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Case No: 2014 Folio 105

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2014

Before:

MR JUSTICE COOKE

- -

Between :

Konkola Copper Mines	Claimant
- and -	
U&M Mining Zambia Ltd	Respondent

- -
- -

Graham Dunning QC, Rebecca Stripe and Louis Flannery (Solicitor Advocate) (instructed by Stephenson Harwood) for the claimant
Derrick Dale QC and Ravi Aswani (instructed by Clyde & Co LLP) for the respondent

Hearing dates: 8th and 9th July 2013

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Judgment

Mr Justice Cooke:

Introduction

1. This is an application by the respondent in an arbitration, Konkola Copper Mines Plc (KCM) under section 67 and section 68 of the Arbitration Act 1996. It is not untypical of applications of this kind made to the Commercial Court. The defendant, which is the claimant in the arbitration, is U&M Mining Zambia Ltd (U&M).

2. In the Arbitration Claim Form KCM asks the court to declare that the Second Partial Final Award dated 6th January 2014 (the Second Award) in four consolidated LCIA arbitrations is of no effect and should be set aside and/or remitted to the Tribunal for reconsideration. In oral argument the relief sought under section 67 was setting aside and the relief sought under section 68 was remission.

3. The grounds as set out in the Claim Form centre on a hearing which took place on 9th December 2013 in the absence of KCM. It is said that the tribunal ought to have granted an adjournment and should not have proceeded on that date. Having failed to give any clear indication of the issues and of what, if any, substantive matters would

be raised at the hearing, and having failed to give KCM proper opportunity to lodge pleadings, submissions or evidence following the First Award made one month earlier, it should not have proceeded to make the Second Award which determined a number of substantive issues. It is said that a number of the issues determined were beyond the tribunal's substantive jurisdiction and that the conduct of the proceedings leading to the Second Award was vitiated by serious irregularity which has caused KCM substantial injustice. It was not given a reasonable opportunity to put its case, the procedure was unfair and the tribunal did not comply with section 33 of the 1996 Act. The tribunal is also said to have acted in breach of Article 19.1 of the LCIA Rules. It is said that none of the procedural defects were ameliorated by the provision in paragraphs 47, 53 and 62(2) of the Second Award which allowed a 14 day period of time following the Award in which KCM could seek to "show cause" against certain heads of relief granted and orally it was submitted that this was an invalid form of Award to make.

4. The factual background can be stated shortly and I take the following summary essentially from KCM's skeleton argument.

5. KCM and U&M are both companies incorporated under the laws of the Republic of Zambia. KCM is a subsidiary of Vedanta Resources Plc, a substantial company which is listed on the London Stock Exchange. It is the largest copper mining company in Africa. KCM operates a number of copper mines on the Zambian copper belt. U&M, which is a subsidiary of a Brazilian mining conglomerate, carries on business as a mining contractor in Zambia. Between April 2007 and December 2011, KCM and U&M entered into a number of contracts which were, in essence, for the provision by U&M of open pit mining and related services at KCM's mines in the Nchanga area of Zambia's copper belt. A number of disputes subsequently arose between the parties in relation to their various contractual arrangements which led to a Settlement Agreement in April 2012 which led to an Adjudication followed by the conclusion of a Settlement Agreement dated 26th October 2012 (the Settlement Agreement).

6. In January 2013 however, KCM terminated one of the mining contracts between the parties and purported to rescind the Settlement Agreement. Notwithstanding the arbitration clause in each of the relevant four contracts, KCM applied to the Zambian courts seeking to compel U&M to vacate KCM's mining site at the COP F&D mine immediately and to deliver certain equipment in its possession to KCM which had been pledged by U&M as security for an Advance Payment Guarantee and Performance Guarantee given by U&M in KCM's favour. U&M successfully applied to this court for an anti-suit injunction in respect of the Zambian proceedings, which was subsequently discharged on the basis of an entitlement, on the part of KCM to obtain interim protective measures from the Zambian courts but not substantive relief, but on terms of an undertaking by KCM not to enforce that security until substantive issues were resolved in arbitration.

7. On 13th February 2013, KCM sought to call upon a bank guarantee (the BES Guarantee) which U&M had procured in favour of KCM in respect of all loss and damage which KCM might suffer by reason of a payment on account of sums that might become due following the reference of earlier claims to an adjudicator. The maximum sum covered by guarantee was US$10 million. On 18th February U&M's parent company applied to the Brazilian court of First Instance for an ex parte

injunction restraining BES from paying KCM's demand under the BES Guarantee. The application was refused but on appeal the Brazilian Court of Appeal overturned that decision on 22nd February 2013.

8. The parties' disputes were referred to LCIA arbitration (at the end of January/beginning of February 2013) under four contracts. The first reference was arbitration 132307 under the Settlement Agreement where U&M claimed sums due under that Agreement totalling US$22,648,465.56. The second arbitration was numbered 132309 which arose under a "Contract for Mining Enhancement from Open Pits" which was referred to as the Main Contract which had come to an end in mid January 2013. U&M claimed under this contract for payment of invoices totalling US$20,345,213.38 (with interest) together with a claim for "other necessary or alternative relief under or in respect of the Main Contract, in particular with regard to payment of further invoices which have not yet fallen due for payment". This was the contract that KCM terminated on 28th January 2013. The third arbitration was numbered 132310 in respect of a "Contract for Mining of Waste at Foot Wall/Hanging Wall at COP F&D Open Pit", which is referred to as the FW/HW contract. KCM sought payment of invoices under that agreement totalling $7,486,607.77 "together with interest and any other necessary or alternative relief under or in respect of that contract, in particular with regard to the payment of further invoices which have not yet fallen due for payment". The last arbitration was that numbered 132311 in respect of a "Contract for Maintenance of Haul Road Connecting COP F&D and East Mill NIBU Concentrator", known as the Road Maintenance Contract. U&M sought payment of invoices totalling $319,786.48 "together with interest and any other necessary or alternative relief under or in connection with the road maintenance contract, in particular with the regard to the payment of further invoices which have not yet fallen due for payment". The statements of claim in relation to each of the four separate arbitrations sought relief in similarly wide terms. In particular, relief was sought in relation to the BES Guarantee, the Advance Payment Guarantee and the Performance Guarantee, each of which related to underlying obligations in the contracts. In the FW/HW Contract arbitration, U&M sought, in addition to its monetary claims, a declaration that KCM was not contractually entitled to the relief claimed in the Zambian court.

9. The four arbitrations were consolidated by a consent order of the Tribunal dated 11th June 2013 and on U&M's application, the Tribunal ordered a preliminary issue relating to the validity of the Settlement Agreement because many of KCM's defences and cross claims stood or fell in limine on this question. The hearing of this took place between 30th September and 4th October 2013 where oral evidence was adduced. U&M were represented by Clyde & Co and KCM by Debevoise & Plimpton LLP (hereinafter Debevoise). It was KCM's case that the Settlement Agreement had been procured by reason of a material misrepresentation on the part of U&M. On 7th November 2013, the 3 man tribunal made a Partial Final Award (the First Award), running to 56 pages in which they declared the Settlement Agreement to be valid, disbelieved the evidence of U&M's main witness Mr Pratap and found there had been no misrepresentation at all. Paragraph 4 of the dispositive part of the First Award reserved "all claims and counterclaims, including all questions of costs, for one or more future awards" and paragraph 5 stated that "directions will be given for the determination of the remaining claims in these proceedings".

Sections 67 and 68 of the Arbitration Act 1996

10. The terms of section 67 of the Arbitration Act provide that a party to arbitral proceedings may, upon notice to other parties and to the tribunal, apply to the court challenging any award of the tribunal as to its substantive jurisdiction or seeking a declaration that an award on the merits be of no effect, in whole or in part, because of the lack of such jurisdiction. Section 67(1) expressly states that a party may lose the right to object, by reference to section 73.

11. Section 73 provides that if a party to arbitral proceedings takes part or continues to take part in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of the Act, any objection that the tribunal lacks substantive jurisdiction or that the proceedings have been improperly conducted or that there has been a failure to comply with the arbitration agreement or with any provision of the Act or that there has been any other irregularity affecting the tribunal or the proceedings, "he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

12. In similar vein, section 31(2) of the Act provides that "any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised". As has been stated previously by this Court, the principle of openness and fair dealing between the parties to an arbitration demand not merely that if jurisdiction is to be challenged under section 67, the issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator, but that each ground of challenge to his jurisdiction must previously have been raised before the arbitrator if it is to be raised under a section 67 application challenging the award.

