Neutral Citation Number: [2023] EWHC 150 (Comm)

Claim No.: CL-2022-000163

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT
AND IN THE MATTER OF AN ARBITRATION
BEFORE TRIBUNALS APPOINTED BY THE FEDERATION OF COCOA COMMERCE ("FCC")

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2023

Before:
Sir Ross Cranston sitting as a High Court Judge

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Between :

(1) AFRICA SOURCING CAMEROUN LIMITED **(a company registered in Cameroon)** **(2) AFRICA SOURCING CÔTE D'IVOIRE** **(a company registered in Côte d'Ivoire)**	**Claimants**
- and –	
(1) LMBS SOCIÉTÉ PAR ACTIONS SIMPLIFIÉE **(a company registered in France, trading as "ROCKWINDS")** **(2) MR ERIC BOURGEOIS** **(Chairman of the Board of Appeal of the FCC)**	**Defendants**

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YASH KULKARNI KC and MAX DAVIDSON (instructed by **GATELEY LEGAL**) for the **Claimants**
PAUL MITCHELL KC (instructed by **TAYLOR ROSE SOLICITORS**) for the **First Defendant**
JULIAN KENNY KC (instructed by **MILLS & CO**) for the **Second Defendant**

Hearing dates: 17-18 January 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 27th January 2023.

Sir Ross Cranston:

INTRODUCTION

1. This is an application to set aside an arbitration award under section 68 of the Arbitration Act 1996 on the ground of apparent bias of the chair of the panel of arbitrators. What is called 'the Award' in this judgment was made by the Board of Appeal of the Federation of Cocoa Commerce ('the FCC'), in February 2022. It determined that the claimants were some two years late in applying for arbitration, and that it would not exercise its discretion to extend time. There is also an application to remove the chair of the panel and to have the award remitted for reconsideration by a freshly constituted Board of Appeal.
2. When the claimants applied to this court in March last year, they made a broader challenge to the Award under both sections 68 and 69 of the Act. However, Foxton J dismissed the section 69 application on the papers stating that the Board of Appeal was entitled to have regard to the factors it did when it exercised its discretion to refuse to extend time. In relation to the application under section 68 Foxton J ordered a hearing, given that there were disputed issues of fact.
3. Following Foxton J's order, the claimants abandoned that part of their section 68 application contending that the Board of Appeal refused to exercise its discretion to extend time when no reasonable tribunal would have done so. Against the background of Foxton J's warning of the need for a proper basis for making the very serious allegation of actual bias, the claimants also abandoned their section 68 challenge on this ground.
4. Consequently, the only issue before the court is the section 68 application regarding apparent bias on the part of the chair of the Board of Appeal which made the Award. The claimants submit that circumstances exist which give rise to justifiable doubts as to his impartiality, and that this qualifies as a serious irregularity within section 68(2)(a). In the circumstances, they contend, the substantial injustice required by section 68(2) is to be assumed although, in any event, there is evidence to suggest that the outcome might well have been different if the chair had not been on the Appeal Board. As well as refuting these submissions, it is said by way of defence that as a result of section 73 of the Act the claimants are precluded from advancing these points now because they could have done so earlier.

BACKGROUND

The parties

5. The claimant companies are traders in cocoa products. The first is registered in Cameroon, the second in Côte D'Ivoire. In this judgment they are described as 'AS (Cameroon)' and 'AS (Côte D'Ivoire)', or as 'the claimants'. Neither is a member of the FCC. Mr Loïc Folloroux is the beneficial owner of both companies. His family has political connections in Cote d'Ivoire. Côte d'Ivoire is the largest producer of cocoa beans in the world.
6. The first defendant, trading as Rockwinds, is also engaged in cocoa trading. It is a member of the FCC. Beans from Côte d'Ivoire used to represent between 60 and 70 percent of Rockwinds' turnover, but as the result of the freezing order imposed by a French court in 2018, described later in the judgment, it has been unable to trade in a significant way since then. Mr Matthew Stolz is the chief executive officer of

Rockwinds and, along with his wife, its beneficial owner. He is a member of FCC's council – its governing body – and over the last 15 years has been active in FCC committees and in sitting as an FCC arbitrator. For a time Mr Frederic Coudray was a trader at Rockwinds at its Geneva office. He is also an FCC arbitrator.

