Neutral Citation Number: [2019] EWHC 1285 (Comm)

Case No: CL-2018-000194

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 22/05/2019

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

ZCCM INVESTMENTS HOLDINGS PLC	**Claimant**
- and -	
(1) KANSANSHI HOLDINGS PLC **(2) KANSANSHI MINING PLC**	**Defendants**

AND IN THE MATTER OF AN ARBITRATION

Between :

ZCCM INVESTMENTS HOLDINGS PLC	**Claimant in the Arbitration**
- and -	
(1) KANSANSHI HOLDINGS PLC **(2) KANSANSHI MINING PLC**	**Defendants in the Arbitration**

- -
- -

Hannah Brown Q.C and James Petkovic (instructed by **Cooke, Young and Keidan LLP**) for the **Claimant**

Michael Black Q.C and Edward Knight (instructed by **Amsterdam & Partners LLP**) for the **Defendants**

Hearing dates: 26, 27, 28 March 2019

- -

Approved Judgment

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

.....

MRS JUSTICE COCKERILL DBE

Cockerill J:

Introduction

1. On 22 February 2018 a Tribunal consisting of Michael Collins QC, Glen Davis QC and J. William Rowley QC produced a 22 page document entitled "*Ruling on Claimant's Permission Application*". That document "The Ruling" has given rise to a raft of applications which I have heard over the course of three days. Those applications are:

    a) The Original Arbitration Claim by ZCCM Investments Holdings plc ("ZCCM") under s. 68(2)(a)/(d) of the Arbitration Act 1996 ("the Act") ("the Original Arbitration Claim").

    b) ZCCM's challenge under s.68(2)(g) of the Act ("the Fraud Claim").

    c) ZCCM's application seeking an extension of time (and related relief) to bring the Fraud Claim ("the Extension Application").

    d) The issues raised in the Respondent's Notice of Kansanshi Holdings Limited ("KHL") namely whether:

        i. The Ruling was not an award but merely a procedural order; and

        ii. The Original Arbitration Claim is barred by s. 70 of the Act because ZCCM has not exhausted any available recourse under s. 57 of the Act.

2. I consider the issues in the order set out below:

Background

3. ZCCM is a majority-state owned enterprise, effectively holding government interests in mining concerns. It has been referred to as a parastatal of the Zambian Government.

4. The First Defendant KHL is part of the First Quantum group of companies ("the FQ Group") which is engaged in the mining sector. It is an indirect but wholly owned subsidiary of a company known as FQM Finance Limited ("FQMF"), which is itself a 100% subsidiary of First Quantum Minerals Limited ("FQML"), the ultimate holding company. FQMF undertook the global treasury function for the FQ Group.

5. Kansanshi Mining PLC ("KMP") is a mining company which owns one of the largest copper mines in Zambia. KHL owns 80% of the share capital of KMP and the remaining 20% is owned by ZCCM. The relationship between KHL, ZCCM and KMP is governed by an Amended and Restated Shareholders' Agreement dated 20 December 2001 ("the ASHA"). KHL consequently controls the management of KMP, governed by a Management Agreement dated 18 March 2004.

6. Between 2006 and 2014, KMP made certain transfers to FQMF from time to time ("the Transfers"). ZCCM says these were deposits of cash reserves. Between at least June 2009 and March 2014, the amounts were very significant and I am told at one point they reached US$2.238 billion. It seems to be common ground that these monies were repaid by the end of 2014/early 2015. Interest was paid by FQMF to KMP at 30-day LIBOR.

7. In the arbitration ZCCM sought to pursue a claim ("the Claim") on behalf of KMP that the Transfers were made in breach of the ASHA and in breach of fiduciary duty and that KHL had dishonestly misrepresented the nature of the Transfers to ZCCM from 2007, giving rise to a claim in deceit. Further or alternative claims were made for inducement of breach of the Management Agreement, conspiracy to injure by unlawful means, inducement of breach of fiduciary duty, dishonest assistance and tortious breach of duty. These claims were set out in a Notice of Arbitration settled by leading Counsel which runs to 42 pages.

8. The loss claimed was damages, representing the additional interest that it was said should have been paid on the Transfers (at "*at least LIBOR plus 5%*"), alternatively an account of profits arising out of the breach of fiduciary duty. The amount of that claim was estimated at US$267 million.

9. Because of KHL's control of KMP any such claim is required to be brought as a derivative claim. The parties agreed the common law position required ZCCM to obtain permission from the Tribunal to pursue the derivative claim.

10. Between 10 and 12 January 2018 the Tribunal heard ZCCM's application for permission to continue a derivative claim on behalf of KMP.

11. The Arbitration was conducted under the UNCITRAL Arbitration Rules 2010. The applicable law was Zambian law, which incorporated the English common law principles which applied to derivative claims prior to the Companies Act 2006.

12. In order to obtain permission, ZCCM was obliged to demonstrate a *prima facie* case. The Tribunal considered carefully what that amounted to and concluded that "*in order to make out a prima facie case ZCCM needs to demonstrate that, giving it the benefit of the doubt on disputed issues of fact, the claim that it wishes to bring on KMP's behalf has a realistic prospect of success.*" That conclusion is not disputed.

13. ZCCM's case on its application was that;

    a) The understanding of its appointees to the Board of KMP ("the ZCCM directors") based on express representations made by KHL/its appointed directors of KMP's board ("the KHL directors"**)** and/ or others within the FQ Group, was that:

        i. KMP's monies were being held by FQMF on deposit with reputable international financial institutions for KMP's use and were readily available for KMP's working capital requirements.

        ii. Therefore, interest at 30 day LIBOR was a fair and appropriate rate and a better rate than KMP could otherwise expect to obtain by use of the monies.

    b) What ZCCM and its directors on KMP's Board did not know was that the FQ Group was using KMP's monies.

    c) Therefore, ZCCM had established a *prima facie* case against KHL under the heads to which I have alluded.

    d) The primary case was put in misrepresentation; but the other claims were said essentially to flow from one or other aspect of the misrepresentation claim. Thus, it was said that:

        i. There was breach of fiduciary duty by (*inter alia*) the KHL directors by which KMP's monies were paid to and used for the benefit of FQ Group without disclosure of the use to which the monies were put, benefitting FQ Group to the detriment of KMP, by obtaining use of KMP's monies at below the market rate and putting those funds at risk.

        ii. There was breach by KHL of the Amended Shareholders' Agreement ("ASHA"), in particular Clause 11 requiring all contracts with Affiliates to be on Arm's Length Terms and disclosure of the Affiliate's interest and implied terms to act in good faith and give full and not false information.

        iii. There was a substantial loss suffered by KMP, in particular, reflecting the interest which it should have been paid at an Arm's Length rate, namely the rate applicable to an unsecured commercial loan. It pointed to the interest payable under a US$300 million senior term loan and US$700 million revolving credit facility with the interest payable on

both being LIBOR plus 3% as evidence that 30 day LIBOR was well below genuine market rates.

14. As I have said, the Ruling runs to 22 pages. Some seven pages of that length is devoted to a careful summary of the facts, including the history of the exchanges between the parties from 2007 when the KMP board was first told of the transfers made to FQMF and an agreement was reached to charge interest on such transfers. That history included, in brief, the following features:

    a) The inclusion of the sums transferred in the KMP audited accounts as an inter-company loan to FQMF bearing interest at LIBOR;

    b) A memorandum of 11 October 2010 from KHL to ZCCM containing certain statements including as to the payment of commercial interest and as to FQMF's status being the FQ Groups global treasury function managing funds with highly rated financial institutions;

    c) ZCCM's request for a loan on similar terms;

    d) Later accounts noting the loan was repayable on demand;

    e) The approval of the KMP Board to provide loans on similar terms to both shareholders;

    f) ZCCM's request for a one-off dividend to compensate it for not having participated in shareholder loans earlier.

15. At paragraphs 36 of the Ruling the Tribunal summarised the claims under six sub-headings. At paragraph 37 it summarised, by a quote from ZCCM's skeleton, the representations which were at the heart of those claims. It then (between paragraphs 39 and 49) summarised the relevant law applicable to applications to pursue derivative claims. Between paragraphs 50 and 65 it discussed the claims, before concluding its decision and dealing with the orders sought and costs.

16. It is plain that the Tribunal well understood the case being made to it. At paragraph 50 of the Ruling it refers to a "*constant theme*" with the following components:

    a) Dishonest representation that:

        i. The monies were held on deposit whereby the full amount was immediately available for repayment;

        ii. For that reason, the interest rate was the best available;

    b) In fact, FQMF was using the monies for the purposes and to the benefit of the FQ Group.

17. Consistently with the approach which they had found should be taken to the application, the Tribunal accepted at paragraph 53 that ZCCM had established a *prima facie* case that the relevant representations were made. At paragraph 54 it accepted that a *prima facie* case had been made out that FQMF used the monies or some part of them

otherwise than on deposit and that it had been acknowledged that some part were used by FQMF.

18. At paragraph 55 the Tribunal says: *"However, in order to establish that, if its evidence were accepted, [ZCCM] would succeed at trial [it] also has to demonstrate a prima facie case as to both (i) the falsity of the representations that were made and (ii) the loss that was suffered by KMP as a result."*

19. Perhaps the key passage of that Ruling is at paragraphs 58 to 59. As I will refer to it repeatedly below I reproduce those paragraphs in full here:

> "58. Addressing, first, ZCCM-IH's focus on the characterisation of the arrangement as a deposit that was managed by highly-rated financial institutions, it is impossible to divorce the references in the contemporaneous material to the transaction as a "*deposit*" from the references to the same transaction as a "*loan*". For the purposes of determining whether or not a statement was made dishonestly, regard has to be had to the entirety of the relevant material, and not just to selected parts of it. In particular:
>
> a. it is apparent from a review of the record that the terms "*deposit*", "*short-term deposit*", "*loan*", and "*intercompany loan*", along with other similar terms, were all used interchangeably by both KHL and ZCCM-IH to refer to the same transaction: for example, KHL's Memorandum, upon which ZCCM-IH particularly relies, refers repeatedly to both "*the deposit*" and "*the loan account*", as does ZCCM-IH's Related Party Financing paper, which was prepared several years later;
>
> b. shortly after ZCCM-IH first began to question the arrangement, in December 2010, it sought not to obtain a better rate of return for KMP, but rather to secure a similar shareholder loan for itself. While the two are not inconsistent, in looking for a similar loan pro-rated to its shareholding ZCCM-IH was plainly not treating the arrangement simply as a deposit arrangement, in which KMP's monies could not be put to use by the recipient of the loan for its own purposes: on the contrary, it was asserting that FMQF had derived a benefit from transfer to it of KMP's funds, and that it, ZCCM-IH, should be afforded the opportunity to do the same. Indeed, in March 2011 ZCCM-IH itself proposed a shareholder loan arrangement that, as noted above, included terms (i) that the applicable interest rate on the loans would be the LIBOR 30 day rate; (ii) that part of the loan funds must be placed on deposit with approved banks as determined by KMP (the "*Escrowed Amount*"); and (iii) that the loan balance, which was not escrowed, may be used by the shareholders for their general corporate purposes – in other words, it made a proposal in almost precisely the same terms as the arrangement that it contends in this arbitration that KHL dishonestly failed to tell it about;

> c. there is no evidence that the value of KMP's funds loaned to FQMF was not available for use if needed: on the contrary, amounts were repaid to KMP, together with interest, as and when required.
>
> 59. The thrust of ZCCM-IH's case is that it was deliberately and dishonestly misled by KHL into believing that the transaction was not in fact a loan (implicit in which is an entitlement on the part of the borrower to use the funds it has borrowed in any way it sees fit), but we are unable to accept ZCCM-IH's submission that KHL's characterisation of the arrangement as a *"deposit"* had the dishonest connotation that ZCCM-IH now ascribes to it in circumstances where both parties repeatedly described the same arrangement as a *"loan"*; where – having had the arrangement described both as a *"deposit"* and as a *"loan"* (e.g. in the Memorandum) – ZCCM-IH sought a similar loan for itself; and where it is undisputed that (i) KMP's funds were repayable on demand; and (ii) they were repaid as and when required, with interest. On the contrary, taken in the round, and in the context of all the discussions that took place in relation to the arrangement over the period in question, as reflected in the contemporaneous documentation, KHL's description from time to time of the arrangement as a *"deposit"* was, not in our judgment, obviously or necessarily dishonest. To establish a *prima facie* case of dishonesty it is insufficient, as a matter of law, to point to representations that are consistent with honesty, unless there is some additional factor that "*tilts the balance*", which is not the case here."