13. Section 68 of the Arbitration Act provides that a party to arbitral proceedings may apply to the court challenging an award in the proceedings "on the ground of serious irregularity affecting the tribunal, the proceedings or the award". Serious irregularity is defined in section 68(2). It has been described in these courts as a "closed list". Section 68(2) reads as follows:

> "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);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) failure by the tribunal to deal with all the issues that were put to it;

> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or
>
> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

14. In commenting on this in *The Petro Ranger* [2001] 2 Lloyd's Rep 348 at 351, Cresswell J, by reference to paragraph 280 of the DAC report, which is often cited, stated the following:

> "1. Section 68 sets out a closed list of irregularities (which it is not open to the court to extend).
>
> 2. Section 68 reflects the internationally accepted view that the court should be able to correct serious failure to comply with the "due process" of arbitral proceedings: cf art. 34 of the Model Law.
>
> 3. A serious irregularity has to pass the test of causing "substantial injustice" before the court can act (s.68(2)).
>
> 4. The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process, that the court will take action.
>
> 5. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate not litigate.
>
> 6. Having chosen arbitration, the parties cannot complain of substantial injustice, unless what has happened cannot on any view be defended as an acceptable consequence of that choice.
>
> 7. Section 68 is designed as a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in s.68, that justice calls out for it to be corrected.

> 8. Section 68 must not be used as a means of circumventing the restrictions upon the court's power to intervene in arbitral proceedings. Further, the distinction between s.68 and s.69 must be maintained. In addition, the court's powers under s.70(4) should be borne in mind (see below)."

15. The general duty of a tribunal is set out in section 33 of the Act which provides:

> "33.-(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 of 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."

16. Section 39 provides that the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award, a power which is confirmed by the LCIA rules, under which this arbitration proceeded. The Rules provide that the tribunal can "order an a provisional basis, subject to final determination in an award any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money …".

17. In addition to the general duties of the tribunal set out in section 33, section 40 sets out the general duty of the parties. This provides that the parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings and specifically states that the obligation includes "complying without delay with any determination of the tribunal as to procedural or evidential matters or with any order or directions of the tribunal."

18. Section 41(4) states that if, without showing sufficient cause, a party fails to attend or be represented at an oral hearing of which due notice was given, the tribunal may continue with the proceedings in the absence of that party.

19. There is a slight tension between some of the decisions of this court as to the extent to which a party applying under section 68 needs to show that the alleged "serious irregularity" has affected the ultimate result. Section 68 is concerned with the fairness of the process but the ultimate question is one of substantial justice. The claimant is thus required to show that, had he had an opportunity to address any point where he says he was not given that opportunity, "the tribunal might well have reached a different view and produced a significantly different outcome". To my mind it is plain that, since it is necessary for the applicant to show that the serious irregularity

"has caused or will cause substantial injustice to the applicant", he cannot succeed in that unless he can establish that he had at least a reasonably arguable case contrary to the findings of the tribunal.

The basis of the application

20. KCM contends that the tribunal failed to comply with section 33 of the Act inasmuch as it did not act fairly and impartially as between the parties and failed to give KCM a reasonable opportunity of putting its case and dealing with U&M's case. It failed to adopt procedures which were suitable to the circumstances of the case so as to provide a fair means for the resolution of matters which fell to be determined. It contends that the tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction) and did not conduct the proceedings in accordance with the procedure agreed between the parties. There were thus failures which fell within section 68(2)(a), (b) and (c) of the Act. Additionally, KCM challenges the award under section 67 in relation to three specific limited areas of the tribunal's decision. It submits that the tribunal lacked substantive jurisdiction to determine:

    i) U&M's claim for a declaration that it was entitled to be reimbursed for its legal costs incurred in connection with certain legal proceedings in Brazil and Zambia.

    ii) U&M's claim for payment of certain invoices totalling about $400,000 that were not the subject of any Request for Arbitration nor referred to in any Statement of Claim (nor otherwise pleaded by U&M).

    iii) U&M's claim for £15,000 in respect of a deposit towards the LCIA's costs and the tribunal's fees paid by U&M (on behalf of KCM which was obliged to pay this sum) to the LCIA.

The section 67 challenge

Legal costs incurred in connection with proceedings in Brazil and Zambia

21. These costs relate to the BES Guarantee which came into existence under the terms of an earlier settlement agreement, the April Settlement Agreement, under which KCM paid U&M $10 million as an interim advance payment in respect of monies claimed by U&M, the entitlement to which was to be determined by an Adjudicator. U&M provided the BES Guarantee by way of security should the Adjudicator determine that such money was not truly owing. The Settlement Agreement of 26th October 2012 provided at clause 2.6 that U&M was entitled to the $10 million paid on account but on 28th January 2013, KCM sought to draw down on that guarantee on the basis of alleged claims against U&M.

22. The entitlement to draw down on the guarantee and to make claims in respect of monies owing depended upon KCM's claim that the Settlement Agreement was invalid. Once therefore the tribunal had decided that the Settlement Agreement was valid and U&M was therefore entitled to the $10 million, the BES Guarantee fell to be released. U&M requested KCM to agree to this and received no response which resulted in U&M's application to the tribunal dated 13th November 2013 seeking the release of that Guarantee.

23. The claim for wrongful calling down of the BES Guarantee and for the release of that Guarantee was pleaded in the Settlement Arbitration Statement of Case (paragraphs 10, 18-19, 56 and paragraph 6 of the prayer for relief). Paragraphs 7 and 8 of the prayer sought further or other relief as appropriate. Whilst not incorporated in the Request for Arbitration the claims in relation to the BES Guarantee were directly linked to the Settlement Agreement because of the terms of clause 2.6. KCM responded to the relevant pleas in paragraphs 50-55 of its Statement of Defence and Counterclaim.

24. By emails of 13th March and 14th March 2013 Debevoise applied to the tribunal for relief in relation to the BES Guarantee.

25. It is clear that there was, by consent, an ad hoc reference of claims relating to the BES Guarantee to the arbitrators. Legal costs were incurred by U&M in Zambia and Brazil in seeking to prevent KCM calling down the BES Guarantee. The claim for such costs arose as a result of the First Award which made it clear that no sums were owing by U&M to KCM by reason of clause 2.6 of the Settlement Agreement which was held to be valid and binding. There was therefore no basis upon which KCM could possibly call down the BES Guarantee.

26. The claim for these fees was verified by the first and third witness statements of Peter Hirst, although he did not exhibit the invoices for such fees. The tribunal accepted that U&M was entitled to be reimbursed the legal costs incurred in seeking to prevent the BES Guarantee being called at paragraphs 35-39 of the Second Award, for the reasons there set out, declaring at paragraph 40 and 75(v)-(vii):

    i) U&M is entitled to the release and/or discharge of the BES Guarantee.

    ii) KCM's attempt to draw down the BES Guarantee was wrongful and in breach of clause 2.6 of the Settlement Agreement.

    iii) U&M is entitled to be reimbursed its legal costs, including those incurred in Brazil and Zambia, in respect of KCM's wrongful attempt to draw down under the BES Guarantee. Clyde & Co having supplied details of these costs of KCM in exhibit PGH2 to the third witness statement of Peter Hirst dated 4th November 2013, KCM is directed to file any response to U&M's application for costs within 14 days of this award.

27. At no stage, despite being given the opportunity to do so, did KCM ever suggest that this matter fell outside the jurisdiction of the arbitrators, either in the period between November 19th and December 9th 2013 or in the "show cause" period ending on January 20th 2014. KCM took part in the arbitration proceedings on 9th December by seeking an adjournment. It paid LCIA fees on 24th December and it received the transcript of the 9th December hearing the following day, yet never took any jurisdiction point. In these circumstances KCM must be taken to have waived any jurisdictional point there may have been, even if there had not been an ad hoc reference.

The Invoices

28. As to the contention that there were invoices that were not the subject of any Request for Arbitration nor referred to in any Statement of Claim, I have referred earlier to the Request for Arbitration which specifically referred to future invoices. The claim for all invoices other than debit notes 1046-1049 and 1053 was specifically pleaded. The latter invoices which totalled $525,000 approximately, rather than about $400,000 were the subject of evidence from Mr Pinto and Mr Hirst, to which I subsequently refer. The point taken is, in reality, a pleading point, not a jurisdiction point. Once again, the point was never taken before the tribunal either before December 9th or before January 20th and, for the same reason as set out in relation to the Brazilian and Zambian legal costs, KCM must be taken to have waived any jurisdiction objection that there could have been.

The LCIA costs

29. The final section 67 point relates to U&M's claim for £15,000 in respect of a deposit towards the LCIA's costs and tribunal fees which was paid by U&M on behalf of KCM which was obliged, under the LCIA Rules, to pay this sum to the LCIA. It is said that the tribunal wrongly applied Article 24.3 of the LCIA Rules because it only operates where the LCIA court (or the Registrar on its behalf) directs a party to effect a substitute payment for a non-paying party in order to allow the arbitration to proceed. It is only in those circumstances that the party paying the substitute payment is entitled to recover the amount as a debt under the terms of Article 24.3.