7. Mr Eric Bourgeois is the second defendant. He chaired the Board of Appeal which made the Award, and the challenge of apparent bias in these proceedings is about him. Mr Bourgeois is an experienced cocoa trader, who has worked in the business for over 30 years. At present he is the head of the cocoa department of Walter Matter, a private company based in Geneva which trades in coffee and cocoa. Mr Bourgeois has been a member of FCC's council for over 4 years and since September 2021 has been its treasurer. That means he is one of its three directors, along with the chair and vice-chair. He has been an arbitrator for the FCC (and its French precursor) for over twenty years.
8. Mr Bourgeois has been made a defendant because the claimants have applied under section 24 of the 1996 Act to have him removed as an arbitrator: CPR62.6(1). He takes no position in relation to the relief the claimants have sought, including his removal, although he attended the hearing to give evidence and to rebut criticism about his behaviour: see *T v V* [2018] EWHC 1492 (Comm), [10]-[11], per Males J.
9. It is common ground that Mr Stolz and Mr Bourgeois have known each other for around 15 to 20 years. They know each other from their work with the FCC. They have never sat together on the same committees but have seen each other at meetings of FCC arbitrators, industry social events, workshops, and at FCC council meetings. However, for reasons explained below I accept the evidence that they are not friends and do not know each other well. Mr Bourgeois' evidence, which I accept, is that his relationship with Mr Coudray (whom he had known for some 7 years) is of the same character – they have seen each other at industry and FCC events but are not friends and their relationship is professional.
10. Mr Stolz and Mr Bourgeois have done one piece of business together, in December 2017, when in the course of his trading for Walter Matter, Mr Bourgeois bought a consignment of cocoa from Mr Stoltz, acting for Rockwinds. It was a trade on the secondary market. It was an exceptional trade for Walter Matter which mainly buys directly from producers, but sometimes a secondary trade is undertaken to plug a gap for a customer. Mr Bourgeois has never traded directly with Mr Coudray.

The FCC

11. The Federation of Cocoa Commerce is an international trade association with over 200 members from 38 countries. It dates back to 1929 when the Cocoa Association of London was established. In 2002 it merged with the Paris based Association Française du Commerce des Cacaos (AFCC), founded in May 1935, to form the FCC. Like other trade associations in the commodities trade it provides services to its members and arbitration for the settlement of disputes in the trade is a major aspect of this.
12. FCC arbitrators are on its arbitration and appeal panel and come from its membership. There are some 40 members of the panel. New arbitrators undergo a written and live test, and all arbitrators on the panel must undertake continuing training. The FCC's Arbitration and Appeal rules provide for a first-tier decision and then, if required, an appeal to a Board of Appeal. The rules disqualify arbitrators from sitting if circumstances exist that give rise to justifiable doubts as to their impartiality or if they are 'aware of any circumstances which may affect their impartiality'.

13. The FCC is managed by its council of 18 voting members. It has representatives from among traders, those engaged in the industry (business to consumer; business to business), and those involved in production or export. The FCC has five committees, arbitration and appeal, membership, education, contracts, and superintending and warehousing.

Evidence

14. Mr Folloroux, Mr Stolz, and Mr Bourgeois attended the hearing to give oral evidence. I found Mr Folloroux's evidence difficult. He was intent on getting across his case on the merits of the underlying dispute and the unfairness of the arbitration. He did not seem to hear some of the questions and spoke over counsel. By contrast Mr Stolz and Mr Bourgeois gave evidence calmly and accepted that in some respects they could not remember or did not know. Mr Kadoko Bamba also gave evidence for the claimants. He is the foreign marketing manager of the Conseil du Café Cacao of the Côte d'Ivoire. He is also a member of the FCC council. He gave evidence before me with the assistance of a French interpreter. I accept the submission that compared to the other three witnesses he was the closest to an independent witness. I return to his evidence later in the judgment.