20. The Tribunal then went on to find:

a) At paragraphs 60-2 that the same point could be made in relation to the representations as to the rate of return. The Tribunal found that ZCCM had put in no evidence to support the assertion that a better rate of return could have been obtained and that the only independent evidence was a report of KPMG which supported LIBOR as arms' length based on an analysis of short term interest rates. Hence it found the representations were consistent with honesty;

b) At paragraphs 63-5 that the case on loss was bound to fail in the light of the facts that (i) ZCCM had known about the rate of interest and not suggested an alternative arrangement, (ii) KMP had extensive capital requirements which made short term deposit arrangements sensible and (iii) there was no evidence that the directors of KMP could not properly have made this arrangement.

c) At paragraph 67 it found:

> "ZCCM-IH has in our judgment failed to make out a *prima facie* case either as to falsity or as to loss. These conclusions are fatal to ZCCM-IH's permission application, whichever way it is put. Most of ZCCM-IH's causes of action are founded on its allegations of deliberate dishonesty which in our view fail to meet the threshold for a finding of dishonesty. All of its causes

> of action are dependent upon proof of loss, as to which ZCCM-IH has put in no evidence."

21. Following the publication of the Ruling, ZCCM brought the Original Arbitration Claim on 22 March 2018. That raises grounds under s. 68(2)(a) and (d) of the Act (failure to deal with issues, and failure to comply with the duty of fairness). KHL raised its arguments as to the nature of the Ruling and exhaustion of remedies in its Respondent's Notice dated 12 April 2018. An application was made to strike out the claim on the basis of the argument that the Ruling was not an Award. That application was not successful.

22. ZCCM then sought to bring the Fraud Claim (i.e. s.68(2)(g) challenge) and an application for an extension of time in relation to that challenge on 1 June 2018.

23. On 20 July 2018, there was a directions hearing (originally scheduled to be the hearing of the application to amend). Jacobs J ordered that ZCCM's 1 June 2018 extension application should be dealt with at this hearing.

24. On 15 March 2019 I (i) refused KHL's application to cross-examine Ms Mkandawire and (ii) gave directions for this 26-28 March 2019 hearing.

25. It is fair to say that the bulk of the argument before me was addressed to the Fraud Claim. However, I will consider the Original Arbitration Claim first, not just because it is first in time, but also because the range of issues raised by it require a close consideration of the Ruling, which consideration is then relevant also to the issues which arise on the Fraud Claim.

The Original Arbitration Claim

26. ZCCM contends that there were serious irregularities which have caused it substantial injustice under s. 68(2)(d) by reason of the failure of the Tribunal to deal with five key issues that were put to it and, in one case, also under s. 68(2)(a) by reason of the failure by the Tribunal to comply with its general duty under section 33 of the Act by wrongly proceeding on the basis that an issue was not in dispute.

27. However, before dealing with this I should deal with what is a threshold issue: whether the decision was one which is capable of giving rise to a section 68 challenge. The question of whether if so any such challenge is precluded because available remedies have not been exhausted, I shall deal with in the context of the individual challenges.

The Ruling: Procedural Order or an Award?

28. The starting point for this is s. 68(1) which provides:

> "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)."

29. KHL relies on the decision of Waller LJ in *Fletamentos Maritimos SA v Effjohn International BV* (No. 2) [1997] 2 Lloyd's Rep 302, at 306:

> "I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically, the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions. The power which it does have comes from the Arbitration Acts. It follows that there can be an examination as to whether there has been misconduct at any stage which may lead to the arbitrator being removed. But the power to review and remit under s. 22 applies to awards. (See Mr. Justice Donaldson (as he then was) in *Exormisis Shipping S.A. v. Oonsoo,* [1975] 1 Lloyd's Rep. 432; *Three Valleys Water Committee v. Bunnie,* (1990) 52 B.L.R. 47, a decision of Mr. Justice Steyn (as he then was); and Lord Donaldson, M.R. in *King v. Thomas McKenna Ltd.,* [1991] 2 Q.B. 480 at p. 490B-C). In so far as the Judge relied on s. 22(1) (which speaks of matters rather than awards), as providing the power to review and remit a decision not in the form of an award, it seems to me with respect his view is inconsistent with well-established authorities."

30. KHL says that this is just such a case. In the first place it contends that the Ruling related to a "procedural device" which was needed because ZCCM has no cause of action with respect to the Claim. It relies on the fact that this form of action has been specifically described as a "*procedural device to get over the difficulty that as a practical matter no authority can be obtained to bring the action in the company's name*": *Wallersteiner v Moir (No. 2)* [1975] QB 373, 399. It also points to the judgment of Briggs J (as he then was) which described it in *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch); [2013] Ch 551 at paragraph 26 not just as a "*procedural device*" and as a "*piece of procedural ingenuity designed to serve the interests of justice*".

31. KHL says that the only issue determined by the Ruling was that ZCCM could not pursue the Claim. KMP's causes of action are unaffected and there is no prohibition upon KMP pursuing the action itself.

32. It submits that conclusion is supported by the transcripts in that the form of the decision to be rendered was expressly canvassed by the Chairman of the Tribunal in the closing stages of the hearing and submissions made by both parties. Having offered the preliminary view that a procedural order was appropriate on an application for permission the Chairman asked for the parties' views. KHL asked for an award, whereas ZCCM sought a procedural order. As their counsel said: "*...ordinarily one would proceed by way of procedural order with reasons*".

33. That discussion, says KHL, is then reflected in the title of the ruling: "*Ruling on Claimant's Permission Application*". Nowhere does the Ruling purport to be an award.

34. It also refers to the fact that, in discussing costs at the end of the Ruling, the Tribunal noted that the arbitration was not brought to an end and the Tribunal has not been rendered *functus officio*.

35. ZCCM submits that the ruling is properly to be regarded as an award. It refers me to a number of authorities including *Cargill SrL Milan v P Kadinopoulos SA* [1992] 1 Lloyd's Rep 1, *Ranko Group v Antarctic Maritime SA* (unreported, Commercial Court, 12 June 1998), *The Smaro* [1999] 1 Lloyd's Rep 225, *Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch) and *Uttam Galva Steels Limited v Guvnor Singapore Pte Limited* [2018] EWHC 1098 [2018] 2 Lloyd's Rep. 152.

36. It submits that the hallmark is whether a ruling is a final determination of a particular issue or claim in the arbitration or not. It says that the Ruling was a final determination of the claims in the arbitration because it determined that ZCCM had failed to establish a *prima facie* case in respect of the claims it wished to bring on KMP's behalf and refused permission to continue the derivative claim. As such, it says the Ruling brought the arbitration proceedings to an end; it is not open to ZCCM to re-argue the matter before the Tribunal. It notes that in correspondence KHL subsequently referred to proceedings being at an end.

37. It also relies on certain "*indicia of form*" in terms of the fact that despite the discussion at the hearing the Ruling is not called a Procedural Order, was signed by all three arbitrators, is fully reasoned and gives a location.

Discussion

38. On this issue I conclude that KHL's argument is to be preferred.

39. The authorities on this subject do not enunciate any set of principles by which such a consideration should be governed. They arise in a wide variety of circumstances ranging from decisions on interlocutory rulings regarding disclosure through strike out applications and including amendment disputes with jurisdictional aspects. Nor is there a plainly analogous case.

40. A consideration of these authorities (and also of the cases of: *Michael Wilson v Emmott* [2009] 1 Lloyd's Rep 162 (Teare J), *Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar) Limited* [2016] EWHC 1301 (QB) at [39] (HHJ Moulder as she then was) and *The Trade Fortitude* [1992] 1 Lloyd's Rep 169 (Anthony Diamond QC)) however suggests the following points:

    a) The Court will certainly give real weight to the question of substance and not merely to form: *Emmott* at paragraph 18 (by concession); *Russell on Arbitration* (24th edition, 2015) at [6-003].

    b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim: *Cargill* at 5, *The Smaro* at 247; *Enterprise Insurance* at [39].

c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award. *Brake* at [25], *The Smaro* at 247; *Emmott* at [19-20], *Cargill* at 5, *The Trade Fortitude* at 175.

d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status: *The Trade Fortitude* at 175 *Emmott* at [19-20].

e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it: *Emmott* at [18]; *Ranko* p 4.

f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning: *Emmott* at [19 -20]; *Uttam Galva Steels* at [29]; *The Trade Fortitude* at 175; *The Smaro* at 247.

g) While the authorities do not expressly say so I also form the view that:

i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award: *The Smaro* at 247, *Ranko* p 4.

41. I turn then to consider this Ruling in the light of these factors. As to the substance, this is in essence a procedural ruling. While it is not at all akin to the kinds of decisions which will be set out in a basic procedural order – dealing with timetables, disclosure, form of statements and so on, and it is final to its subject matter, the Ruling does not decide an issue of substance relating to the claim. It is not a final decision on the merits of any of the claims. It is a decision on a procedural issue (a derivative claim being itself a procedural device, and this being a decision on leave to bring that form of claim) which has a discretionary element. The bottom line is that the arbitration is not over and the Tribunal is not *functus*. Before that can happen there will have to be an award on the merits. It is possible that the claim could be pursued by KMP, although as matters stand (with KHL being *de facto* in control of KMP) that is obviously unlikely.

42. There is in my judgment a valid contrast with striking out for want of prosecution. In *Enterprise* it was agreed that dismissing a claim for want of prosecution must result in an award. That is because it brings the claim to an end. Here, by contrast, there is no such finality. So much for the substance.

43. As to the form of the Ruling, it is certainly true that the document which emerged was not a simple procedural order. However, nor is it in its form what one would expect to

see by way of Award in a multi-million pound multi-claim arbitration; while 22 pages is not nothing, a much longer and more detailed document would very probably be expected by way of an award.

44. Certainly, it does include reasons; but here one can see from the transcript that the parties were expecting reasons even with a procedural order – as indeed is often the case, as can be seen in the authorities. The other formalities having been included is hardly surprising once one is dealing with reasons. Further those reasons are, as I shall indicate below, somewhat compressed. There is not a point by point analysis of each claim raised. Rather there is a "triaging" of the issues, explaining what the Tribunal sees as the clear path through. This is entirely consistent with a Ruling on a complex procedural issue; it is less so with an award - as the authorities considered below on the question of dealing with all issues, and the arguments deployed in the arbitration claims indicate.

45. As for the inclusion of reasons, and their length (ie the fact that there were reasons at all), one should perhaps also bear in mind that this very distinguished and experienced Tribunal will have had well in mind that the substance of this document might well be the subject of challenge once the arbitration was determined. If ZCCM's claim were dismissed in a final award, the Tribunal having refused an application to permit a derivative claim, the award might well be challenged on the basis that the Tribunal had erred or misconducted itself in approaching the matter on that basis. It was therefore plainly appropriate for the Tribunal to give some guidance to the parties as to how the exercise had been conducted; albeit that that guidance was not as full as a reasoned award. The form of the Ruling therefore resonates best as a ruling, not as an award.