30. There is of course an alternative basis for any such claim, namely a claim in damages by reason of the breach of the arbitration agreement on the part of KCM in failing to pay sums due to LCIA. Whether or not there was a direction, and U&M argued that there was an implicit direction to that effect, in order to progress the arbitration, U&M paid £15,000 on KCM's behalf. It could properly be said that U&M suffered damage in this amount as a result of KCM's breach.

31. It is hard to see how this is a jurisdictional point since the arbitrators had power to deal with costs and to make orders for payment of sums of money as a debt due or as damages.

32. In fact, the whole of this complaint, as with another complaint raised in relation to the order for an interim payment of costs, has been overtaken by events. In the case of costs, the point that was originally being taken by KCM evaporates in the light of the Third Award which made a final order as to costs. In the case of the LCIA fees, although this could also have been covered in the costs award, it was not, but, as a matter of administration, adjustment has been made by the LCIA court in relation to funds subsequently received from both KCM and U&M so that the books are effectively balanced on this point. The claim has thus disappeared, although it was extant at the time of the award.

33. The same point as to waiver applies here in relation to this claim, as it does in relation to the other two claims where jurisdictional objection was raised.

34. Whilst therefore there is no basis upon which the award could now be enforced in relation to this element, as the sum has been recouped by LCIA Court adjustments, there is no basis on which the challenge could succeed under section 67.

Conclusions under section 67

35. In the light of the above, I find that the jurisdictional objections raised by KCM fail.

The section 68 application

The exchanges between the parties and the tribunal following the First Award

36. On 8th November 2013, the tribunal stated its availability for a further hearing on 21st November and 9th, 10th or 12th December and said that the parties would no doubt wish to agree procedural directions once they had received the First Award which had been published the previous day. Shortly following receipt of the First Award, Clyde & Co wrote to Debevoise and the tribunal, seeking a direction at the forthcoming hearing that U&M be released from the undertakings which had been given on 21st March 2013 not to remove its equipment (worth approximately $88 million) as security for a spurious claim which had been made by KCM (which could now be seen as spurious in the light of the First Award and evidence given at the hearing which led to it). This was the first of what Debevoise subsequently described as a "barrage" of letters in which Clyde & Co applied to the tribunal for various elements of relief, following upon the issue of the First Award.

37. By another letter of 11th November 2013, Clyde & Co pointed out that the tribunal had ordered KCM to pay various sums in the First Award ($22.65 million approximately) and attached a schedule showing further default interest which had accrued on those sums down to the date of that award. As U&M point out, no sums have ever been paid under the terms of that award.

38. By a letter dated 13th November 2013, Clyde & Co pointed out to Debevoise that the tribunal had reserved all questions of costs in its First Award and claimed that U&M was entitled to the costs of the Settlement Agreement Arbitration, in the light of its success in that arbitration. A schedule of costs was attached and a request for an immediate interim payment of 60% was made with the threat of an application to the tribunal if there was no positive response by close of business on Friday 15th November. By a second letter of the same date to Debevoise, Clyde & Co invited KCM to agree to the immediate release/discharge of the BES Guarantee as a result of the First Award which would enable U&M to have immediate access to $10 million cash collateral which it had pledged to BES to secure that Guarantee. The third witness statement of Peter Hirst set out the basis upon which KCM should agree to that release, stating that it followed from clause 2.6 of the Settlement Agreement, which the tribunal had upheld, that KCM's attempt to call on the BES Guarantee in February 2013 was wrongful. U&M claimed to be entitled to an order that the BES guarantee should be immediately released or discharged and a declaration that KCM's attempt to call down the Guarantee was wrongful and in breach of Clause 2.6. It further sought reimbursement of its legal costs, including those incurred in Brazil and Zambia in respect of KCM's attempt to collect under that Guarantee. The fees of U&M's Brazilian and Zambian counsel was set out in a schedule which was exhibited to the third witness statement. A draft order was attached, to which KCM's agreement was invited, failing which Clyde & Co stated that an application would be made to the tribunal for an order in those terms.

39. On 14th November, Clyde & Co wrote to the tribunal stating that a number of letters had been written to Debevoise inviting its agreement not only to the hearing on 21st November and the reservation of dates of 9th and 10th December but also seeking relief following the First Award. Clyde & Co requested the tribunal to require an answer from KCM as to the hearing date of 21st November and reservation of the December dates.

40. On 15th November there were a number of exchanges between the parties and the tribunal. The tribunal indicated its availability on 21st November and on 9th December stating that there was no other availability in 2013.

41. Debevoise had not responded in any way to the letters from Clyde & Co to which I have made reference. On 15th November however Debevoise wrote to the tribunal stating that KCM's counsel was unavailable on 21st November and 9th and 10th December and would not be available for a further hearing until mid-January 2014. The letter professed a lack of understanding as to the need for a further hearing. It maintained that the next step was for KCM to file amended pleadings in each of the three remaining arbitrations by 6th December 2013 in the light of the First Award. Responsive pleadings should follow. The parties should then seek to agree further directions on disclosure and exchange of evidence and, failing such agreement, by 10th January, a procedural hearing could be heard in late January for the tribunal to determine the way forward.

42. Clyde & Co's approach was to continue to write letters to Debevoise inviting agreement to various forms of relief which, it maintained, followed from the terms of the First Award. With the first of those letters it served the fourth witness statement of Peter Hirst with exhibits and another draft order. It claimed a declaration that the FW/HW contract had been wrongfully terminated by KCM, since the allegations of breach which had been relied on to justify that termination pre-dated the Settlement Agreement and were therefore precluded by the Settlement Agreement which the tribunal had held to be valid. It also claimed a declaration that two Zambian court orders which required U&M to vacate the site immediately and hand over its equipment had been wrongfully sought and obtained by KCM since the termination of the FW/HW contract was wrongful. U&M also claimed the demobilisation fee under clause 3.3(e) and the termination fee under clause 35.1.7 of the FW/HW contract. Once again KCM was invited to agree, failing which the letter was to be treated as an application to the tribunal for an order in the terms set out in the draft order attached (or for an interim payment in respect of the amounts claimed).

43. In a second letter, Clyde & Co made reference to paragraphs 18-49 of the witness statement of Mr Pinto in the arbitration which contained an analysis of invoices under the Main Contract, the FW/HW contract and the Hall Road Maintenance Contract which remained unpaid. The letter also stated that further invoices had fallen due since U&M's statement of case on which Mr Pinto's witness statement had been based. A schedule accompanied the letter setting out the unpaid amounts and the default interest accruing. It was said that KCM had no defence to these claims which had (save for the latest invoices) been the subject of extensive pleadings in the arbitrations leading up to the First Award. The letter stated the intention of U&M to ask the tribunal to make an immediate interim payment in respect of the invoices which totalled over $40 million.

44. A third letter of that date sought the agreement of KCM to declarations and orders that KCM's attempted draw down under the Advance Payment Guarantee was unlawful and in breach of contract, that KCM should immediately release U&M from the Advance Payment Guarantee and for similar relief in relation to the second Performance Guarantee. KCM's attempt to call on these guarantees had been made in respect of allegations of breach which predated the Settlement Agreement and were therefore barred by clause 2.8 of that Agreement. Again, failing KCM's agreement, Clyde & Co stated that the letter was to be treated as an application to the tribunal for such relief.

45. At 19:06 on the evening of 15th November, Clyde & Co wrote a letter to the tribunal, copying in Debevoise. This stated Clyde & Co's concern about Debevoise's letter to the tribunal earlier that day which had suggested an exchange of amended pleadings and the need for directions relating to disclosure and service of evidence. Reference was made to the tribunal's June order for a preliminary issue as an efficient means of progressing the dispute. The reason for that order was, it was said, that a determination of the validity of the Settlement Agreement would effectively dispose of most of the remaining issues in the consolidated arbitration. Clyde & Co attached the correspondence sent to Debevoise in the preceding week and referred to the applications which were made thereby in the light of KCM's refusal to respond and the absence of any defence to them. Clyde & Co rejected any suggestion that the matter should be put off until mid-January because of counsel's unavailability, pointing out that the tribunal had been convened on an emergency basis some nine months prior to the letter, that it was owed significant sums and that their applications needed resolution on an urgent basis. It asked for the dates of 21st November and 9th December 2013 to be retained irrespective of counsel's availability.

