the Tribunal "dealing with" issues. The question whether an issue was dealt with depends upon a consideration of the award: as Mr Gavin Kealey QC said in Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd, [2010] EWHC 442 (Comm) at paragraph 38:

> "It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section [68(2)(d)] is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined."

27. As Mr Smouha submitted, and Lord Grabiner acknowledged, a tribunal does not have to "set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration": Hussman (Europe) Ltd v Al Ameen Development and Trade Co and ors, [2000] 2 Ll Rep 83 paragraph 56. Nor does a tribunal fail to deal with an issue that it decides without giving reasons (or a fortiori without giving adequate reasons): see Margulead Ltd v Exide Technlogies, [2004] EWHC 1019 (Comm.) at paragraph 43. No less pertinent in this case, as I see it, are these considerations:

i) A tribunal does not fail to deal with issues if it does not *answer* every question that qualifies as an "issue". It can deal with an issue by making clear that it does not arise in view of its decisions on the facts or their legal conclusions.

ii) By way of amplification of this point, a tribunal may deal with an issue by so deciding a logically anterior point that the issue does not arise. For example, a tribunal that rejects a claim on the basis that the respondent has no liability is not guilty of a serious irregularity if it does come to a conclusion on each issue (or any issue) about quantum: by their decision on liability, the tribunal disposes of (or "deals with") the quantum issues.

iii) A tribunal is not required to deal with each issue seriatim: it can sometimes deal with a number of issues in a composite disposal of them.

iv) In considering an award to decide whether a tribunal has dealt with an issue, the approach of the court (on this as on other questions) is to read it in a "reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it": Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd, [1985] 2 EGLR 14 at p.14F per Bingham J.

v) This approach may involve taking account of the parties' submissions when deciding whether, properly understood, an award deals with an issue. Although submissions do not dictate how a tribunal is to structure the disposal of a dispute referred to it, often awards (like judgments) do respond to the parties' submissions and they are not to be interpreted in a vacuum.

28. The focus of PIC's argument that the Tribunal failed to recognise or to deal with the assumption of responsibility issue is the indications or assurances summarised at paragraph 8 above. PIC rightly point out that they are nowhere referred to in the award, and they submit that the Tribunal did not resolve "the central question what a reasonable person in PIC's position would have understood by the assurances PIC received from Dow's top executives".

29. I do not accept PIC's submission on this point. I consider that the Tribunal dealt with the issue, admittedly succinctly, in the first sentence of paragraph 146 of the award: "Accordingly, PIC *should reasonably have been expected to be held* liable for costs associated with its failure to close" (emphasis added). This echoes the language of the objective test for assumption of responsibility identified in The "Achilleas" (especially at paragraph 9 per Lord Hoffmann and paragraph 32 per Lord Hope), and it can be traced to the language of Robert Goff J in The "Pegase", which had been set out in the award. It is the Tribunal's answer on the assumption of responsibility issue.

30. What then do PIC's complaints come to? First, that the Tribunal might be said to have conflated the foreseeability question and the assumption of responsibility question, and so not to have adopted the structure to their decision suggested by PIC (see paragraph 5 above): hence the formulation of the "further subsidiary issue" in paragraph 141 of the award. This does not mean that the Tribunal failed to deal with the assumption of responsibility question (or for that matter the foreseeability question). PIC could not in any case complain about the composite disposal of these questions provided they were both dealt with (as, in my judgment, they were). But the approach in the award is the more understandable because PIC themselves recognised before the Tribunal that the various issues about remoteness might be so dealt with. I have already referred to what Lord Grabiner said when addressing the Tribunal, but I also cite the Introduction to the part of PIC's Second Memorial about "Consequential Losses" and "Dow's Consequential Losses are too Remote". Having submitted that the "traditional two-staged remoteness test" (meaning, I think, the two limbs of Hadley v Baxendale) is a means of establishing an inference as to whether PIC assumed responsibility, PIC said that the inference could be displaced (either to make recoverable what would otherwise be irrecoverable or vice versa). In this context PIC observed (in footnote 353) that,

> "It is not always necessary to make this distinction expressly and the test can be stated by a single principle, namely whether the types of loss were within the reasonable contemplation of the parties as not unlikely to occur, given all that they reasonably knew and all that they actually knew (provided that any actual knowledge was acquired in such circumstances as to lead a reasonable person in the position of the defendant to

> conclude that he was assuming responsibility for such losses), see The Pegase …".

31. The other aspect of this part of PIC's complaint is that the Tribunal did not refer to the assurances upon which they relied. This does not mean that they failed to deal with an issue. In paragraph 146 of their award they referred to what PIC were told by JP Morgan: they were, I think, saying that this in itself provided sufficient reason to justify the conclusion in the first sentence of the paragraph. They concluded the paragraph by alluding (albeit not in specific terms) to what PIC learned from Dow about the "link between the K-Dow transaction and the Rohm & Haas acquisition". PIC's complaint is that the Tribunal did not explain why they gave more weight to these considerations than the assurances on which they rely, but that does not amount to a complaint of a "serious irregularity" within section 68.