46. To this one may add the evidence of the debate at the hearing. This has two aspects. The first is that in the light of the debate as to the nature of the decision, if the Tribunal had intended to produce an Award it seems overwhelmingly likely that it would have called it that.

47. The second feeds into the reasonable recipient test. The reasonable recipient, in the light of the debate between the Tribunal and the parties would itself have expected the document not to be an award and that if, contrary to initial indications, an award was being produced, the Tribunal would have said so. Or, to put it the other way around, what was expected was an order with reasons; that is what the Tribunal on its face produced. That is what a reasonable recipient would read the Ruling as being.

48. It follows that the Ruling is not an award and no s. 68 challenge can arise. However I will deal with the other issues raised for completeness.

S. 68: The Law

49. S. 68(2) provides:

> "(1) 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.
> …

> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-
>
> > (a) failure by the tribunal to comply with section 33 (general duty of the tribunal); …
> >
> > (d) failure by the tribunal to deal with all the issues that were put to it; …"

50. It is common ground that the court will only accede to an application under section 68(2)(a) or (d) in extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. I have been reminded of the words of Field J in *Latvian Shipping Company v The People's Insurance Company OEJSC* [2012] EWHC 1412 (Comm):

> "the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults … Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it"

51. There is much further authority to similar effect. In *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm); [2013] 2 C.L.C. 901, Flaux J (as he then was) said:

> "6. …the focus of the enquiry under section 68 is due process, not the correctness of the tribunal's decision. As the DAC Report states, and numerous cases since have reiterated, the section is designed as a long-stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected….
>
> 30. A number of cases have emphasised that the court should read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults. … A similar point was made by Teare J in *Pace Shipping v Churchgate Nigeria Ltd* [2009] EWHC 1975 (Comm); [2010] 1 Lloyd's Rep 183 at [20] specifically deprecating a minute textual analysis."

52. I also referred, given the nature of the challenge, to a considerable number of authorities on the subject of what is an "issue" for the purposes of such a challenge.

53. As a starting point I was referred to the summary in *Russell on Arbitration* (24th Edn.) (2015). paragraph 8-105:

> "… the Court of Appeal has said that they do not mean each and every point or argument in dispute. Rather they mean those issues which the tribunal has to resolve. …The "*issue*" must be

> an important or fundamental issue, for only a failure to deal with such could be capable of causing substantial injustice. There is also a difference between a failure to deal with an issue and a failure to provide sufficient reasons for a decision on that issue. … The court will not nit-pick through the reasons in an award. … Once the court has identified the issue and the tribunal has dealt with it in any way that is the end of the enquiry. It does not matter for the purposes of ground (d) whether the tribunal has dealt with it well, badly or indifferently."

54. As the first line indicates, this reflects *dicta* in a variety of cases. So in *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 at paragraphs 48 to 49:

> "[49] In my judgment "*issues*" certainly means the very disputes which the arbitration has to resolve. In this case the dispute was about the open market rent for this property. The arbitrator decided that. In order fairly to resolve that dispute the arbitrator may have subsidiary questions, "*issues*" if one likes, to decide en route. Some will be critical to his decision. Once some are decided, others may fade away."

55. In *Petrochemical Industries v Dow* [2012] EWHC 2739. Andrew Smith J rejected Dow's argument that because the Tribunal had dealt with the issue of remoteness of loss, it could not be said to have failed to deal with the issue of assumption of responsibility for Dow's consequential loss:

> "[20] …: general issues can often be broken down into more specific issues. An "*issue*" of remoteness, itself an aspect of the "*issue*" whether damages are recoverable, might well embrace sub-issues, and I think that sub-section 68(2)(d) can cover sub-issues of this kind.
>
> [21] The assumption of responsibility question … is, to my mind, an "*issue*" within the meaning of sub-section 68(2)(d). It is not simply a way of presenting the question of foreseeability, and not simply an argument in support of a contention that losses were not within the First Limb or the Second Limb of *Hadley v Baxendale*. It can be difficult to decide quite where the line demarking issues from arguments falls, but here almost the whole of Dow's claim could have depended … upon how the assumption of responsibility question was resolved. I accept PIC's submissions about whether it was an issue because this accords with what I consider to be the ordinary and natural meaning of the word, and I find support for this conclusion in that, as I see it, fairness demanded that the question be "dealt with" and not ignored or overlooked by the Tribunal, assuming it was put to them."

56. In *Soeximex v Agrocorp* [2011] EWHC 2743; [2012] 1 Lloyd's Rep. 52, Gloster J set aside an award where the Tribunal had held that a contract was not void for illegality

under US and EU Regulations on one basis but failed to address two different and distinct arguments under the Regulations.:

> "[19] … But, although the Board expressly referred to the evidence of Mr Newcomb in its Award…, there is no indication that it addressed what was clearly an important and discrete issue. Paragraph 7.12 of the Award (where the evidence and the Board's conclusion in relation to listed persons is set out) does not address the point.
>
> [20] … … the Board appears to have overlooked the issue as a separate issue altogether, and concentrated on the identity of the specific suppliers; … If the Board had indeed been addressing the wider argument, it is inconceivable that it would not have addressed its reasons for not accepting – or treating as irrelevant – Mr Newcomb's unchallenged evidence."

57. Characteristically careful consideration was given to what is an issue and what is a step in the evaluation of the evidence by Colman J in *World Trade Corp v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm):

> "On analysis, these criticisms are all directed to asserting that the arbitrators misdirected themselves on the facts or drew from the primary facts unjustified inferences. Those facts are said to be material to an "*issue*", namely what were the terms of the oral agreement. However, each stage of the evidential analysis directed to the resolution of that issue was not an "issue" within Section 68(2)(d). It was merely a step in the evaluation of the evidence. That the arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. It is, in truth, a criticism which goes no further than asserting that the arbitrators made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences."

58. Reference was also made to *Transition Feeds LLP v Itochu Europe plc* [2013] EWHC 3629 (Comm); [2013] 2 CLC 920. There Field J rejected an argument that the two issues not dealt with were merely arguments in the broader issue of what was the correct measure of damages.

> "[32] … The issue of the non-applicability of the Rotterdam resale prices for the reasons on advances by the Buyers to the Board was a quite distinct issue from the Sellers' claim for an increase in the damages. It was an issue raised fair and square before the Board by the Buyers and yet it received no mention at all by the Board in their Award. In my judgment, even after a fair, reasonable and commercial reading of the Award, the conclusion must be that the Board failed to deal with this issue."

59. That decision was then considered by Gavin Kealey QC sitting as a Deputy High Court Judge in *Buyuk Camlica Shipping Trading and Industry v Progress Bulk Carriers* [2010] EWHC 442 (Comm):

> "[38] … As those observations recognise, there should be some form of communication, normally in the form of a decision, by an arbitral tribunal to the parties from which the latter can ascertain whether or not an essential issue has dealt with. It is not sufficient for an arbitral tribunal to deal with crucial issues in *pectore*, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68(2)[d] is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined."

60. There is also authority, which was relied on by KHL to the effect that once the Court has identified the issue and the Tribunal has dealt with it in any way that is the end of the enquiry. It does not matter whether the Tribunal has dealt with it well, badly or indifferently: *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) at [33] where he also deals with the question of cursory reasons:

> "(vi) If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry (Primera at paragraphs 40-1); it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.
>
> (vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length (Latvian Shipping v Russian People's Insurance Co [2012] 2 Lloyd's Rep 181, paragraph 30)."

61. The other issue on which authority was cited was the meaning of *"substantial injustice"*, in relation to which the first case relied on was: *Transition Feeds LLP v Itochu Europe plc* [2013] EWHC 3629 (Comm); [2013] 2 C.L.C. 920. There Field J, approving paragraph 20.8 of *Professor Merkin's Arbitration Law* including:

> "[23] … By contrast, if it is realistically possible that the arbitrator could have reached the opposite conclusion had he acted properly in that the argument was better than hopeless, there is potentially substantial injustice. The accepted test now seems to be that there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable."

62. Secondly Popplewell J in *Terna Bahrain Holding v Bin Kail Al Shansi* [2012] EWHC 3283 (Comm) [2013] 1 All E.R. (Comm) 580:

> "In determining whether there has been substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

63. Against this background I turn to consider the issues which were said to be neglected by the Tribunal.

Issue 1: Failure to deal with the allegation that KHL expressly represented to ZCCM how FQMF was holding the monies.

64. ZCCM's first point relates to the fact that it alleged that KHL made express misrepresentations as to the basis upon which FQMF was holding KMP's monies, namely that KMP's monies would be:

a) Held on deposit accounts maintained by FQMF with reputable international financial institutions/managed by highly rated international financial institutions; and

b) Retained on deposit accounts for KMP's use and were readily available as and when needed to meet KMP's working capital requirements.

65. The complaint is that although the Ruling does refer, in recital of ZCCM's case, to the alleged express representations as to how FQMF was going to use the monies and it held that it would be assumed that the KHL directors did make the representations as contended for by ZCCM, the Tribunal did not then address the crucial issue, namely whether there was a *prima facie* case that the express representations were false (and therefore dishonest).

66. ZCCM contends that the Tribunal only considered the respective implications of the use of the words "*deposit*" and "*loan*" to describe the arrangement as between KMP and FQMF. It points to paragraph 59, where the Tribunal held that "*implicit*" in the word loan "*is an entitlement on the part of the borrower to use the funds it has borrowed in any way it sees fit*" and that "*KHL's description from time to time of the arrangement as a "deposit" was not … obviously or necessarily dishonest*". It says that this shows the Tribunal wrongly focussed on the position as between ZCCM and FQMF and not the critical point which was the representation as to use of the monies.

67. It says that while the Tribunal did address the question of the description of the arrangement, which was one representation alleged, the Tribunal should have (but did not) address the separate and distinct issue of whether there was a *prima facie* case that the express representations as to how FQMF would actually use the monies (managed by first rate financial institutions/available on demand) were false. In essence it says

that the Tribunal diverted its attention to address only part of one representation, and not all of both.

68. It submits that had the Tribunal addressed the issues of the express representations as to what FQMF was going to do with KMP's monies, the Tribunal must have found that there was, at least, a *prima facie* case that the express representations were false (and therefore dishonest).

69. It says that there is no route round this via the *"issue"* argument by saying that these representations were merely arguments presented by ZCCM in support of the claim, or evidence to be weighed up by the Tribunal in making a determination of the issues; rather these were separate and distinct allegations.

70. KHL submits that this approach is unfair and unrepresentative of the Ruling. The submissions of both parties concentrated very largely on the representations alleged to have been made about the terms and use of the Transfers and whether those representations were true. It submits that the Ruling at paragraphs 56-59 deals with the allegations in question clearly.

Discussion

71. On this issue I accept KHL's submission. The Ruling requires to be read carefully and in the light of the allegations. It must also, as the authorities make clear, be read constructively rather than destructively. There are two particular aspects to this. The first is the extent to which the different allegations, although pleaded as separate representations, interact with each other. This is similar to but distinct from the *"issue"* argument.

72. ZCCM's case, as I have summarised it above, essentially had three aspects:

    a) False representation that KMP's monies were being held by FQMF on deposit with reputable international financial institutions for KMP's use.

    b) False representation that KMP's monies were readily available for KMP's working capital requirements (when in fact FQMF was using them).

    c) Therefore, false representation that interest at 30 day LIBOR was a fair and appropriate rate and a better rate than KMP could otherwise expect to obtain by use of the monies.