46. Debevoise responded to this at 20:24 hours that Friday night, referring to the "barrage of letters dealing in piecemeal fashion with topics that could more efficiently and effectively have been combined into one letter, together with a spread of witness statements and proposed draft orders relating to matters where our client was given no opportunity first to indicate whether there is any dispute between the parties on the relevant points and whether such steps are needed." Debevoise went on to say that they had been discussing Clyde & Co's letters with their client in order to take instructions and would respond over the weekend or early next week. They would not however propose to trouble the tribunal with the correspondence "unless and until it is established whether there is any dispute between the parties in relation to the points raised". The letter thus reveals an uncertainty on Debevoise's part whether there were or not points which KCM would wish to raise in opposition to the applications that Clyde & Co wished to pursue.

47. On Monday morning, 18th November 2013, Clyde & Co wrote to the Tribunal and to Debevoise suggesting that the hearing on 21st November should deal with the date by which KCM should pay sums ordered under the First Award, the question of costs and payment on account of costs, the application for an interim payment in respect of outstanding invoices, the application relating to the release of the BES Guarantee and the release of the undertaking that had been given to the Tribunal in March 2013 that U&M retain its equipment at the New Area. It suggested that the balance of the applications should be dealt with at the later hearing on 9th December. On the same day Clyde & Co served the fifth witness statement of Mr Hirst in support of the

application first set out on 11th November for U&M to be released from the undertakings given on 21st March. This was followed by service of the sixth witness statement of Mr Hirst which exhibited a schedule of the invoices and default interest claimed.

48. An email that evening from Clyde & Co to the tribunal, once again copied to Debevoise, referred to earlier correspondence and to a telephone conversation which Mr Hirst had conducted with Mr Chesney of Debevoise. The email referred to the attempt in that conversation to narrow the issues for resolution at the hearings and to Mr Chesney's stance that Debevoise were "currently without instructions" but had advised that a letter would be dispatched soon, whilst refusing to engage in any detailed discussion. Debevoise also had indicated that no-one from the Debevoise team was available to attend the hearing on 21st November and stated that it was not their practice to instruct external counsel and that KCM had restricted their ability to do so in any event. Clyde & Co stated that hearing dates could not be dictated by the diary of counsel at Debevoise. It asked for both the 21st November and 9th December hearing dates to be retained.

49. On Monday evening 18th November 2013 the tribunal sent an email to the parties stating that it had considered Debevoise's letter of 15th November which had raised the question of amended pleadings, disclosure and evidence and Clyde & Co's letter of 18th November suggesting what should be dealt with at the hearings of 21st November and 9th December. The letter stated that the tribunal considered that the matters listed by Clyde & Co's for determination on 21st November could all be dealt with by written submissions and made the following "procedural directions":

> "The parties should endeavour to agree procedural directions for the remaining claims in dispute. If directions are not agreed the Claimant should submit its proposed directions by 26 November 2013 and the Respondent should submit its proposed directions by 3 December 2013. The Tribunal will retain the 9 December 2013 [date] to deal with outstanding procedural issues and any substantive issues which can be dealt with that day but 21 November is vacated. The Tribunal will have to weigh the availability of counsel against the need for these matters to be determined without undue delay. To the extent that matters cannot be determined on 9 December the Tribunal is not then available until 10 February 2014. The parties are asked to indicate the availability of their counsel after that date."

50. On the evening of 19th November, Clyde & Co responded to the tribunal's directions stating that it was difficult to anticipate what procedural and substantive issues might remain outstanding on 9th December let alone 10th February 2014 because Debevoise had not responded to any of Clyde & Co's letters seeking agreement to the forms of relief put forward. Clyde & Co asked for 11th and 12th February to be set aside, as well as 10th February, in case they should be needed.

51. On 22nd November 2013 Clyde & Co wrote to Debevoise in the light of the tribunal's direction that the parties should seek to agree procedural directions for the remaining claims in dispute. It proposed that the tribunal should, as a matter of priority, deal

with the applications which U&M had made in the prior correspondence and make orders/directions as follows:

"1 (1) U&M be released from the undertakings required to be given at the hearing on 21st March 2013 …

3 (1) That U&M be awarded its costs of the Settlement Agreement Arbitration as a whole … and that KCM make an immediate interim payment on account of 60% …

4 (1) That KCM should immediately release/discharge the BES Guarantee …

(3) That U&M is entitled to be reimbursed its legal costs including those incurred in Brazil and Zambia in respect of KCM's wrongful attempt to draw down under the BES Guarantee.

5 (1) A declaration that KCM wrongfully terminated/repudiated the FW/HW contract by its letter dated 25th January 2013.

(2) A declaration that the Zambian court orders dated 31st January and 1st February 2013 were wrongfully sought and obtained by KCM.

(3) A declaration that U&M is entitled to be paid the demobilisation fee due to it under clause 3.3(a) of the FW/HW contract … alternatively an interim payment.

(4) A declaration that U&M is entitled to be paid the termination fee under clause 35.1.7 of the FW/HW contract … alternatively an interim payment.

(5) A declaration that U&M is entitled to the transfer of the ownership in items of equipment referred to in clause 3.2.6 of the FW/HW contract.

(6) A declaration that U&M is entitled to damages for the losses which it suffered by reason of KCM having wrongfully terminated/repudiated the FW/HW contract.

6 (1) An order that KCM should make an immediate interim payment with regard to the invoice claims which are identified, together with default interest accrued thereon down to 7th November 2013, in the schedule attached as PGH1 to the sixth witness statement of Peter Gordon Hirst.

> 7 (1) A declaration that KCM's attempt to draw down under the Advance Payment Guarantee issued under the main contract was unlawful and in breach of contract.
>
> (2) An order that KCM should immediately release U&M from the Advance Payment Guarantee.
>
> (3) KCM should immediately release U&M from the Second Performance Guarantee issued pursuant to the Main Contract."

Clyde & Co went on to state that these reflected the requested directions and orders previously set out in earlier correspondence upon which no substantive response had been received. Once those applications had been determined, the parties and the tribunal would be able to consider what further directions would be required for the future. A response was sought as a matter of urgency and in no event later than midday on Monday 25th, so that, if directions were not agreed, U&M would be in a position to submit its proposed directions by 26th November 2013 as the tribunal set out in its email of 18th November.

52. This email was met with deafening silence. On 27th November Debevoise informed the tribunal that it had no proposals as to payment as to the first award and that, as it had already been issued, the tribunal was functus and had no power to consider or fix schedules for payment of any amounts specified in it.

53. On 4th December the tribunal referred to its direction on 18th November that the parties should attempt to agree procedural directions for the remaining issues in the arbitration and directed each party to state the present position by close of business the following day, which would be Thursday 5th December, with a hearing scheduled on Monday 9th. Clyde & Co responded by attaching a copy of its letter of 22nd November 2013 to Debevoise with the procedural directions which it wished the tribunal to make, stating that no response had been received from Debevoise. The following day, Debevoise told the tribunal that it had hoped to be in a position to reply to the tribunal's emails but KCM had been unable to give further instructions to enable it to do so because the executive responsible had been unavailable. A short extension of time in which to make such a reply was sought, until Saturday 7th December. The letter went on to say that in any event, neither Lord Goldsmith QC nor Mr Chesney of Debevoise would be able to attend the hearing on 9th December and "in such case, the respondent would reserve all of its rights with respect to the arbitrations and their procedure".

54. On the morning of Friday 6th December, the tribunal responded to say it had considered the correspondence relating to the hearing on 9th December. It referred to its earlier directions of 18th November, pointing out it had retained 9th December to deal with "any outstanding procedural issues and any substantive issues which could be dealt with on that day", having confirmed that it would have to weigh counsel's availability against the need for matters to be determined without undue delay. In the light of the resources available to KCM's legal team and the notice which had been given of the hearing on 9th December, the tribunal decided that the hearing should proceed and invited the parties to confirm the matters which they wished to be

considered at the hearing, stating that it would deal with "as many of those matters as are capable of being dealt with on that occasion". It also acceded to KCM's request for an extension of time until 2pm on Saturday 7th December 2013 to state its position. On the evening of 6th December, Clyde & Co stated that it would confirm U&M's position once Debevoise had written to the tribunal on its proposed procedural directions.

55. At 15:20 on the afternoon of Saturday 7th December, Debevoise wrote to the tribunal to say that KCM had instructed Debevoise to state that the time frame within which the hearing had been set was too short and that it needed more time to consider at senior management level the points proposed to be raised at the hearing set for Monday 9th December. In consequence Debevoise did not have any instructions to put forward any proposals on the matters concerned. At 9pm that evening Clyde & Co set out the orders and directions which U&M intended to seek on the Monday, indicating the tabs in the bundles supplied where the relevant correspondence, witness statements and documents were to be found. This repeated the matters raised in Clyde & Co's letter of 22nd November 2013 in extenso.

56. At 22:42 on Sunday night 8th December 2013, Debevoise emailed the tribunal stating that it no longer acted for KCM and that it would not be appearing at the hearing the following day "save, if instructed to do so, for the limited purpose of requesting on KCM's behalf an adjournment to allow KCM the opportunity to seek alternative counsel".