The dispute and the contracts

15. The substance of the dispute between the claimants and Rockwinds over transactions in cocoa futures is not a matter dealt with in the Award. Nor is it a matter before the court. Suffice to say that Rockwinds agreed to act as a broker for the claimants' cocoa futures dealings by email exchanges dating between February 2017 and March 2018. For this purpose, Mr Folloroux advanced moneys to Rockwinds, which on his account he had loaned to the claimants.
16. The upshot of the dealings is disputed. Mr Folloroux contends that, overall, his futures trading was successful so that when the positions were closed he was owed money which has never been fully paid. Mr Stolz denies having retained any money owing to Mr Folloroux or to either of the claimants.
17. Importantly for the purposes of the Award and these proceedings, on the 30 November 2017 three short form contracts for the forward sale of specified quantities of cocoa beans were signed, two between the first claimant and Rockwinds, one between the second claimant and Rockwinds. In this judgment these are called the November 2017 contracts. There is no need to inquire into these contracts - their purposes, errors in the detail, and related letters dated April 2018. The key fact is that each contract contained the following provision:

> "This contract is subject to the FCC Contract Rules for Cocoa Beans (which rules shall be deemed to incorporate the FCC Quality Rules, the FCC Sampling Rules, the FCC Weighing Rules and the Appeal Rules) in force on the date of this contract, as though such rules had been set out in full in this contract. Any dispute arising out of or in connection with this contract shall be referred to arbitration in accordance with the FCC Arbitration and Appeal Rules in force on the date of the contract."

The French proceedings

18. On 7 September 2018 AS (Cameroon) applied to the Tribunal de Grande Instance at Bordeaux for the making of *saisie conservatoire* against Rockwinds. A week later the Bordeaux court made a freezing order over the contents of Rockwinds' accounts with two banks.
19. The day after the application for the freezing order, 8 November 2018, AS (Cameroon) brought actions against Rockwinds on the November 2017 contracts. Among the submissions to the Bordeaux Court was that it should accept jurisdiction because it was not possible for it to receive a fair hearing before any FCC tribunal: it was not a member of the FCC whereas Rockwinds and Mr Stolz were leading members, and no FCC arbitrator could have the independence and necessary impartiality required by article 6.1 of the European Convention on Human Rights. AS (Côte d'Ivoire) made similar submissions. In his evidence before me, which I accept, Mr Folloroux said that he genuinely believed that the Bordeaux court had jurisdiction because the claims involved futures contracts where, he believed, FCC tribunals did not have jurisdiction.
20. Ultimately, the Bordeaux court held in late 2020 that it did not have jurisdiction because of the FCC arbitration clauses in the contracts. That judgment was subsequently upheld by the Bordeaux Court of Appeal in July 2021.

The Geneva dinners 2018-2019

21. In November 2018 Mr Stolz organised a dinner for those in the cocoa business in the Geneva area where Rockwinds had an office. About 20 to 25 people attended. Since as we have seen FCC arbitrations (as with other trade associations) are conducted by its own members, it is not surprising that some of those attending were on the FCC arbitration and appeal panel. Mr Stolz paid for the drinks, but those attending paid for their food. Mr Bourgeois was one of the attendees.
22. The following June Mr Alexandre Gedrinsky of CCT International SA sent an email to the same list as had been invited to the November 2018 dinner (with one addition) for another dinner along the same lines. Mr Bourgeois suggested that Mr Gedrinsky use a Doodle poll to arrange a suitable date, which was done. Again the host, in this case Mr Gedrinsky, paid for the drinks while those attending paid for the food. Mr Stolz did not attend this dinner, although his colleague, Mr Coudray, did.
23. There was a third dinner in November 2019, this time arranged by Mr Bourgeois as host. The same arrangement for payment of the drinks and food applied with Mr Bourgeois' firm paying for the drinks. Again Mr Stolz did not attend although Mr Coudray did. There were no further dinners following the onset of the Covid pandemic.
24. I accept the evidence that at the first dinner Mr Stoltz and Mr Bourgeois did not discuss the dispute which Rockwinds had with the claimants, that Mr Bourgeois did not hear any discussion about it, and that Mr Bourgeois never discussed the arbitration or Rockwinds' dealings with the claimants or Mr Folloroux with Mr Coudray. I also accept the evidence that, apart from that dinner, Mr Stolz and Mr Bourgeois have not had lunch or dinner together either before or since.