73. Aspect (c) plainly follows from (a) and (b), but a false representation as to the second part of (a) (reputable financial institutions) also implies falsity of (b). The representations alleged are therefore entwined.

74. The second aspect is that it can easily be seen that the case run by ZCCM had a multiplicity of overlapping claims; these are distinct issues but with some common components. Where that is the case, it makes perfect sense for the Tribunal to "triage" the issues, dealing with common factors which would either make or break a number of different claims. One should not therefore expect to see every single aspect dealt with, where there was an overlap. Indeed, ZCCM rightly accepted that the Tribunal had no need to deal with an issue if, based on a conclusion relating to a logically anterior

issue, it did not arise. This point is in fact specifically dealt with in the judgment of Akenhead J in *Raytheon*:

> "A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an 'issue'. It can 'deal with' an issue where that issue does not arise in view of its decisions on the facts or its conclusions. A tribunal may deal with an issue by so deciding a logically anterior point."

75. The same must also be the case if based on a logically subsequent, but also necessary issue (a prime example being loss), the claim would necessarily fail.

76. Once one approaches the matter in this way it is not necessary under this head to look at the question of whether the matter relied on was itself an issue or an aspect of an issue; that is an argument which is really predicated on a conclusion that the representation was ignored. The essence of the position is that the representation was not ignored. It is plain from [56] that the Tribunal understood that what was alleged was threefold and that the question of "deposit" formed only one part of that. Embedded in this first "deposit" allegation however was the allegation of management by highly rated financial institutions; that was because it was the antithesis of use by FQMF. It should further be noted that this was ZCCM's own case at bottom: as Ms Brown QC put it more than once in submissions, "*the money cannot be in two places at once*". Therefore, to the extent that the Ruling deals with one side of the coin, the Tribunal deals also with the other.

77. Further in terms of the substance of the consideration, the Tribunal plainly had well in mind the need to construe the representation which was alleged against the relevant background. To that end the Tribunal performed a careful recital of the background in the early part of the ruling. It also flagged at [52] the need for the pleaded allegations, where an inference of fraud is sought to be made, to be ones which are not consistent with honesty. That is critical to understanding what the Tribunal found. So, it assumed (rightly) in ZCCM's favour, that the representation was made. On falsity, and assuming the representation to be as alleged, it essentially presumed this also in favour of ZCCM at [54] based on the evidence before it, and the information imbalance at this stage of trial.

78. The Tribunal then did not find that the words alleged had not been used; rather it rejected both the representation as to deposit and the specific inference which ZCCM sought to draw (highly rated financial institutions managing the funds) on the basis that, having considered the totality of the evidence, a proper construction of the words was one which was (i) not dishonest and (ii) did not mislead KMP. Part of that background of course was ZCCM's understanding, which was to be inferred from it having requested a loan on similar terms. The finding was clear: "*we are unable to accept ZCCM's submission that KHL's characterisation of the arrangement as a deposit had the dishonest connotation that ZCCM now ascribes to it.*". With that conclusion on dishonesty on "loan vs deposit" goes the conclusion on dishonesty as to fund management. With the conclusion on dishonesty on the fund management representation goes a conclusion as to the use of the monies.

79. Furthermore of course all three representations would (on the Tribunal's reasoning) fail in any event because of the loss issue.

80. It is fair to say that the Tribunal's mode of dealing with this conclusion under the heading of falsity might tend to be a little confusing. The approach is also somewhat compressed. But the exercise performed is ultimately clear. It is quite plain to me that the Tribunal did consider falsity as regards the representation complained of; they regarded it and dealt with it as hand in glove with dishonesty and with reliance.

Issue 2: Failure to address the issue of breach of fiduciary duties.

81. The second issue relates to fiduciary duties. ZCCM says that at the core of its case was the allegation that, in particular, the KHL directors acted in breach of their fiduciary duties to KMP by transferring KMP's monies to FQMF while (i) failing to disclose the actual use to which the monies were put and (ii) paying a rate of interest which did not reflect a commercial rate applicable to the use and risk to which FQMF was in fact putting the monies (i.e. a commercial lending rate rather than an on-demand deposit rate).

82. It says that the existence and breach of the fiduciary duties as alleged by ZCCM were crucial issues in ZCCM's permission application. They were separate to, and independent of, the issue of whether KHL/the KHL directors misled the ZCCM directors as to use to which the KMP monies were put.

83. ZCCM says that the only mention of fiduciary duties is where the Tribunal addresses, in the context of loss, an entirely different point which did not reflect ZCCM's case. It points to [64]:

> "Moreover, critically in this context, whether or not to place the monies on longer-term deposits, or to use them in some other way, would be a management decision, to be taken by the KMP board; and there is no evidence that the KHL directors on that board, acting in accordance with their fiduciary duties and in the best interests of KMP, could not quite properly have decided that putting the monies on short-term deposit was the right thing to do."

84. This, it says, addresses a breach of fiduciary duty which was not alleged; ZCCM never alleged that the directors could not properly have decided that putting the money on short term deposit was an appropriate course.

85. KHL says that this is a classic example of an overcritical reading of an award, which is directly contrary to the correct legal approach in this area. It submits that the Tribunal dealt with this on a "rolled up" basis when it dealt with dishonesty and ZCCM's knowledge and that it further dealt specifically with the breach of fiduciary duty of the directors (the claims were advanced as those of inducement of breach of the directors' fiduciary duties, alternatively dishonest assistance) at [64]. To the extent that it is necessary to do so it also invokes the *Raytheon* approach and contends that this was an issue which did not arise since the Tribunal had decided there was no reprehensible conduct, and therefore the issue did not require to be dealt with.

Discussion

86. I accept the submission that there was no failure to deal with the question of fiduciary duties. Again, in my judgment, what one sees in the Ruling is a streamlining of the issues by the Tribunal. This can be seen when in conclusion, the Tribunal said [67]:

> "For these reasons, ZCCM has in our judgment failed to make out a *prima facie* case either as to falsity or as to loss. These conclusions are fatal to ZCCM's permission application, whichever way it is put."

87. In other words, the Tribunal formed the view that all of the claims alleged hinged either on falsity or on loss (or both). Having reached conclusions on these two fundamental points it concluded that it need not deal *seriatim* with each iteration of the argument, whether put forward as representation or breach of fiduciary duty or breach of shareholders' agreement or so forth.

88. I concur with that analysis. The breach of fiduciary duty claim was pleaded as breaches of the directors' duties of full and frank disclosure as regards the use of the monies, the fact that LIBOR was below a commercial rate for that use and consequently as secret profits/failures to act in KMP's best interests. Hence in essence the fiduciary duty claim had two components (i) misrepresentation/failure to disclose use by FQMF and (ii) paying a rate of interest which did not reflect a commercial rate.

89. The former point is the one already considered under Issue 1. It fails for the same reason. The latter is effectively the same as Issue 4; and its substance will be considered together with that issue.

90. It is clear from the passages I have considered that the breach of fiduciary duty was dismissed as a matter of fact. What the Tribunal did was to consider the main ground first and in detail, and then to look at whether anything survived if that failed, given the overlap between the cases being run. It must be borne in mind that, as I have noted earlier, the case was put on a plethora of bases. It was a perfectly sensible way of dealing with the issues for the Tribunal to adopt the course which it did. There was no failure to deal with the issue. It was dealt with clearly, and the conclusion was clear.

91. To the extent that a challenge were made to the Tribunal's conclusion that all the alternative heads of claim failed on the basis of its factual conclusions that they were subsumed into the two main questions, such a challenge would be a matter of law and could only be subject to appeal on that basis under section 69. This can be seen from the authority of *Protech Projects Construction (Pty) Ltd v Al-Khara & Sons* [2005] EWHC 2165; [2005] 2 Lloyd's Rep. 779 at [34].

92. No such challenge has explicitly been made. Certainly no such appeal has been commenced and any appeal would now be long out of time.

93. The question of exhaustion of remedies, which was raised by KHL, therefore does not strictly arise. However, I deal with it separately for completeness after the individual issues.

Issue 3: Tribunal's failure to deal with the issue of breach of the ASHA

94. This challenge is based on the fact that Clause 11 ASHA required that all contracts with Affiliates including FQMF be on "Arm's Length Terms" as defined at Clause 1.1 including a requirement that "*the parties in negotiating the transaction have sought to promote their own best interest in accordance with fair and honest business methods.".* Clause 11.2 also required disclosure in writing to the Board of any interest of the Affiliate in any proposed contract.

95. For the same reasons as ZCCM alleged that the arrangement between KMP and FQMF was made in breach of fiduciary duty, it contended that the arrangement was not on Arm's Length Terms and was in breach of Clause 11 of the ASHA.

96. It follows that this ground of challenge stands or falls with the previous one.

Issue 4: Failure to deal with the case put to it by ZCCM in relation to the rate of interest paid by FQMF to KMP

97. This was the ground on which ZCCM really concentrated the most fire, and as noted above, a part of Issues 2 and 3 now hinges on the outcome of this ground. It was ZCCM's case that a commercial Arm's Length rate of interest should have been paid by FQMF to KMP which reflected the actual use/risk to which FQMF put the monies, i.e. using them to fund FQ Group's business, namely the rate applicable on an unsecured commercial loan, rather than an on-demand deposit rate.

98. ZCCM says that no "issue" argument can arise in that it was a fundamental issue in the arbitration, cutting across all aspects of its claim: misrepresentation, breach of fiduciary duty, breach of ASHA. Indeed, in dealing with exhaustion of remedies Ms Brown QC for ZCCM conceded that the conclusion on loss rendered Issues 2 and 3 foregone conclusions.

99. The primary basis upon which ZCCM sought to establish a *prima facie* case of loss in relation to all of these heads was that KMP should have received a rate of interest reflecting a commercial unsecured loan rate. ZCCM contended that there was evidence of such rates and that the Tribunal nonetheless failed to address this crucial issue at all.

100. What was necessary, it submitted, was for the Tribunal to address the issue of whether LIBOR was a commercial Arm's Length rate when the monies were being used to fund FQ Group business. Instead, the Tribunal addressed the issues of express misrepresentation and proof of loss on a basis which was not contended for by ZCCM and which ZCCM had expressly disavowed. Indeed, ZCCM contended that the Tribunal had not even properly identified the issue. On that basis it submitted it should be assumed that the issue was not properly dealt with.

101. ZCCM submitted that the position is not dissimilar to that in *Transition Feeds LLP v Itochu Europe plc* in that the Tribunal failed to address the key argument raised by ZCCM as to how its loss should be calculated on a *prima facie* basis.

102. KHL submitted that the Tribunal did deal with this issue. It submitted that the Tribunal dealt extensively with interest rates and loss at paragraphs 60 to 65, including the rate of interest paid by FQMF to KMP.

103. Specifically, the Tribunal referred both to ZCCM's failure to adduce any evidence that a higher rate of interest could be obtained at paragraph 60 but also to "*the only independent evidence*" being a KPMG report dated 13 November 2014 at paragraph 61, which concluded that: "…*the one-month LIBOR rates on deposits under the Deposit Agreement were not below the Arm's Length rate.*"

104. It conceded that the Tribunal might have dealt with the question more fully. However, what mattered was that it was dealt with.

105. Further or in the alternative KHL contended that the Tribunal's conclusions were conclusions of fact, and were not properly open to challenge.