57. On the early morning of 9th December, Mr Dawar of KCM emailed the tribunal stating that the time frame within which the hearing had been set was too short and that KCM had not had sufficient time to consider, at senior management level, the points proposed to be raised at it. "The issues are complex and considerable work needs to be done to prepare for a proper hearing before the tribunal. What makes this task particularly difficult is that the management of KCM at this point of time is engaged in an urgent matter initiated by the Government of Zambia at its premises in Chingola, which is consuming the majority of the time of senior management." The email went on to say that KCM needed to be given a fair and reasonable opportunity to defend itself which would not happen if the tribunal proceeded with the hearing that day. It requested that the hearing be rescheduled for a future date allowing KCM not less than three months to prepare. It also pointed out that it was actively considering a change in legal representation.

The effect of that correspondence

58. Despite KCM's submission to the contrary, the following is clear:

    i) Clyde & Co had made it abundantly clear that it was making substantive applications for relief to be determined at the hearing scheduled for 9th December.

    ii) Details of the relief sought appeared in its correspondence to Debevoise and Debevoise knew exactly what was being sought by 19th November. The third to sixth witness statements of Mr Hirst had been served with exhibits and the letters made U&M's position clear.

iii) The tribunal had directed expressly on 18th November 2013 that the question of costs and an interim payment on account, the application for an interim payment in respect of outstanding invoices, the application relating to the release of the BES Guarantee and the release of the undertaking given to the tribunal on March 21st should all be dealt with by written submissions. It had further indicated that 9th December was set as a hearing date to deal with "outstanding procedural issues and any substantive issues" that could be dealt with that day.

iv) On 22nd November Clyde & Co set out conveniently in an email, all the relief which it intended to seek.

v) Following Debevoise's failure to address any points in the applications being made by Clyde &Co or even to put forward procedural suggestions (other than its email of 15th November 2013 suggesting that pleadings be re-amended, followed by disclosure and evidence) on 6th December the tribunal referred to its earlier order of 18th November and allowed KCM a further extension of time in which to state its position until 2pm on Saturday 7th.

vi) Following Debevoise's email saying that it had no instructions to put forward any proposals because KCM said it had been given insufficient time, on 7th December, once again Clyde & Co set out exactly what it was that it was seeking at the hearing.

vii) On 8th December Debevoise came off the record and on 9th December KCM directly sought an adjournment of the hearing from the tribunal.

59. I have set out this correspondence extensively because it is quite plain that KCM was given every opportunity to respond to the applications being made by Clyde & Co on behalf of U&M. It was U&M's case that all the relief it sought flowed directly from the tribunal's decision in the First Award that the Settlement Agreement was valid and binding. At no stage between the receipt of the First Award and 9th December 2013 did KCM, through Debevoise, ever suggest that U&M was wrong in the stance it was taking, save for the suggestion on 15th November that re-amendment of pleadings, disclosure and evidence were required. In its second letter of that date, Debevoise had suggested that Clyde & Co's approach was unnecessary because there was not necessarily any issue between the parties on some or all of the points being raised.

60. U&M submits that the reason why there was no response from KCM in respect of any of its applications was that there was nothing that KCM could usefully say by way of defence. There was not the slightest indication that there was any available defence to be put forward, nor any suggestion, which may be of significance in the context of these applications, that the tribunal had no jurisdiction to determine any of the matters which were raised by U&M.

61. As at the morning of 9th December 2013, the tribunal had determined the First Award, following the full exchange of pleadings and evidence and a five day hearing at which witnesses had been cross-examined and counsel had made submissions. The tribunal had held three hearings in February, March and June and at the latter had ordered a preliminary issue as the most efficient way of progressing the resolution of

the dispute. It was in a position to know what were and were not direct consequences of its decision in the First Award that the Settlement Agreement was valid and binding. It had all the material put before it by Clyde & Co in support of its applications and knowledge of the defences and counterclaims which had been put up by KCM during the course of the consolidated arbitration and had heard considerable argument at earlier hearings about the undertakings given and the various guarantees.

The hearing of 9th December 2013

62. Under section 41(1) of the Arbitration Act, the parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration. Section 41(4) provides that "If without showing sufficient cause a party fails to attend or be represented at an oral hearing of which due notice was given, or where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it."

63. Article 14 of the LCIA Rules provides for the conduct of the proceedings. The tribunal's "general duties at all times" are spelt out including the duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent and the duty to "adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute." Under Article 14.2, "unless otherwise agreed by the parties … the Arbitral Tribunal shall have the widest discretion to discharge its duties under such laws or rules of law as the Arbitral Tribunal may determine to be applicable; and at all the times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration". Specifically, under Article 15.8, "if at any point any party fails to avail itself of the opportunity to present its case in the manner determined … or directed by the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration and to make an award".

64. The tribunal was therefore, when faced with the application for an adjournment of the hearing, bound to act fairly and impartially as between the parties but to adopt procedures which would avoid unnecessary delay or expense in order to provide a fair and efficient means for resolving the parties' dispute. It was entitled to have regard to any failure on the part of any party to do everything necessary for the fair, efficient and expeditious conduct of the arbitration and, particularly, if a party failed to avail itself of the opportunity of presenting its case, to proceed with the arbitration and make an award, which was what took place on 9th December.

65. KCM contends that there was serious irregularity because the tribunal failed to comply with the general duty of fairness imposed on it by section 33, exceeded its powers (otherwise than by exceeding its substantive jurisdiction) and failed to conduct the proceedings in accordance with the procedure agreed by the parties. The general duty of fairness was said to be breached because the tribunal did not give KCM a reasonable opportunity for putting its case, nor dealing with that of U&M and because it did not adopt procedures suitable to the particular circumstances of the case. This led to the Second Award being made.

66. The hearing opened with Mr Williams of Debevoise stating that the latter was off the record for KCM which was in the process of trying to find alternative legal representation and that he was present simply to request on its behalf an adjournment to enable it to do that. He had a further request which was that, if the tribunal was against him on that point, a transcript of the hearing should be sent to KCM direct. He made no other submissions in support of the application for the adjournment at all. Mr Derrick Dale QC who appeared for U&M opposed the application, submitting that the matters which the tribunal were to be asked to determine on that day arose either directly from the First Award or were consequential upon it – "as night follows day". He pointed out that there had been no substantive response at all to U&M's applications of which Debevoise had received details between 15th and 18th November, over three weeks previously. He referred to Debevoise's emailed letter to the tribunal of 15th November in respect of directions which it had sought, as a stalling ploy, and submitted that the absence of response to Clyde & Co's applications was because there was no sensible response to be made in the light of the findings made by the tribunal in the First Award and the effect of clause 2.8 of the Settlement Agreement. To seek an adjournment of three months in circumstances where Debevoise had told Clyde & Co to expect a letter of response shortly after 18th November was unjustifiable. KCM had been given more than sufficient opportunity to respond if it had anything to say.

67. The tribunal refused the adjournment stating that U&M's position had been made very clear, certainly from 19th November and no response had been received. Reference was made to the expressed unavailability of counsel at an earlier stage and the need to be fair to U&M which had succeeded in the First Award and wished to proceed with the hearing to obtain the fruits of that award. The tribunal considered it would be unfair to grant the adjournment in all the circumstances.

68. Knowing the nature of the applications, the urgency of them and the whole past history of the arbitrations, the tribunal was in a good position to gauge whether or not KCM had received sufficient notice of the hearing and sufficient opportunity to deal with the matters raised by U&M.

69. At paragraphs 23-25 of the Second Award, the tribunal spelt out in greater detail its reasons for refusing the adjournment, making reference also to the email from Mr Dawar, the chief financial officer of KCM. The tribunal specifically stated that it did not accept that the time frame was too short for an organisation of the size and substance of KCM to consider the issues, none of which could have taken it by surprise. The tribunal considered that KCM had sufficient time to consider the issues raised and had received a reasonable opportunity to deal with them.

70. In my judgment the tribunal's decision not to adjourn the matter is beyond criticism. KCM had, since the publication of the first award, not only failed to pay sums due under it but had failed to adhere to the tribunal's directions to make submissions about the content of the hearings and the procedure to be adopted, once its unrealistic suggestions on 15th November had been rejected by the tribunal. As Mr Dale QC was to go on to repeat at the hearing, most of the applications followed from the First Award "as night follows day". The tribunal was well aware of this and could see the stance which was being taken by KCM. Whatever the reason for Debevoise coming off the record the night before the hearing – and no reason was given to the tribunal by KCM – KCM had been given every opportunity between 19th November and 9th

December to respond to the applications made by U&M through Clyde & Co and had failed to take that opportunity. Its failure to appear at the hearing on 9th December whilst sending an email requesting a three month adjournment and also, it is to be inferred from Debevoise's letter of 8th December, instructing Debevoise to appear and apply for the adjournment, was its own deliberate choice. Whilst issues of management time were put forward in its email to the tribunal, matters which have been developed in a solicitor's witness statement put before this court, there was no adequate reason presented to the tribunal which could have persuaded it to grant the adjournment sought. It is hard to imagine that any tribunal in such circumstances would have acceded to KCM's application and the submission that it was unfair to refuse it is untenable.