32. If I am right in deciding that the Tribunal dealt with the assumption of responsibility question, I do not need to decide whether otherwise substantial injustice would have been or would be caused, but I shall say this much. In Checkpoint Ltd v Strathclyde Pension Fund, [2003] EWCA 84, a case about an arbitration under a rent review clause, Ward LJ said this at paragraph 58:

> "The court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather the court should try to assess how the tenant would have conducted his case but for the procedural irregularity. It is the denial of the fair hearing, to summarise procedural irregularity, which must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will. I am not sure I would have found that if any of the irregularities were proved in this case the tenant would have been put at such a disadvantage that a substantial injustice had been caused. Once the arbitrator had accepted [the approach of the landlord's expert], as broadly he did, then the die was cast."

33. On an application under section 68 the court does not decide the question that the parties agreed should be arbitrated in order to determine whether or not substantial injustice has or will be caused by a serious irregularity. Lord Grabiner cited the judgment of Ramsey J in London Underground Ltd v Citylink Telecommunications Ltd, [2007] EWHC 1749 (TCC), who referred to whether an arbitrator "might realistically have reached a conclusion favourable to the applicant", but the courts have not, I think, identified a single test for deciding whether substantial injustice has or will be caused within the meaning of section 68. (I listed some of the authorities in paragraph 17 of my judgment in Michael Wilson & Partners Ltd v Emmott, [2011] EWHC 1441 (Comm).) All I shall say here is that, if the Tribunal in this case had entirely ignored the assumption of responsibility question, PIC would have been caused substantial injustice: it would not have been what Ward LJ called a technical irregularity. But if I am right in understanding that the first sentence of paragraph 146 of the award is directed to the question but it fell short of "dealing with" it for the

purposes of sub-section 68(2)(d), then I would conclude that no substantial injustice was or will be caused: the first sentence would still have "cast the die".

Breach of the general duty

34. I come to the complaint under section 68(2)(a), that the Tribunal failed to comply with section 33 of the 1996 Act. This strikes me as the more optimistic part of PIC's application, and I consider it relatively briefly. Section 33 of the 1996 Act is headed "General duty of the tribunal" and provides as follows:

> "(1) The tribunal shall –
>
> (a) act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that if his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

35. PIC's argument is that the Tribunal was in breach of the duty in sub-section 33(1)(a) in two ways: because they "genuinely overlooked the evidence of Dow's assurances" and because they "reached the conclusion that PIC had relied upon the information learned from JP Morgan when negotiating a price reduction".

36. If the matter were free of authority, I would not have thought that a tribunal is in breach of the duty in sub-section 33(1)(a) (or indeed that in sub-section 33(1)(b)) if it overlooks evidence (genuinely or otherwise). I would have interpreted the sub-section as being concerned with the even-handed conduct of the arbitral proceedings, and not with mistakes in evaluating the evidence by oversight or otherwise. I agree with Mr Smouha that this approach would sit comfortably with section 34 of the 1996 Act. Lord Grabiner argued that section 33(1) must be interpreted more widely in view of the description of it in sub-section 33(2) as a "general duty in conducting the arbitral proceedings", but I think that he places too much weight on these words. However, PIC's contrary view is supported by first instance decisions of Toulson J in Arduina Holdings BV v Celtic Rersources Holdings plc, [2006] EWHC 3155 at paragraph 46 and of Akenhead J in Schwebel v Schwebel, [2010] EWHC 3280 (TCC) at paragraph 27. It suffices to cite what Toulson J said:

> "The assertion that the arbitrator failed to take any or proper consider (sic) of the evidence could in an exceptional case, give rise to a challenge under section 68, based on the general duty of an arbitrator under section 33 if, for example, an arbitrator genuinely overlooked evidence that really mattered, or got the wrong end of the stick in misunderstanding it. But there is all

> the difference in the world between such cases and an arbitrator evaluating evidence but reaching factual conclusions on it (as will happen in most arbitrations) which one party does not like. That cannot be the basis of a complaint under section 68."

In view of these precedents, at first instance I should adopt the same approach.

37. However, I reject PIC's complaint because I am unable to infer that the Tribunal overlooked the evidence on which PIC rely. It is true that the award does not refer to it, but that is understandable given that the Tribunal decided that what PIC had been told by JP Morgan was relevant on questions of remoteness and given the importance that the Tribunal attached to this evidence. The more natural inference is that they considered the evidence on which PIC rely to be of lesser importance. Any other conclusion to my mind defies the proper approach to the court's appraisal of awards that Bingham J articulated.

38. In view of this, I say nothing about whether, had the Tribunal been in breach of their general duty in this way, the breach would have caused or would cause substantial injustice. The question does not arise and is not suitable for consideration on a hypothetical basis.

39. This leaves the alternative basis of the challenge under sub-section 68(2)(a), that the Tribunal concluded that PIC had relied upon information learned from JP Morgan in negotiating a price reduction. PIC did negotiate a reduction of $1 billion before concluding the JVFA, but their complaint is that the clear and uncontroversial evidence was that they were instructed by the Supreme Petrochemical Council ("SPC") to negotiate a reduction because of prevailing economic conditions, and the SPC had not been provided with the relevant parts of the JP Morgan presentation when they did so.

40. Although this error was said to involve the Tribunal being in breach of their general duty, Lord Grabiner acknowledged that (as was clearly the case) it does not amount to a separate complaint under section 68. If there were any error of this kind, I do not see how it could amount to a breach of the general duty, or cause substantial injustice. In the end Lord Grabiner relied upon this point only as "demonstrating that this Tribunal is not perfect", and that is the most that could have been made of it. But imperfection is not itself a serious irregularity under section 68, and, having rejected PIC's other complaints, I need say no more about this one.

Conclusion

41. I refuse PIC's application.