Discussion

106. One difficulty for ZCCM on this argument is that its attempt to divorce the representation as to the rate of interest and as to the use of the funds is artificial. The reality is that ZCCM's entire position comes down to a claim that it should have received a higher rate of interest. The claim for a misrepresentation (or breach of fiduciary duty) as to the non-availability of a higher rate of interest is not conceptually distinct from its claim for misrepresentation (or breach of fiduciary duty) as to the use of the money. At bottom ZCCM's case is constructed thus: we should have got a higher rate of interest because of the use of the funds (about which you lied to us).

107. Thus, it follows that if there is no case with a realistic chance of success on the first head, there could be no case with a realistic chance of success as regards the rate of interest; because the interest rate is dependent on the use of funds. There is no separate misrepresentation pleaded that KHL represented that LIBOR was an Arm's Length rate for the use to which the funds were actually put (because it formed no part of ZCCM's case that it was told this). One might therefore conclude that the case failed for this reason.

108. But in addition, the Tribunal have (entirely correctly) highlighted a separate and critical point. This is that one needs to look at the counterfactual which must govern any assessment of loss. It is not enough to say (i) you lied about the rate relevant to the use you were making of the funds, therefore (ii) we are entitled to that higher rate. ZCCM must bridge the gap by showing that what they would have done if the lie had not been told is that they would have taken advantage of that rate; i.e. they must have a case on causation. On this point ZCCM's case is dependent on an implicit assertion that if it had been told that FQMF intended to use the monies it would either have bargained for a different rate with FMQF or would have got a better rate elsewhere.

109. But as the Tribunal has spotted, that must be tested against the known facts. In particular given that (*ex hypothesi*) KMP had (or understood itself to have) free use of its funds, it could have got a better return elsewhere anyway, and chose not to do so. That implies that the causation case is not good. That evidence is, as the Tribunal notes, bolstered by the other known facts – it notes at paragraph 63 that a suggestion to tie up part of the monies for a greater return elsewhere was not welcomed by ZCCM.

110. The Tribunal then at paragraph 64 bolsters this reasoning yet further by (i) explaining why ZCCM appears to have taken (and hence would have taken) this, on the face of it counterintuitive, position and (ii) saying that in any event KHL's directors could control

this decision and there was nothing so wrong about that decision that it could give rise to a claim for breach of fiduciary duty.

111. Finally, it also notes at paragraph 64 that the evidence of higher rates which ZCCM relies upon was not apposite in the context of what it has (unappealably) found were "*extensive capital requirements which on the face of it made it sensible to keep the monies – or at any rate a large part of them – on short term deposit*.". It therefore does not (as was submitted) ignore ZCCM's submissions on rate; rather it finds therefore that on the facts ZCCM's evidence is of the "apples and oranges" variety, and that the only evidence it had which was pertinent to the investment decision on the counterfactual was the KPMG report, which suggested that there was no loss.

112. It is fair to say that the Tribunal does not explain this reasoning as clearly as it might have done. Its reasoning jumps straight from ZCCM's case to the counterfactual, without explaining where in the loss analysis ZCCM's problem lies.

113. However, it is on careful reading quite clear what the Tribunal was saying, and that it was dealing with the relevant question. There is therefore no failure to deal with the case as put; nor are the authorities as to inferences from inadequate reasoning apt. The reasoning is robust; the expression of that reasoning is just not very user friendly.

114. It follows that Issues 2, 3 and 4 therefore fail.

Issue 5: The Tribunal wrongly proceeded on the basis that it was undisputed that KMP's monies were repaid as and when required and/or failed to address the issue that KMP's monies were not always readily available

115. As well as being brought under s. 68(2)(d), the challenge on this issue is also brought under s. 68(2)(a) on the basis that it was a failure to comply with section 33 of the Act for the Tribunal to proceed incorrectly on the basis that a matter was undisputed.

116. As to this ZCCM points to *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749; [2007] 2 All ER (Comm) 694:

> "[37] From these decisions I derive the following propositions relevant to grounds under section 68(2)(a):…
>
> (1) The underlying principle is that of fairness or, as it is sometimes described, natural justice. …
>
> (3) It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity. …"

117. It contends that by analogy it must be a procedural irregularity under s. 68(2)(a) for the Tribunal wrongly to decide an issue on the basis that a matter is undisputed. This proposition was not disputed.

118. The factual basis for the complaint is that ZCCM says that it did not accept that the monies were *"repaid as and when required"*; indeed, it expressly denied that the monies were always available for use by KMP – here the *"money can't be in two places at once"* argument was deployed. ZCCM reiterates that the mere fact that the monies were ultimately repaid by the end of 2014 does not mean that they were always available for use between 2007 and 2014.

119. ZCCM points to a report by PwC which said *"While [KMP] has access to these funds and makes drawdowns for working capital purposes, there is a risk that if the amount were called on, [FQML] may not be in a position to immediately settle it"*. That, it contends, gives the lie to the Tribunal's conclusion and represented ZCCM's position. It also points out that in its evidence what was said was that *"there is no evidence that it was sitting there every day"* and in submissions its counsel said *"there is ... no evidence that at any given point the funds were readily available contrary to representations which were made."*

120. ZCCM contends that, given the significance placed by the Tribunal in their analysis at paragraph 59 of the Ruling on the incorrect premise that it was undisputed that the monies were repaid as and when required, it is at the very least *"realistically possible"* that had the Tribunal not misdirected itself it would have concluded that there was a *prima facie* case that the monies were not always available and therefore, a *prima facie* case that dishonesty was made out.

121. KHL contends that this ground is an illegitimate exercise in semantics and contrary to the approach indicated by Flaux J in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm). It submits that ZCCM never did dispute the "*always repaid*" proposition but suggested only that the monies were not always available to be paid as and when required. Properly understood, the Tribunal decided on the evidence that there was no dispute the monies were repaid when they were actually required, which was true: further ZCCM was unable to point to any time where, had money been required, it could not have been repaid.

122. As for the PwC report, KHL argues that ZCCM fails to recognise that this was merely setting out the risk that PwC were testing for the purposes of the audit, i.e. simply identifying an "*audit focus area*". On the same page, they set out the *"procedures performed and results"*, stating that *"as at 31 January 2014 FQML had signed USD2.5 billion facility with Standard Chartered Bank to shore up its financing"*, which, in context, satisfied then that there was no such risk.

123. In any event, whether the issue was contested or not, KHL submits that the Tribunal also found that *"there was no evidence that the value of KMP's funds loaned to FQMF was not available for use if needed"*. This is a primary finding of fact and cannot be disturbed.

124. In those circumstances, it says, there can be no substantial injustice.

Discussion

125. On this point both sides appeared at times to be engaging in a semantic dispute. It seems clear that ZCCM could not and did not actively dispute the *"always repaid"* point. It did however not actively accept it and they did obviously dispute the *"available for*

repayment" proposition, at least insofar as reference was had to the exact monies transferred to FQMF. I will avoid this dispute, which leads nowhere and deal rather with the essence of the complaint – that the Tribunal assumed that there was no dispute as to availability of funds, when there was such a dispute.

126. I am not persuaded that there is anything amiss with the Ruling in this respect. The Tribunal may have slightly overstated the common ground, but not to any material effect. So far as concerns the narrow point ("*repaid*"), what the Tribunal said does not misrepresent the position. Nor is it fair to say that the "*available*" argument, which was ZCCM's focus, was ignored as ZCCM says. It is dealt with at [58(c)]. I do not accept, as Ms Brown attempted to persuade me, that there is anything objectionable in the use of the word "*Value*" in that context (*"the value of KMP's funds loaned to FQMF"* being available or otherwise). There was no reason why repayment had to be made from the exact funds transferred. There was no trust and so long as the value was available to be repaid on demand, this was all that mattered.

127. Further so far as the question of "*realistic possibility*" of a different outcome is concerned in the context of substantial injustice, ZCCM's submission overstates the emphasis on this point within the Ruling. The Tribunal leant on (i) the detailed history of the way the parties described the arrangement (ii) ZCCM's own attempt to get such a loan for itself and (iii) that it was undisputed that it was repayable on demand/repaid when required. That makes this point one half of the third point on which weight was placed. It cannot be said that even if the Tribunal slightly overstated the willingness with which the concession was made, there is a realistic possibility that the fuller iteration of it would have made a difference. One need only read into the Ruling the terms in which the point was actually put to the Tribunal to see how very marginal a difference is in focus here.

Exhaustion of Remedies

128. In relation to Issues 2-5 above KHL also raised the question of exhaustion of remedies. KHL says that if there was any failure to deal with an issue ZCCM's remedy was to apply to the Tribunal for an additional award under Article 39 of the UNCITRAL Rules.

129. It places reliance first on section 70 of the Arbitration Act 1996, which provides:

> "(1) The following provisions apply to an application or appeal under section 67, 68 or 69.
>
> (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted –
>
> (a) Any available arbitral process of appeal or review …"

130. Secondly it points to Article 39 of the UNCITRAL Rules which provides:

> "Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal."

131. The wording of Article 39 is materially similar to section 57(3)(b) of the Act, which provides an alternative in the absence of agreement to make additional awards.

132. Thus in relation to breach of fiduciary duties, KHL contends that the breach of fiduciary duties is a primary head of claim and therefore falls within Article 39. It is not an issue *"which is part of the process by which a decision is arrived at on one of those claims"*: *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787.

133. ZCCM argues that this Article and the section only apply to claims presented and not decided, pointing to *Torch* at paragraph 27 where Cooke J said:

> "In my judgment section 57(3)(b), which uses the word "claim", only applies to a claim which has been presented to a Tribunal but has not been dealt with, as opposed to an issue which remains undetermined, as part of a claim … I consider that the terms of section 57(3)(b) are apt to refer to a head of claim for damages or some other remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims."

134. ZCCM contends that the breach of fiduciary duty argument was not a claim in that sense in the context of this hearing, which was not to decide the merits of the claims, but was only for permission to bring a derivative claim. It was a key issue which should have been addressed; but it was not a claim which was capable of giving rise to a separate Award. It points to KHL's submission in the context of the Award vs Procedural Order debate that the determination left KMP's causes of action unaffected. It also emphasises the point that the decision on no loss was determinative.

Discussion

135. This question is somewhat artificial in the light of the conclusions to which I have already come. The question is by now one of double contingency: if I had decided the Ruling was an award, and if I had decided that there was a failure to decide the particular issue. Had both of those questions gone the other way I would have concluded that there were substantive final determinations of issues and that the Tribunal had failed to deal with one or more of them. It would then follow that the provisions of Article 39 would be applicable and that ZCCM should have and did not seek to invoke Article 39, with the result that any claim under s. 68 is barred by the operation of section 70.

The Fraud Claim

136. By its 1 June 2018 Application, ZCCM seeks permission to amend its Arbitration Claim to include a claim under s.68(2)(g) that there was a "*serious irregularity affecting the tribunal, the proceedings or the award" "which has caused or will cause substantial injustice*" to ZCCM by reason of "*the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy."* It also seeks an extension of time to make this amendment, the application having been brought well after the time limit set out in the Act.

137. ZCCM's case is in essence that in the arbitration KHL argued that:

a) The arrangement between KMP and FQMF was "*a simple loan at interest*" and, accordingly, there were no restrictions on the use to which FQMF could put KMP's money.

b) Use of the word "deposit" to describe the arrangement between KMP and FQMFL did not mislead ZCCM because in a general deposit arrangement there is no restriction on the use to which the monies advanced can be put.

c) "*All of the evidence*" supported its case and that there was "*not a shred of evidence*" to support ZCCM's case.

I was taken to a number of transcript references focussing on this distinction between loan and deposit; and while I have not read the entire transcript it is fair to say that it is apparent from the Ruling that this distinction was the focus of much argument at the hearing.