71. It is also untenable to suggest that there is anything unfair in the tribunal dealing with substantive matters at the hearing, "having failed to give any clear indication of the issues to be addressed" and of what, if any, substantive matters would be addressed, as paragraph (1) of the Arbitration Claim Form states. Nor was there any failure to give KCM a proper opportunity to lodge pleadings, amended pleadings, submissions or evidence following the First Award since the tribunal was entitled to regulate its own procedure and every opportunity was given to KCM, as I have already found.

72. It is also suggested at paragraph 1 of the Arbitration Claim Form that the tribunal failed to adopt procedures suitable to the circumstances of the case so as to provide a fair means for the resolution of the matters which fell to be determined, because it determined a number of substantive issues without "any further evidence or submissions from either party and thereby failed to give KCM a reasonable opportunity to put its case and deal with that of U&M". This too is untenable. The tribunal had before it the witness evidence of Mr Hirst in statement form and materials upon which it could come to a view as to the relief to be given. The failure of KCM to provide any evidence was no bar to the tribunal proceeding to an award and was KCM's own choice in the circumstances. It is clear from the transcript that the tribunal was conscious of the absence of KCM and the need for U&M properly to establish its case before it in order to justify the grant of the relief which it sought. The point is repeated at paragraph 26 of the Second Award. Although many of the issues followed from the First Award "as night follows day", the hearing lasted from 10:29 in the morning until 13:18 and the transcript shows the tribunal challenging Mr Dale QC on some points and probing the submissions he made whilst plainly being content to accept others as being self-evidently right.

73. KCM relied upon the *Guideline for Arbitrators on Proceeding and Making Awards in Default of Party Participation* published by the Chartered Institute of Arbitrators. These are, of course, no more than guidelines which purport to "give general advice as to the manner in which arbitral tribunals may exercise their powers to proceed in the face of default". Where there has been a failure to participate, the guidelines suggest that the tribunal should satisfy itself that the dispute comes within the provisions of the arbitration clause or agreement, that all parties are fully informed of the proposed proceedings and any deadlines or time limits that may be applicable. In the event of default, the tribunal should state how it proposes to proceed. Moreover, in all instances of default, where reasonable notice of proceedings have been given and ample opportunity provided for a party to present its case, the tribunal could proceed in the absence of the defaulting party. If it did so, the Tribunal should satisfy

itself that the claimant has a case by testing the evidence presented to it and, when giving reasons for its award, it should attempt so far as possible to mention the main contentions raised by the defaulting party in one way or another.

74. These guidelines take the matter no further because I am satisfied that the tribunal complied with them for the reasons already given. KCM would have been in no doubt that the tribunal was asked to, and had expressed its intention to, deal with substantive matters at the hearing so far as it was possible to do so and that an award would follow if substantive matters were determined. It knew exactly what substantive relief was being sought by Clyde & Co and could have made any submissions it wished to make.

75. In adopting the procedure which it did, the tribunal did not act in breach of section 33 of the Act, nor was there a serious irregularity within the meaning of section 68(2)(a) of the Act.

76. Nor was there any failure to give KCM the right to be heard orally on the merits as required by Article 19.1 of the LCIA Rules. The opportunity was provided to KCM but KCM declined to avail itself of it, both on 9th December, and, by not showing cause subsequently, of a further hearing which it could have engendered in February, where dates had been set aside.

77. KCM raises now a number of points in relation to the invoices which were the subject of paragraphs 41-47 of the Second Award which included a schedule which had been attached to Peter Hirst's sixth witness statement. That schedule was entitled "Schedule showing further default interest accrued on sums due under the Main Contract, Foot Wall/Hanging Wall Contract and Road Maintenance Contract as at 7th November 2013". It was submitted that the tribunal did not properly deal with these invoices because there were points available to KCM by way of defence. This point cannot avail KCM in circumstances where there was evidence before the tribunal in the shape of a witness statement from a Mr Pinto, at paragraphs 18-49 relating to most of the invoices and a witness statement from Mr Hirst dealing with the balance. KCM had failed to make any response to the applications by 9th December 2013 and, when given a final opportunity to do so, failed yet again to raise any point prior to 20th January 2014. The points of detail now raised in relation to particular invoices do not therefore show a failure in due process at all, whether or not there was an argument available to KCM and whether or not, in the light of such argument, the tribunal could be said to have made any errors of law or fact. Errors of fact would not of course be capable of appeal under section 69 of the Arbitration Act.

78. It is clear from the terms of the transcript that Mr Pinto had verified his witness statement at the earlier hearing leading to the First Award when U&M had made it plain that it wished to seek an interim payment. As that was not the subject matter to be determined, he was not cross-examined about these invoices at the time. The tribunal raised questions about the dates of the invoices in relation to clause 2.8 of the Settlement Agreement and satisfied itself that, on the proper construction of the Settlement Agreement, where work was done between October and determination of the contracts, payment was due. It had evidence before it which verified the schedule and was entitled to proceed on that basis.

79. In the pleadings in each of the arbitrations, claims were made in respect of all the invoices save for debit notes 1046, 1047, 1048, 1049 and 1053. The only specific defences pleaded, other than a general set off in respect of cross claims which fell within the finding that the Settlement Agreement was valid and binding, related to invoices 632 and 673 which arose in relation to customs duties on parts and equipment temporarily imported for the project. There was a potential argument about the application of clause 7.3 of the Main Contract in respect of invoices totalling some $476,000, which Mr Pinto did not address at paragraphs 38-42 of his witness statement which simply verified the expenditure. Additionally, there were over-deductions claimed by U&M against sums due in respect of Advance Payments and payment for explosives totalling some $29,000 which KCM, in its pleadings, denied. Mr Pinto's statement at paragraphs 43 and 44 dealt with the over-deduction point.

80. In the course of the hearing which led to the First Award, KCM's witnesses including Mr Pratap stated that they did contend not that any of the invoices at that time were not payable. They stated that KCM had cash flow problems which prevented them being paid. In his witness statement in support of KCM's current applications Mr Pratap did not suggest that there were any defences which KCM would have wished to raise at the 9th December hearing or by way of later "showing cause". It was left to KCM's new lawyers to raise points before me, which they did.

81. The schedule to Mr Hirst's sixth witness statement which was incorporated in the Second Award included the five debit notes which were referred to in the schedule as "other invoices and debit notes not included in arbitration". The reason for this, as appears from the material put before me, is that they were claims for interest accrued on late payment of invoices by KCM, as appears from Mr Pinto's statement. Paragraph 4 of Mr Hirst's sixth witness statement was less than clear about this and it appears that the tribunal may have awarded both the principal sum on the invoices which had been paid and not simply the interest which appears in the sixth column of the schedule. The overall figure at issue appears to have been of the order of $525,000.

82. The fact that these points are now taken does not show that there was a failure by the arbitrators to fulfil their duties at the hearing, even if there were errors. It is inconceivable that these points could not have been taken by KCM at the hearing of 9th December 2013, had it chosen to appear or in the "show cause" period prior to 20th January 2014. With a schedule of invoices verified by Mr Hirst and, for the most part by Mr Pinto, the tribunal was entitled to proceed on the basis of the evidence before it, whilst giving an opportunity to KCM to point out any errors by making use of the "show cause" form of order.

The form of the Award

83. A number of different points were taken by Graham Dunning QC, who appeared for KCM, about the form of the Second Award, which ran to 25 pages and at paragraphs 27-74 set out the decisions and the reason for them. He complained that:

    i) The Award finally disposed of a number of disputes and thus dealt with substantive issues when KCM reasonably expected only procedural issues to

be determined and the tribunal proceeded to the Award without giving KCM an adequate opportunity to deal with such matters.

ii) The Award was not truly an award at all in respect of those parts of it which provided for orders "unless KCM shows cause, supported by evidence, within 14 days of the Award, why such an order should not be made". Such provision was made in paragraphs 47, 53 and 62(ii) of the Second Award as reflected and repeated in paragraph 75(viii), (ix) and (xi) in relation to payment of the invoices, a release of the Advance Payment Guarantee and the Second Performance Guarantee and payment of the demobilisation and termination fees due under the FW/HW contracts. The invoice figure was $40,205,995.31: the demobilisation fee was $2,780,000 and the termination fee was $4,149,488.92.

iii) The Award in paragraphs 47 and 75(viii) ordered KCM to pay invoices totalling the figure mentioned unless it showed cause within 14 days why such invoices should not be paid, when the application by U&M had been for an interim payment under Article 25(1)(c) of the LCIA Rules. The tribunal thus purported to make a final award when it had been asked to make an interim award only and did so without notice to KCM.