Claimants' application for FCC membership, September 2020

25. AS (Côte d'Ivoire) had applied for membership of the FCC in 2016, which had been refused. It applied again in 2020 and was supported by two existing members. The FCC membership committee agreed that the basic requirements of the application process

had been met but that further consideration would be required by the council due to concerns raised in relation to the company.

26. The matter was listed as an agenda item for consideration at the quarterly meeting of the FCC council held on 2 September 2020. That meeting was conducted online. The minutes record the names of those attending, including Mr Olivier Hullot (chair), Mr Bamba, Mr Bourgeois, Mr Stolz, and Mr Mario Snellenberg (who was a member of the first instance tribunal which ruled in favour of the claimants). Mr Robin Dand and Ms Silde Lauand were in attendance from the FCC secretariat.
27. At item 2.1, Membership Committee, the minutes read, in part:

> "After a lengthy discussion, the Council voted eight in favour and four against to postpone the review of the membership application from Africa Sourcing to the next meeting in December 2020. This was due to concerns raised by Mr Stolz regarding the political nature of the applicant company as well as a technical discrepancy in the information provided concerning the company shareholder. M Stolz added that, in the past, Africa Sourcing had not complied with the FCC Arbitration Rules in cocoa contracts' disputes with Rockwinds by using the Tribunal of Commerce of Bordeaux, France instead of the FCC. Mr K Bamba stressed that the political issue raised was not relevant and it should not hinder the progress of the application. This was agreed by the Council."

28. The minutes of the September 2020 council meeting add that the council agreed that the chair of the membership committee should write to AS (Côte d'Ivoire) to advise it of the Council's decision to reconsider the application at its December 2020 meeting. In the meantime, clarification would be sought concerning the 'technicality' concerning its shareholder as well as its reasons for referring cocoa disputes to the French courts rather than to FCC arbitration as provided for in the FCC rules. The minutes state the actions agreed: (i) RD [Mr Dand, secretary of the FCC] was to update Mr Barnett Quaicoo, chair of the membership committee, about the council's decision; (ii) the FCC secretariat were to draft a letter to be sent to AS (Côte d'Ivoire) by Mr Quaicoo on behalf of the council; and (iii) the membership application was to be added to the agenda for the Council meeting in December 2020.
29. In addition to what is set out in the minutes, there was evidence before me about the meeting and what was said from Mr Bamba, Mr Stolz and Mr Bourgeois, all of whom were in attendance as council members. The proceedings were in English, and Mr Bamba said that if he had difficulty understanding he would ask Mr Hullot, the chair.
30. Mr Bamba, Mr Stolz and Mr Bourgeois agreed that the discussion was unusually lengthy, 30, perhaps 40 minutes, to consider a membership application.
31. Mr Bamba's evidence was that in that time Mr Stolz spoke at length. As regards the reasons Mr Stolz gave, the council agreed with him, Mr Bamba, that the issue of the political nature of AS (Côte d'Ivoire) - Mr Folloroux's family having political connections in Cote d'Ivoire – was irrelevant to the application.
32. Mr Bamba's evidence about the discrepancy concerning Mr Folloroux's listing as a company shareholder in one part and a director in another was that Mr Stolz presented these as if it was deliberate. Mr Stolz did not think he had done this. Mr Bourgeois denied that Mr Stolz had done so.
33. As to the application to the Bordeaux court, which took most time, Mr Stolz's evidence was that he addressed the council that there was a dispute with the claimants, and that it had taken the matter to that court when the clauses in the contracts obliged the parties to use FCC arbitration.
34. According to Mr Bamba, Mr Stolz went 'on and on' about the details of the dispute and the third of the points, the application to the Bordeaux court. Mr Bamba added that in