138. ZCCM say that this was a key point and point to what they say is the acceptance of KHL's case at paragraph 59 of the Ruling and the finding that KHL's characterisation of the loan as a "*deposit*" was not dishonest where both parties had also described the same arrangement as a "*loan*". ZCCM say that it was on the very basis of this distinction that the Tribunal held that ZCCM had failed to establish a *prima facie* case on falsity (and therefore dishonesty).

139. ZCCM says that in stark contrast to this, KMP had argued in correspondence with the Zambian Revenue Authority ("the ZRA") that the arrangement between KMP and FQMF was not a loan but was rather a deposit with all the funds held on an FQMF account in London at KMP's disposal. Further in arguing that interest at LIBOR was Arm's Length, KMP asserted *"deposit and borrowing rates differ"*.

140. The factual basis of this derives from a series of letters, described as "the ZRA Correspondence".

141. The first is a letter from ZRA dated 27 May 2013. It says this:

> "Kansanshi Mining PLC-Audit Findings
>
> Reference is made to our audit that we conducted from 14 June 2012 to 29 June 2012.
>
> Thus, this letter serves as notice of the audit findings emanating from the audit mentioned above.
>
> …
>
> 1.3.2 Loan to FQM Finance
>
> The company provided an unsigned loan agreement with FQM Finance dated 1 January 2007. Though the company has argued that the arrangement was not a loan but simply a senior credit obligation.

> However, we still feel the loan should have attracted interest at Arm's Length like a loan to any other third party would have attracted. The company recently went to the market to get a loan amounting to one billion dollars at LIBOR plus 3%. This is very unusual especially that as at 26 June 2012 the loan account (money learnt FQM Finance) was about $2,000,000,000. Why then should a company that has a reserve with as much as $2,000,000,000 opt to get a loan with interest rates at LIBOR plus 3%? This further explains why we have argued that the money should have been lent at LIBOR plus 6% to reflect what such a transaction would obtain on the market.
>
> Based on our arguments above, we intend to readjust the lending rate so that it is based at LIBOR plus 6%. Thus, the adjusted interest receivable will be as follows: …."

142. This was addressed in a 14 June letter:

> "**Loan to FQM Finance**
>
> We reiterate the explanation given earlier that this was not a loan but rather a deposit. This deposit cannot be classified as a loan as it has no features common to a loan.
>
> The following are features you would expect from a loan
>
> - Tenor – you would normally expect a tenor to be in the document;
>
> This is an "*at call*" deposit, so the tenor is at default overnight. This is a common feature with all "*deposits*".
> - Security;
> There was no security given by KMP or requested by FQML.
> - Financial Covenants;
> There were no financial or other covenants attached to the arrangement.
> - Repayment;
> There is no repayment schedule.
> - Material Adverse Change/ Event of default clauses;
> There were no MAC or EOD clauses.
>
> The above clearly show that it was not a loan.
>
> Pricing for short dated deposits is generally based off LIBOR adjusted for short term credit risk.
>
> In terms of LIBOR, this is a standard benchmark for pricing of both Deposits and Loans. It is normal to match the LIBOR rate with the tenor, so it is appropriate to use Overnight Libor for pricing.…

> It is worthwhile to note that the income tax act neither defines a loan nor prescribe any criteria necessary for an advance to be classified as a loan. It is therefore reasonable to assume that the income tax act expects the same features as above from a loan….
>
> Based on the above representations, we expect the assessments to be adjusted accordingly and fairly reflecting a consistent and compliant tax payer. …"

143. Then there was a letter of 6 August 2013:

> "**Loan to FQM**
>
> …, we indicated to you that the funds you are referring to as a loan to FQMF is not actually a loan but just a deposit account where all proceeds relating to the exports of KMP are deposited. The funds are accessed by KMP as and when need arises. We submit that the advance does not have the features of a loan and hence cannot be treated as such. We argue on the same line below.
>
> The issue of Arm's Length transacting between KMP and FQM is a matter of fact. KMP has indicated from previous correspondence that there is an arrangement between KMP and FQMF whereby all proceeds of Copper are deposited in the London FQMF account held at Standard Chartered Bank. This is a purely finance/treasury management arrangement to enable the treasury function which is housed in London conveniently manage the funds. There was no loan that KMP advanced to FQMF as found by your audit team. All sale proceeds are deposited into the account in London and the funds are at KMP's disposal. KMP actually draws money from the same account monthly and as and when the funds are needed based on its monthly cash budget requirements.
>
> …
>
> You have also stated that charging interest at LIBOR was not at Arm's Length. As indicated above, the depositing of funds into the UK account is actually not a loan but just a deposit into an account where central treasury (based in London) can easily monitor and manage the funds, KMP can only recover the interest that it would ordinarily earn on a deposit account. … Further note that deposit and borrowing rates differ."

144. ZCCM says that the divergence between these letters and what was said in the arbitration is such that it is right to conclude that the Ruling was obtained by fraud.

145. KHL opposes the application on the merits but also contends that the application never gets off the ground because the extension of time should not be granted because of:

a) Delay, for which ZCCM is culpable;

b) ZCCM's continued participation in the arbitration notwithstanding knowledge of the alleged irregularity;

c) ZCCM's failure to seek disclosure or an adjournment pending disclosure;

d) The test for the introduction of new evidence has not been met;

e) KHL's non-disclosure could not amount to a fraud.

146. Logically the question of extension of time must be considered first.

Amendment/Extension of time

147. In relation to the approach to an application to amend the claim form under section 80(5) of the Act KHL referred me to the judgment of Popplewell J in *Terna Bahrain* at [27-31].

148. However, that judgment refers back to the seminal judgment of Colman J in *Kalmneft v Glencore* [2002] 1 Lloyd's Rep. 128, where he set out the principles which have been substantially undisturbed in the succeeding sixteen years ("the Colman Guidelines"). After considering the policy factors underlying the Arbitration Act regime he said:

> "Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:
>
> (i) the length of the delay;
>
> (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
>
> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
>
> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
>
> (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have;
>
> (vi) the strength of the application;
>
> (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

149. I should add that there was a suggestion in a judgment of Eder J in *S v A* [2016] EWHC 846 (Comm) [2016] 1 Lloyd's Rep 604 that this approach might not be consistent with what are now widely referred to as "the Denton principles" set out in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, and *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926. However that suggestion has not gained traction in the subsequent authorities and was not raised by either of the parties. There are, of course, good reasons why applications under this section may require to be dealt with in a slightly different way to CPR defaults – notably the fact that the consideration arises under the Act not the CPR, and the important arbitration specific factors identified within Colman J's judgment are in play.

150. There is some debate in the authorities (see for example *State A v Party B* [2019] EWHC 799 (Comm) at [33]) whether the first three factors are generally to be taken as the most important ones. However in this case it is essentially common ground that the most important factors other than the merits, to which I will come, will be those listed as (i), (ii), and (iii).

151. On the first factor KHL says that this points clearly against an extension of time. It says by reference to *Terna*, at [28] and *Daewoo Shipbuilding & Marine Engineering Company Ltd v. Songa Offshore Equinox Ltd and Songa Offshore Endurance Ltd* [2018] EWHC 538 (Comm) at [78], *"the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore, a delay measured even in days is significant; a delay measured in many weeks or in months is substantial"*, that even a short delay will often be significant and that on any analysis 71 days late must be so.

152. It notes that in *Terna* it was indicated that the absence of an explanation for a period of delay is likely to be taken as an indication that it was deliberate. As Popplewell J said in that case:

> "Moreover, where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter."

153. It says that this is all the more serious and the second hurdle is also missed in circumstances where ZCCM was aware of all the facts underlying its amendment not just before the deadline under section 68 but for 3½ years before this and even before the arbitral hearing itself.

154. ZCCM argues that this mischaracterises its position and that there was no material or culpable delay. Further it submits that it is highly significant that at this hearing the Court is asked to decide ZCCM's application to extend time at the same time as determining the merits of the fraud claim. It submits that the authorities indicate that in such a case the merits are a powerful factor in determining whether to extend time. It points in particular to *Terna* at paragraphs 31 to 33:

> "[31] ... the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of

> time, the court will not normally conduct a substantial investigation into the merits of the challenge application, ... Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time....
>
> [32] The position, however, is different where … the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the court has heard full argument on the merits of the challenge application. In such circumstances the court is in a position to decide not merely whether the case is "weak" or "strong", but whether it will or will not succeed if an extension of time were granted. … If the challenge is a bad one, this should be determinative of the application to extend time....
>
> [33] Conversely, where the court can determine that the challenge will succeed, if allowed to proceed by grant of an extension of time, that may be a powerful factor in favour of the grant of an extension, at least in cases of a challenge pursuant to s 68. In such case the court will be satisfied that there has been a serious irregularity giving rise to substantial injustice in relation to the dispute adjudicated upon in the award … Where the delay is due to incompetence, laxity or mistake and measured in weeks or a few months, rather than years, the fact that the court has concluded that the s 68 challenge will succeed may well be sufficient to justify an extension of time. The position may be otherwise, however, if the delay is the result of a deliberate decision made because of some perceived advantage."

155. Further, it says that when, as here, the allegation is one of fraud, the Court should be slow to shut out the challenge on the basis of delay. See *Chantier De L'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383:

> "[66] .. Furthermore, the importance and significance of the allegations raised (whatever the eventual outcome of the application) are such that I would be extremely reluctant to shut out CAT on grounds of delay. …"

156. On this basis it submits that if the Court is satisfied that ZCCM's s.68(2)(g) challenge should succeed then it should extend time. The delay was just over 2 months and there is no question of any deliberate decision to delay having been made for tactical reasons.

Discussion

157. I am satisfied that while the position on the merits is not determinative when an application for an extension is heard at the same time as the substantive challenge, it will be a far more significant factor at this stage than it would be if the application were heard earlier.

158. In such a case the authorities indicate that if a claim has merits, something beyond mere delay will usually be required; something akin to a deliberate decision not to pursue the application earlier, which was made because of some perceived advantage.

159. In this case I am not satisfied that the delay which is established is of such significance that I can conclude that this hurdle or a hurdle is reached. In other words this is not a case where, even if I concluded that the Ruling had been obtained by fraud, it would nevertheless have been right to refuse an extension of time.

160. That is not of course to say that I conclude that there was no culpable delay. In my view there was delay. In particular I am persuaded that there was some culpable delay prior to the arbitration and in its early stages. Between July 2014 and June 2017, ZCCM was in active dispute with KHL with both litigation and arbitration in contemplation throughout; and yet it took no steps to obtain permission to use the ZRA Correspondence. On the basis that, as I have been told, these were important documents, ZCCM cannot have been in any doubt it wished to rely on the ZRA Correspondence. Yet there is no explanation of any sort for this default which would entitle me to conclude that delay has been deliberate.

161. There was also a delay after permission had been granted by the ZRA of some 12 days; the explanation given that ZCCM then chose to seek directions from the Commissioner General of the ZRA as to whether the ZRA needed to produce the documents to the Minister is not in my judgment a good reason.

162. Had this matter arisen for decision at an earlier stage, when the merits had to be looked at on a preliminary basis, and delay issues accordingly weighed more heavily it might well have been the case that the balance would have come down in favour of refusing the extension of time based on that delay. However the decision on the extension of time is fact sensitive; and it is highly significant that at this stage I am able to make an informed determination on the merits.

163. Accordingly, in my judgment the result on the extension application in this case would turn on the conclusion which I reach as to the merits of the case.