84. I have already found that KCM was given a full and sufficient opportunity to put its case and to meet U&M's case as put in the applications sent to Debevoise before 19th November and as set out in the emails from Clyde & Co dated 22nd November and 7th December 2013. I have also found that the tribunal did adopt a procedure that was suitable to the circumstances of the case in refusing an adjournment and proceeding to hear those applications. It adopted an entirely fair means for resolution of matters which fell to be determined. There is no substance in the submission that KCM was reasonably entitled to believe that the hearing would deal only with procedural matters in the light of the exchanges between Clyde & Co, Debevoise and the tribunal. The tribunal had made it clear that it would deal with substantive matters to the extent that this was possible on 9th December. The award was therefore not defective or in any way unfair in dealing with substantive matters.

85. KCM submitted that the Second Award was legally defective and not truly an award at all because of the form that it took. A conditional award was not, in its submission, a creature known to the law. The tribunal had either to make an outright award which left nothing in abeyance at all and was final and conclusive in every sense of the word on the date it was issued so it could immediately be enforced or to make a provisional order only which had to be the subject of reconsideration at a later stage leading to a "final" Award.

86. Reference was made to section 39 of the Arbitration Act and Article 25.1(c) of LCIA Rules. Section 39 reads as follows:

> "**Power to make provisional awards.**
>
> (1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.

> (2) This includes, for instance, making—
>
> (a) a provisional order for the payment of money or the disposition of property as between the parties, or
>
> (b) an order to make an interim payment on account of the costs of the arbitration.
>
> (3) Any such order shall be subject to the tribunal's final adjudication; and the tribunal's final award, on the merits or as to costs, shall take account of any such order."

87. Article 25.1(c) reads as follows:

> "to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties."

88. It is clear from paragraphs 4-26 of the Second Award that the tribunal was satisfied that KCM had been given a fair opportunity to deal with the issues raised by U&M for determination at the hearing. It is clear also, as set out earlier in this judgment, that the tribunal had a wealth of background knowledge from its earlier involvement in the arbitration. Nonetheless, where it ordered money to be paid or provided for the release of guarantees, it decided to give KCM one last chance to make submissions and produce evidence to show that such orders should not be made – "to show cause". The submission that no arbitrator could make such an order is, on its face, a surprising one when the object of arbitration as expressed in section 1 of the Act is to "obtain the fair resolution of disputes … without unnecessary delay and expense". The form of the Second Award was plainly designed to avoid further delay and expense whilst not shutting out the absent party, KCM, from adducing material to justify a defence, in circumstances where the tribunal was satisfied that it had received an adequate opportunity to put its case but had failed to do so. The form of order "to show cause" and similar forms of order giving an absent party one final opportunity to apply to reverse an order made against it in the Courts is well recognised as part of the armoury of judicial orders.

89. KCM adopted an anomalous stance in relation to its applications under section 67 and 68 which in express terms referred to applications to challenge an award. On KCM's primary case on this point, the "show cause" provisions of the award did not constitute an award at all and the relief sought should therefore have been a declaration that no valid award had been made in respect of the matters covered by such provisions.

90. There was debate as to the distinction between an order, an award and a final award but the terminology is, in my judgment, of little or no importance. An award will frequently include orders or declarations and it matters not how they are expressed. Nothing turns on the language used, save perhaps in the context of enforcement of an award, either as a judgment or under the New York Convention, to which I shall return. There is no statutory definition of "an award" in English arbitration law and

the word "final" is used in a number of different ways as the authors of Russell on Arbitration (23rd edition) state at paragraph 6.004.

i) An award may be "final" in the sense that it determines all the issues referred to arbitration – i.e. in contradistinction to an "interim" award as it used to be termed – a phrase which has largely disappeared from arbitration parlance. It has been replaced by the concept of a partial award which, by its description shows that there are further matters yet to be resolved in the reference.

ii) An award must be "final" in the sense of being a complete decision on the particular issues considered, without leaving aspects of the issues to be dealt with subsequently or by a third party. A tribunal cannot reserve to itself or delegate to another the power of performing in the future any act of a judicial nature in relation to matters dealt with in the award. It is a breach of duty of the tribunal to make a complete and final decision by its award if it leaves any part to be determined later by itself or someone else, according to Russell (*ibid.*) at paragraph 6.002, 6.007 and 6.078.

iii) An award is "final" under section 58(1) of the Arbitration Act in the sense that the parties to it and their privies are bound by it.

91. On 28th January 2014 Stephenson Harwood, instructed by KCM in late December in place of Debevoise, wrote to the tribunal, referring to the description of the Second Award on its title page as a "Second Partial Final Award". In my judgment the arbitrators who, at paragraphs 1-3 made it plain that the Second Award dealt with various matters arising out of the Partial Final Award dated 7th November 2013 (the First Award), by this description were specifying that there were further matters yet to be decided in the reference but that the award itself was final for what it did decide. They had reached conclusions which were binding upon the parties and had concluded their deliberations on the material before them.

92. In that letter of 28th January 2014, Stephenson Harwood asked the tribunal whether the Second Award was final for the purposes of section 70(2) of the Act which provides that no challenge lies to the court until available arbitral powers of appeal or review have been exhausted. The questions asked were as follows:

> "Accordingly, could the Tribunal firstly please confirm that in relation to paragraphs 41 to 47 and subparagraph 85(viii) of the Second Award, it is final as to the matters set out in those paragraphs (at least in the absence of any timely responses from the Respondent)?
>
> Secondly, could the Tribunal also please confirm (as we and our client have assumed, and as it appears that the Claimant has also assumed) that the remaining parts of the Second Award are not intended to operate on a provisional basis (in the sense that the word "provisional" is used in section 39 of the Act), nor as mere procedural directions. (This applies in particular to those parts of the award that are expressed as orders or directions.)

> Thirdly (and this is linked to the second request above), could the Tribunal please confirm (as again both we and Clyde & Co have assumed) that the time limits indicated in subparagraphs 75(iii), (vii), (viii), (ix), (xi) and xv) of the Second Award are intended to be final, such that they may not be the subject of a request by the Respondent for an extension of time."

93. In response, on the following day, the tribunal gave the confirmations requested. As 20th January 2014 had passed without KCM "showing cause" or responding in any way, there was self-evidently no room for any review of its decision by the tribunal.

94. It will be noted that, in addition to the issues relating to invoices, the release of guarantees and the demobilisation and termination fees, the request also related to other parts of the Second Award, namely paragraph 75(iii) [sic], (vii) and (xv). These set time limits for submissions in relation to U&M's application for costs (as opposed to an interim payment which the tribunal had already ordered), U&M's legal costs in respect of KCM's wrongful attempt to draw down the BES Guarantee and the quantum of U&M's claim for damages for wrongful termination/repudiation of the FW/HW contract. Those orders set time limits but were not of the "show cause" variety in relation to substantive orders made.

95. I have already referred to the passages in Russell upon which KCM relied. Reliance was also placed on Mustill and Boyd's Law and Practice of Commercial Arbitration (2nd edition) at page 387, paragraph 4 where the question of "finality" is discussed. There, the authors state that the arbitrator should not leave issues to be decided by a third party and should also take care not to reserve matters for his own future decision as the award would then be bad for want of finality or, as the footnote says, "completeness", as the two are almost indistinguishable. Beyond these textbooks, the only authority to which I was referred by KCM on the point was *The Kostas Melas* [1981] 1 Lloyd's Rep 18 at page 25 where Robert Goff J (as he then was) referred to section 14 of the Arbitration Act 1950 which set out the power of arbitrators to make an "interim award". He said that there were two aspects of that power to which he should refer:

> "First, since the jurisdiction of an arbitrator is a jurisdiction to decide disputes, it follows that the power to make an award is a power to decide matters in dispute between the parties. An award, interim or final, can only be an award in respect of matters referred to the arbitrators for decision. It follows, therefore, that (in the absence of some special agreement between the parties) a submission of disputes to arbitration will not generally give the arbitrators the power to order that one party shall pay a sum to the other, unless the arbitrators decide that sum is due and owing. Arbitrators can decide, by way of interim award, that a minimum sum is payable by one party to the other, if they decide that that sum at least is due and owing; but they cannot generally order that one party should pay a minimum sum to another on account of claims, simply because on a rough look at the case it looks as though such a sum at least will prove to be payable, without actually deciding that sum is due and owing. So to order would result in a change in

> the parties' respective economic positions, without deciding any matter in dispute; generally speaking, arbitrators have no power to order such a change. The second point is this. An interim award can relate to any issue in the matters in dispute referred to the arbitrators; it may relate to an issue affecting the whole claim (e.g. the issue of liability, reserving the issue of quantum for a final award), or may relate to a part only of the claims or cross-claims submitted to them for decision. It follows that arbitrators, when making an interim award, must specify the issue, or the claim or part of a claim, which is the subject matter of the interim award."