The Merits of the Fraud Claim

164. That brings me finally to the question to the merits of the fraud case.

165. KHL submits that following *Double K Oil v Neste Oil* [2009] EWHC 3380 (Comm); [2010] 1 Lloyd's Rep. 141 ZCCM must establish that: (i) the award was obtained by fraud (or the way in which it was obtained was contrary to public policy) (ii) the new evidence relied upon to show the fraud could not with reasonable diligence have been adduced in the arbitration and (iii) the new evidence would have an *"important influence on the result"* (i.e. the irregularity has caused/will cause substantial injustice).

166. ZCCM relies on the judgment of Jefford J in *Celtic Bioenergy v Knowles* [2017] EWHC 472 (TCC); [2018] 1 All ER (Comm) 608. In that case (summarising in an extremely skeletal form) the application arose in the context of a Final Award concerning the single issue of whether a previous ad hoc arbitration agreement had been complied with. That agreement included terms that one party, "Knowles", would withdraw and extinguish certain invoices against a local authority, which resulted in a Deed of

Waiver. In the arbitration there was an issue as to the enforceability of the Deed of Waiver. Knowles contended that the Deed was valid and enforceable. While arguing this substantive issue it did not tell the arbitrator that it had corresponded on the basis that the Deed of Waiver was not agreed, and had indeed sought from the local authority payment of the fees which would have been waived by that deed.

167. In particular ZCCM pointed to:

a) [67] "*There must be some form of dishonest, reprehensible or unconscionable conduct that has contributed in a substantial way to obtaining the award*."

b) [70] "*In any event, the applicant must also establish that there has been a substantial injustice. Amongst other things, the applicant must show that the true position or the absence of fraud would probably have affected the outcome of the arbitration in a significant respect*."

c) [90] *"… the combination of Mr Rainsberry's complete lack of engagement with the relevance of correspondence, the failure to provide a meaningful explanation for its non-disclosure and the unwarranted and intemperate attacks on others all indicate that he did not have a good explanation, let alone a perfectly simple one, for the correspondence and his failure to disclose it.*"

d) [91] *"I should note that I have repeatedly used, for convenience, the verb "disclose" and the noun "disclosure". There was no order for disclosure in the procedural sense. I do not regard that as relevant on this application and I do not intend this verb/noun to be construed in that way. What I mean is that matters were not disclosed in the sense that matters were not put before the arbitrator which on their face contradicted the version of the facts that was advanced before him."*

e) [105] "*I find, therefore, that the award was obtained by fraud in that matters that were completely inconsistent with key issues in Knowles' case were deliberately withheld from the arbitrator*."

168. ZCCM contends that on its face, the ZRA Correspondence shows KMP's understanding of the nature of the arrangement to be in accordance with ZCCM's understanding and contrary to KHL's case before the Tribunal. It says that KHL, which was in control of KMP, plainly knew about this correspondence and yet it has served no evidence from anyone at KHL or KMP to explain why it was not misleading for KHL to run the case it did before the Tribunal notwithstanding the contrary case put by KMP in the ZRA Correspondence. In these circumstances ZCCM says the Court's only conclusion can be that KHL has no good explanation for its conduct.

169. ZCCM says that the explanation which has been provided that the dispute between KMP and the ZRA was as to whether the arrangement satisfied the requirements of a loan for a transfer pricing audit under s.95D Zambian Income Tax Act ("ZITA") - is wrong. The ZRA correspondence was written in the context of an integrated tax audit and not a transfer pricing audit. The relevant passages in the letters dated 14 June 2013 and 6 August 2013 were written by and on behalf of KMP to persuade ZRA that the terms of the transaction between KMP and FQMF were on an Arm's Length basis in

circumstances where ZRA had concluded that the arrangement was in the nature of a loan facility, and on this basis, was assessing tax in 2013.

170. On the face of it that must reflect how KMP understood the arrangement. It precisely reflects ZCCM's case in the arbitration and is directly contrary to the case run by KHL.

171. ZCCM says that this case is therefore on all fours with or even *a fortiori Celtic Bioenergy*.

172. KHL's response centred on three points. It said:

a) There was no fraud in circumstances where there was no obligation to disclose documents, and ZCCM were in any event well aware of the documents;

b) The merits of the loan vs deposit agreement were not material for the purposes of the application for permission to pursue a derivative claim, in which the Tribunal assumed that the arrangement was a loan and that the representations alleged were made;

c) The documents could have had no effect.

173. In relation to the second point in particular KHL submitted that there was no dispute before the Tribunal as to the nature of the arrangement (which was assumed in ZCCM's favour) or the existence or content of the ZCCM Representations (assumed in ZCCM's favour). There was also no issue that the First Defendant had used the word "*deposit*" in correspondence with ZCCM. That was an issue which had been fully ventilated both in the skeleton submissions and orally before the Tribunal.

174. KHL submitted that in those circumstances the Tribunal found in KHL's favour on the only issue for determination, whether there was any arguable case in fraudulent misrepresentation that the arrangement described was a deposit (in the sense that FQMF would not use the funds). In so doing, the Tribunal found that the words "*loan*" and "*deposit*" had been used interchangeably by both parties and that ZCCM had been well aware of the real arrangement, asking for similar terms for itself. It contends that the ZRA correspondence is entirely irrelevant to the issues on the permission application.

175. On that basis KHL submits that the documents could not sensibly be considered to have been such as to cause the Tribunal to come to a different decision.

Discussion

176. This is not a case which turns on the question of disclosure. The authorities are clear that even in the absence of an order for disclosure an award or judgment may still be obtained by fraud. So in *Celtic Bioenergy* there was no order for disclosure but it was still misleading to put forward a case which was contrary to the March correspondence and to fail to refer to it.

177. Similarly in *L Brown & Sons Limited v Crosby Homes (North West) Limited* [2008] EWHC 817 (TCC), at paragraph 36(iii) the judge held that the withholding or non-disclosure of documents which have not been agreed to be disclosed "*cannot be described as reprehensible or fraudulent unless such non-disclosure is part of some other fraud or reprehensible conduct on the part of the non-disclosing party*". It is

implicit in that that non-disclosure in the sense of withholding - even where there is no order for disclosure - could be sufficient to be a part of fraudulent or reprehensible conduct.

178. The thing which matters therefore is whether there was some such fraud or reprehensible conduct; and for that it is necessary to reach a conclusion about the relation of the letters to the issues before the Tribunal. Are they, as ZCCM submits, of *"obvious utility"*? If they are, one might well infer that there was something reprehensible about their being withheld.

179. In reaching a conclusion on the utility of the correspondence two things need to be considered. The first is what the letters say, and the second is what the Tribunal decided. As regards the first, the context does require to be borne in mind. One aspect of this is that the correspondence (between the ZRA and KMP) arises in the context of a tax audit. In the letter of 27 May 2013 the ZRA says that it does not find the interest rate credible in the context of a loan and produces an adjusted tax calculation based on this (and other) adjustments.

180. The letter of 14 June is a reply to this. It argues against the classification of a loan (attracting Arm's Length interest) using the word deposit, but flagging facets of the arrangement which were not consistent with a loan attracting the higher rate of interest. These include the tenor of the loan, flagging the fact that the loan/deposit was repayable on demand (or "*at call*", the term actually used), as well as the absence of security. It argues that pricing for "*short term deposits is generally based off LIBOR adjusted for short term credit risk*". It argues for overnight LIBOR as consistent with the on-demand nature of the arrangement. It concludes by saying that, based on the above, it expects the assessment to be "*adjusted accordingly*".

181. On 26 July the ZRA responded, saying that it was operating on the basis that the appearance was of a long term loan, and that KMP had obtained loan finance rather than using money from this source. A similar line to the June letter was taken by KMP in the 6 August letter: referencing the absence of features which would result in a higher interest rate. It reiterates that the funds are at KMP's disposal and states "*KMP actually draws money from the same account monthly and as and when the funds are needed based on its monthly cash budget requirements."*. There are two references which are to some extent inconsistent with the case advanced by KHL. At one point the writer calls the arrangement "*a purely finance/treasury arrangement to enable the treasury function … to conveniently manage the funds.*" At another point he says *"the depositing of funds into the UK account is actually not a loan but just a deposit into an account where central treasury … can easily monitor and manage the funds.*"

182. Pausing here, I conclude, following careful examination of the correspondence and looking only at this one piece of context, that there is some conflict between the position taken in the arbitration and the way in which the point was put in correspondence with the ZRA. Certainly, KMP was emphatic in the use of the language of deposit, and there was at least a suggestion that the monies were not used by FQM; the flavour is that of ring-fencing. Ultimately the fact of such limited inconsistency was not really disputed by KHL; what was in issue was its extent and its significance – which are essentially two sides of the same coin.

183. The next question is whether that conflict was such as to be material. That depends on the approach and analysis of the Tribunal.

184. As regards the second issue it is possible to look back at the consideration given to the Tribunal's analysis above, in particular in relation to Issues 1 and 4. When one looks carefully at the Ruling there are two key aspects. One is the finding on loss. The second is the finding on liability, which is based on a rejection of the inference which ZCCM sought to draw because the Tribunal concluded that, looking at all the material which gave the representations their context, there was a proper construction which was not dishonest - and also that it did not mislead KMP.

185. That conclusion was reached against a consideration of much documentation, including documentation in which the terminology of deposit is used and against a background where the context was debated in considerable detail. It is also reached against a background where even if (as ZCCM submit) the making of the representations was disputed by KHL, the Tribunal assumed that the representations alleged (including as to deposit and availability) were made. Those representations included one as to ring fencing.

186. Against this background I cannot accept ZCCM's argument that the ZRA material would have been of obvious utility or that there was any real chance that it would have impacted upon the Tribunal's decision. When one posits the question as to what the ZRA correspondence adds to the material relevant to the issues it is hard to enunciate exactly what it is that it adds.

187. ZCCM placed particular emphasis on *Celtic Bioenergy*. Their reason for so doing is clear; on a reading of the case there do appear to be parallels. But those parallels depend on looking at the case from ZCCM's perspective, and disappear when one looks at it with closer regard to what the Tribunal were doing.

188. The starting point is that *Celtic BioEnergy* was a very different case indeed to this. As I hope is apparent from the summary I have given (and is certainly more than apparent from the detailed and lucid judgment of Jefford J) the documents withheld in that case went to the very heart of the dispute, flatly contradicted the case run and were withheld in the context of a substantive determination. Here – importantly – what was being done was simply a determination of whether ZCCM were entitled to bring a derivative claim. There was no ruling on the merits.

189. ZCCM pointed to the fact that in *Celtic Bioenergy* the Tribunal had considered the issue of whether Knowles had given a waiver as required, it had done so in the absence of the "*March correspondence*" which was completely inconsistent with acceptance by Knowles that the waiver was valid and claimed to be *pari passu* with that situation. But here while it is true that the debate during the arbitral hearing as to what the nature of the arrangement was understood to be and what the parties understood and meant by the use of the term "*deposit*" took place in the absence of the ZRA Correspondence, that was not, properly regarded, correspondence which was completely inconsistent with even the case which KHL advanced, and it certainly was not completely inconsistent with the approach which the Tribunal took. Here the merits were (in essence) assumed in favour of ZCCM by the determination to assume both representation and use.

190. Further the documents do not put a different complexion on matters when compared to those documents which were before the Tribunal. As I have indicated, it is hard to say what they add to the state of affairs which was assumed in ZCCM's favour on the basis of the October memorandum. Even the apparent inconsistencies are when viewed in context very slight – as was perhaps tacitly conceded by ZCCM in submitting that the correspondence *"is not in identical terms"*.