96. In my judgment that dictum does not militate against an award in the form adopted by the tribunal. The tribunal did not purport to order a payment of sums which were not due and owing nor to take a "rough look" and determine a minimum sum that would in any event be payable: nor did it purport to order a payment on account or a provisional payment subject to final determination later. The arbitrators found that the sums in question were due and owing on the evidence presented to them. In order, however, to give KCM one final chance to adduce any defence, the tribunal gave it one last opportunity to show cause within 14 days why the orders it had made should not be operative.

97. I do not see why, as matter of principle, whatever the statements in Russell are intended to mean, an award cannot be final and conclusive in its terms where it clearly provides for specific relief, including payments of money, which only bites at a point in the future, in the absence of submission and evidence from an absent party to the contrary. The tribunal has made decisions which are final and complete and are not subject to further decisions on its part or of any other person or body unless a specified contingency occurs. Such an award is complete and final on its own terms, albeit conditional. Whilst this might present difficulties for enforcement purposes, that is nothing to the point and does not prevent it from being an award which binds the parties. So, here, those parts of the Second Award which contained the "show cause" provisions were final, complete and conclusive, as between the parties, albeit conditional.

98. I can see nothing wrong with this form of order, whether it is contained in a document headed "Award" or not. The orders made were plainly substantive and not procedural and have been the subject of applications under section 67 and section 68 by KCM as part of an Award.

99. Mr Dunning QC relied on authorities relating to enforcement of awards in submitting that this was either not an award or was an impermissible form of award. I am however not concerned here with enforcement, only with section 67 and section 68 of the Act.

100. It is true that section 66 of the Act refers to enforcement of an award in the same manner as a judgment or order of the court to the same effect and that, where leave is given to do so, "judgment may be entered in terms of the award". Decisions of Mr Justice Aikens (as he then was), Mr Justice Moore-Bick (as he then was) and Mr Justice Beatson (as he then was) support the proposition that a judgment so entered must truly be "in terms of the award", in other words, in identical terms and I do not

think that this is in doubt. In *Tongyuan (USA) International Trading Group v Uni-Clan Ltd* [2001] WL 98036 (unreported), Moore-Bick J referred to an earlier decision of the Court of Appeal as authority for the proposition that an award which is effectively couched in purely declaratory terms cannot be enforced as a judgment and also as authority for the wider proposition that, in order to be enforceable as a judgment under section 66 of the Act, the award must be framed in terms which should make sense if those terms were translated straight into the body of the judgment. Whether this means that there is any difficulty in enforcing the award in its current form is not a matter which I have to decide. What I have to decide is whether or not, as matter of English law, the award as it stands is binding on the parties or should be set aside or remitted on the basis of section 67 or section 68 of the Act. If it be the case that a further Award is needed, consequent upon the Second Award, which states that no representations were made or cause shown within the 14 day time limit, no doubt an application could be made to the tribunal for it.

101. Having decided that the form of order made in the Second Award is a permissible and valid one, the only point which remains in relation to the form of the Second Award as such, arises from the fact that U&M's application in relation to the invoices was for an interim payment on account of sums due rather than a final disposition in the absence of KCM showing cause within the 14 day period. KCM cited a decision of my own, *BTC Bulk Transport Corporation v Glencore International AG* [2006] EWHC 1957 (Comm) where a hearing which a party rightly expected to proceed on one basis in fact took place on an altogether different basis with the result that, on an application to strike out a counterclaim, the tribunal did not just decide that the application failed but held that the counterclaim succeeded. In the circumstances which arose there, I considered that there had been a serious irregularity which caused substantial injustice because there were further points to be put in opposition to the counterclaim which had not been put in the attempt to strike it out.

102. Whilst it is true that Clyde & Co's application was solely for an interim payment, it is plain from the discussion with the tribunal at the hearing, that the tribunal thought that a better solution was an order for payment with the show cause provision. As Mr Dale QC submitted, U&M did not obtain the order which it was seeking which would have been an order for immediate payment of a sum on account of the sums claimed on the invoices. Instead it obtained an order for delayed payment of the full amount but subject to KCM not showing cause within a 14 day limit from the date of the Second Award. Had KCM produced submissions and evidence in relation to the invoices, there can be no doubt that there would have been no payment at all until the tribunal determined the matter at a further hearing.

103. The effect therefore of what was ordered did not, in any real sense, operate against KCM's interests since it was not required to pay anything immediately and had the same opportunity which it would have had in the event of an interim payment, of challenging the invoice claim in its entirety, albeit with a time limit for doing so. If an interim payment had been ordered, the tribunal would presumably have, as it did on other matters, set a time limit for submissions to be made before final determination at a hearing which was then scheduled for February.

104. In these circumstances, whilst the order made was not that which U&M sought, the tribunal acted within the scope of its powers and without unfairness to KCM. There

was no serious irregularity, let alone one which caused or will cause substantial injustice.

105. A further point taken by KCM relates to the time period which was allowed to "show cause". It is said that 14 days from the date of the Award, namely from 6th January 2014, was insufficient for a party faced with matters of this complexity where it was known to be unrepresented. I am unable to accept that submission.

106. The nature and extent of the applications were known to KCM by 19th November 2013. All the material upon which U&M relied had been supplied by that date. Debevoise was at that time instructed and had been involved in the arbitration for a long time and therefore knew what all the issues were. It was in a position to advise KCM and to take instructions in relation to the hearing on 9th December. I have already found there was sufficient time for KCM properly to deal with these matters by that date. A transcript of the hearing was sent, as requested, to KCM on 10th December so that any reader could see what orders the tribunal would be making. As the Second Award was not published until 6th January 2014, KCM effectively had the period from December 10th 2013 to January 20th 2014 to put together any case it had to make, by reference to the full pleadings already submitted in the first half of 2013 and to show cause.

107. No information has been supplied as to why Debevoise came off the record on the night before the hearing. Stephenson Harwood, according to the evidence of Mr Zografakis, were instructed in "late December" with no more precise date being given. Whilst the Second Award was not received by it until 10th January 2014, and the papers were not obtained from Debevoise until 14th January 2014, there is no adequate explanation advanced by KCM for its failure to show cause other than the change of representation, the reason for which is unexplained.

108. The tribunal considered that the period from 19th November to December 9th was sufficient for KCM to grapple with the issues. I have already found that that was a justified decision. In these circumstances it is impossible to say that, given that period and additionally the period from 10th December to 20th January, the tribunal did not give a fair opportunity to KCM to show cause, even if the formal period was a 14 day period running from 6th January.

Conclusions on the section 68 application

109. The section 68 application must fail. KCM was given every opportunity to put in submissions and evidence at the hearing of 9th December 2013 and failed to take that opportunity. There was no failure by the tribunal to comply with the general duty of fairness set out in section 33 nor any failure to adopt procedures suitable to the circumstances of the case. What the tribunal did, in refusing an adjournment and in making a final award with its "show cause" provisions on certain items, was to adopt procedures which avoided unnecessary delay and expense and provided a fair means for resolution of the matters which fell to be determined. It gave KCM a reasonable opportunity of putting its own case and dealing with U&M's case. There was no serious irregularity of a kind falling within section 68(a), (b) or (c) of the Act, let alone an irregularity which caused or will cause substantial injustice to KCM.

Finale

110. As I said at the outset, the application which is made is not untypical of many applications made to this court. The vast majority of section 68 challenges which come before this court are unfounded and occupy too much of this court's time because, although there is the summary power available to dismiss them, a detailed investigation is often required which renders the summary process unworkable in practice.

111. This is such a case where KCM deliberately chose not to participate in the hearing on 9th December, having failed to pay the First Award. It had engaged a team of competent London lawyers who must fully have understood what would take place at the hearing on 9th December 2013 before they came off the record the night before. KCM chose to do nothing therefore before 20th January 2014, despite knowing from the transcript what had transpired at that hearing and the opportunity that was to be extended to it to show cause. It cannot justifiably complain about the consequences of its own conduct. It has since failed to pay the Second Award, which is the subject of these applications, and subsequently the Third Award.

112. Costs must follow the event and, subject to hearing any submissions on the subject, it appears to me that this case is sufficiently "out of the norm" to justify costs being awarded on an indemnity basis. The applications are dismissed with costs.