191. The rejection of the use of the word "*loan*" in the ZRA correspondence also has to be viewed in context, as pertaining to an argument about whether the arrangement was apt to attract LIBOR only or a higher rate. Indeed on one view it illustrated exactly the ambivalent nature of the arrangement – and of course this was consistent with the Tribunal's conclusion that ZCCM was seeking just such an arrangement for its own benefit. In this respect it had seemed to me that ZCCM's case again hinged too much on the semantics and paid insufficient regard to the substance of the debate – both in the ZRA correspondence and in the arbitration.

192. Nor was the ZRA Correspondence inconsistent with the case advanced by KHL that the funds were indeed repayable on demand and always available to KMP. Again the correspondence in fact provides evidence from KMP that it had sought repayments from time to time and received them.

193. It cannot therefore be said that in this case the correspondence was completely inconsistent with KHL's case or only consistent with ZCCM's case. Even if it did add (as Ms Brown submitted) a further dimension to the question of whether KMP were misled or what they understood, it is dubious whether it would have added much at all to the materials already in play. But certainly it could add nothing to the conclusion regarding dishonesty, which was, as I have earlier noted, essentially one of the two key determinations.

194. Nor is it fair to say that KHL could not realistically have run the argument it did in the arbitration had it disclosed that KMP had itself described the arrangement to ZRA as "*not a loan*" but "*just a deposit account*" where KMP's monies were deposited into FQMF's account in London and were at KMP's disposal. There was nothing more out of step with this correspondence than there was in other correspondence which was before the Tribunal – in particular the 10 October memorandum, which the Tribunal accepted should be taken as giving a *prima facie* case that such representations were made.

195. Nor would the correspondence have impeded KHL in running its case that 30-day LIBOR was an Arm's Length rate of interest. KMP's point in the ZRA Correspondence was that interest at LIBOR was an Arm's Length rate of interest not because the arrangement was not a loan (of some sort) but because the nature of the arrangement, including the repayability on demand meant that its risk profile was more akin to a deposit, than a term loan. The terminology such as: "*Further note deposit and borrowing rates differ."* as explicitly pegged to repayability on demand.

196. In my judgment it cannot therefore be said that the disclosure of the ZRA Correspondence in the arbitration would "*probably have affected the outcome*" of the arbitration in a significant respect. Accordingly the Extension Application fails.

197. I would add that my conclusion is independent of, but is reinforced by the position on loss. Given the Tribunal's conclusion that the case on loss must fail, even if there had been something significant in the ZRA materials, that could not have affected the outcome. That provides another reason why the fraud claim fails.

198. I note that I do not place any weight on the fact (relied upon by KHL) that the fact of the ZRA audit was in evidence before the Tribunal. That would not preclude the possibility of other materials relevant to the audit being relevant and likely to impact the Tribunal's decision. However on the facts, and looking at both ends – the new material and the exercise performed by the Tribunal, the material not before the Tribunal was not significant.

199. Nor do I place any weight on the KPMG report in this context. I accept the submission that the KPMG report is a different document prepared for FQMF in a different context.

Remaining issues

200. In the circumstances the further very interesting questions which were raised are academic, and I will deal with them briefly only for completeness. These are the questions of reasonable diligence and s.73(1) of the Act.

201. The first of these was that KHL also submits that it becomes relevant to consider at this stage one aspect of the "*new materials*" test which also forms part of the requirement for any application to set aside a judgment as having been obtained by fraud. It points me to *DDT Trucks of North America Ltd v DDT Holdings Ltd* [2007] EWHC 1542 (Comm):

> "Unless the plaintiff can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence and which is so material that its production at the trial would probably have affected the result and (when the fraud consists of perjury) is so strong that it would reasonably be expected to be decisive at the re-hearing and if unanswered must have that result."

202. I was also referred in this connection to *Nestor Maritime* at [28] and *Chantiers de L'Atlantique S.A. v Gaztransport & Technigas S.A.S.* [2011] EWHC 3383 at paragraph 59.

203. This argument was met with both a factual denial and reliance on the recent Supreme Court decision in *Takhar v Gracefield Developments* [2019] UKSC 13.

204. On the former factual argument, ZCCM says it was unable to deploy the evidence in the arbitration (or, indeed in the arbitration claim presently before the Court), until 23 May 2018 because under the provisions of 8(1) ZITA, it was obliged to preserve the confidentiality of the documents. Section 8(2) ZITA provides that any individual who, in breach of s. 8(1), uses or reveals any information or document disclosed to him, shall be guilty of an offence punishable with up to two years imprisonment and/or a fine.

205. On the latter, legal issue, ZCCM says the authorities support the proposition that where, as here, there is an allegation of fraud in the conduct of the arbitration, then the *Ladd v Marshall* conditions should be approached with a greater degree of flexibility.

206. I was pointed to paragraphs [54-5] and [66]. In the former Lord Kerr stated:

> "For the reasons that I have given, I do not consider that the *Etoile* and *Bracco* cases are authority for the proposition that, in cases where it is alleged that a judgment was obtained by fraud, it may only be set aside where the party who makes that application can demonstrate that the fraud could not have been uncovered with reasonable diligence in advance of the obtaining of the judgment. If, however, they have that effect, I consider that they should not be followed. In my view, it ought now to be recognised that where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment.
>
> 55. Two qualifications to that general conclusion should be made. Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application. .... The second relates to the possibility that, in some circumstances, a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected. If that could be established, again, I believe that a discretion whether to allow an application to set aside the judgment would be appropriate but, once more, I express no final view on the question."

207. In the latter Lord Sumption said:

> "66. I would leave open the question whether the position as I have summarised it is any different where the fraud was raised in the earlier proceedings but unsuccessfully. My provisional view is that the position is the same, for the same reasons. If decisive new evidence is deployed to establish the fraud, an action to set aside the judgment will lie irrespective of whether it could reasonably have been deployed on the earlier occasion unless a deliberate decision was then taken not to investigate or rely on the material."

208. These are said to provide powerful support for the proposition that if an arbitration award has been obtained by fraud it should not be allowed to stand unless there has been a deliberate tactical decision not to put the content in question before the court.

209. Finally, reliance was placed on *Daly v Sheik* [2002] EWCA Civ 1630, Chadwick LJ at paragraph 19:

> "… Where the evidence of forgery which it is sought to adduce is credible and cogent, this Court is made aware that there may well have been an attempt by one party to deceive the other and the court; so that a trial which ought to have been a fair trial may well have been rendered an unfair trial by that party's conduct. In those circumstances the requirements of doing justice are likely to point strongly towards admitting that evidence. It would be a reproach to the administration of justice if a party who had set out to deceive the court and the other side were able to say, once his deception had been found out, that, if only the other side had been more astute, the deception would have been discovered earlier. ..."

210. KHL also relies on another basis for precluding reliance on this ground. It notes that a claim under s. 68(2)(g) of the Act based on new evidence must also overcome the provisions of s. 73(1):

> "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 this Part, any objection …
>
> (d) 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 …"

211. It points to the following passage from *Nestor Maritime S.A. v. Sea Anchor Shipping Co. Ltd* [2012] EWHC 996 (Comm) at [9-11].

> ""[i]t follows that where a party knows of a serious irregularity but takes a deliberate decision to continue to take part in the proceedings without objection and takes the point only after losing the arbitration, such party will generally be precluded from raising such irregularity at that later stage ...
>
> Moreover, the effect of s. 73 is that an objection to a serious irregularity may not be raised by a party after participating in the proceedings without taking objection, unless that party can show that at the time of participation the grounds for the objection were not known to him and he could not with reasonable diligence have discovered them": *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 at 20-21; *Thyssen Canada* at para 18. "If the respondent can show that the applicant took part in or continued to take part in the arbitral proceedings without objection, after the grounds of objection arose (as happened in

> the present case since the alleged facts which are the basis for the objection occurred almost 3 years before the hearing of the arbitration), the burden passes to the applicant to show that he did not know and could not with reasonable diligence have discovered those grounds at the time": *Thyssen Canada* at para 18": *Nestor Maritime* at [11].

212. In essence KHL submits that ZCCM falls foul of this provision because knowing both KHL's case before the Tribunal and the contents of the ZRA Correspondence, ZCCM continued to participate in the arbitration without objection. It contends that ZCCM could perfectly well have sought disclosure or an adjournment while it obtained evidence that supported that objection. It elected not to do so and is therefore prevented from raising the objection late: section 73(1) of the Act.

213. In response ZCCM has accused KHL of adopting inconsistent positions, and says that these latter arguments are particularly unattractive given that KHL's response to the Extension Application was to assert that the deployment of the ZRA Correspondence in the Extension Application is unlawful and in breach of s. 8 ZITA accusing ZCCM and its officers, of "*punishable offences under Zambian law*" and are "*expose[d] … to civil liability to KMP as well."*

214. ZCCM contends that absent permission from the Minister, ZCCM could not have taken any of the steps suggested by KHL without running the risk of using and/or revealing its knowledge of the content of the ZRA Correspondence in breach of s.8 ZITA. As to this:

215. It points to the authorities on the concept of "use" of documents such as *Tchenguiz v Grant Thornton* [2017] 1 WLR 2809 [21] as indicative that any disclosure request or request for an adjournment would have constituted a breach of the relevant law.

Discussion

216. On the first issue, reasonable diligence, had it arisen, I am not persuaded that ZCCM would have discharged the burden upon it, despite *Takhar*. This is essentially for three reasons.

217. The first is that ZCCM's evidence focussed only on the later period and the difficulties encountered after July 2017. However if (*ex hypothesi*) this material was key, ZCCM should have been taking steps to get clearance to use it from the moment when a claim was contemplated. The arbitration was commenced in 2016, but the length of the Notice of Arbitration makes quite clear that it was a long time in gestation. It received the relevant documents in 2014 in the presence of leading counsel. The possibility of litigation or arbitration was already manifest by this point. There was therefore the best part of 2 years before the Notice of Arbitration in which steps could have been taken to get these documents. Even after the commencement of the arbitration there was then a further eight months allowed to go by before any steps were taken to obtain the documents for use. It is therefore not accurate to say that the need for the material can be said only to have arisen in mid 2017. There was a period of about a year where attempts could have been made to get the documents, and were not. This would not satisfy the requirement of reasonable diligence.

218. Secondly, the account given is somewhat skeletal, is advanced by someone without direct knowledge and fails to deal with the obvious issue of the relationship between GRZ and ZCCM which is an obvious point of relevance given ZCCM's "parastatal" nature. It is incumbent on a party seeking to bring a claim based on new materials to condescend to real particularity. As noted in *Terna i*n seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. Thus if an applicant does not do this, the court is entitled to count any periods where no good excuse is established as being periods lacking in good reason. So too may it draw an inference when issues go un-dealt with.

219. Thirdly, even if (which is by no means clear) *Takhar* is applicable in this context, this case would either fall into the first exception outlined by Lord Sumption (a case of fraud advanced in the arbitration and fraud is relied on to set aside the award) or, in the circumstances set out above (significant unexplained delay) a deliberate decision not to investigate/procure documents.

220. Accordingly the second issue s. 73, which turns on the possibility of seeking disclosure or an adjournment, would itself not arise. Had the evidence been sufficient to explain the earlier delay I would not have been minded to conclude that ZCCM were disentitled from pursuing their claim on this basis. This is on the primary basis that the Ruling is not an award. However had the substantive claims arisen, I would have found that both arbitration claims failed to meet the test in s. 68.

Conclusion

221. Consequently I conclude that the original Arbitration Claim fails, and that both the Fraud Claim and the application for an extension of time for bringing the Fraud Claim also fail.

222. This is on the primary basis that the Ruling is not an award. However had the substance of the arbitration claims arisen I would have found that both arbitration claims failed to meet the test in s. 68. It follows that the application for extension of time in relation to the Fraud Claim would also have failed.