the course of Mr Stolz's account, Mr Stolz had said that the applicant should assume the consequences of its choice to file its action there. Mr Bourgeois could not recall that being said. Mr Stolz said that if he had said that, *assumer les conséquences* was a common phrase in French and indicated that it did not have the connotations it can have in English.

35. Mr Bamba also said that Mr Stolz explained in the meeting that Mr Folloroux had criticised the FCC's impartiality. Mr Stolz denied this; Mr Bourgeois said that he could not remember whether Mr Stolz had done so.
36. Mr Bamba is undoubtedly correct that an unusual amount of time was spent on this item; the minutes confirm the lengthy nature of the discussion. He is also right that Mr Stolz spent time addressing the council about the issue, although to characterise Mr Stolz as having gone 'on and on' when there were three issues discussed and council members may have had comments and questions may be an overstatement. Mr Bourgeois's evidence was that Mr Stolz's comments were delivered in a neutral tone, and that he did not give the impression that his comments were motivated by hostility to the claimants or Mr Folloroux. Having heard Mr Stolz give evidence I accept that he would have addressed the council in neutral tones. I also accept his evidence and that of Mr Bourgeois that he, Mr Stolz, did not go into the details of the dispute he had with the claimants.
37. With respect to Mr Bamba, I am not persuaded about his recollection of all the details of what was said at the council. After the meeting he reported orally to his superior about the meeting, but he did not make any note of what was said about this item on the agenda. It was not until March 2022 – some 18 months later - that Mr Folloroux told him about his dispute and asked him to recollect the November 2020 meeting. He then prepared his witness statement. I have already mentioned Mr Bamba's facility in English, yet his account involved a relatively detailed recollection of what was said (in English) in the discussion. By contrast Mr Stolz and Mr Bourgeois were more realistically hesitant about what had been said at the November 2020 council meeting, given the time which had elapsed.
38. Even if contrary to my finding Mr Bamba is correct that Mr Stolz told the council that Mr Folloroux had criticised FCC's impartiality that was simply a statement of what the claimants had already said in their submissions to the Bordeaux court. There is nothing to support Mr Bamba's opinion that members of the council had 'a problem' with the claimants going to the Bordeaux court. Nor did Mr Bamba offer anything to support his opinion that some members of the council (including Mr Bourgeois) had agreed beforehand to oppose the application for membership. Mr Bamba did not suggest that Mr Stolz disclosed confidential information or anything that was not in the submissions before the FCC arbitration tribunal appointed a couple of months later, or that he adduced evidence or legal argument to show that he was correct or relating to the merits of the dispute Rockwinds had with the claimants. There was unchallenged evidence that Mr Stolz did not comment on the integrity or reputation of the claimants or Mr Folloroux.
39. There was also evidence from Mr Folloroux about the September 2020 meeting. He was not there, but he had a conversation in October 2020 with Mr Olivier Hullot, the then chair of the council, about 20 or 30 minutes or so in length, at the railway station café in Bordeaux. Mr Folloroux did not take any note of the conversation. Mr Folloroux said that Mr Hullot had told him that Mr Stolz had told the meeting that he was bullied into entering into the contracts by Mr Folloroux. Mr Bamba did not mention this in his evidence; Mr Stolz and Mr Bourgeois denied that this was said. Mr Hullot was not called as a witness. I cannot accept this hearsay statement as to what Mr Hullot said.

40. At no stage did the FCC council express the view that Mr Stolz was correct or make any decision on the assumption that he was. Mr Kulkarni KC submitted that what the council did was to decide not to approve AS (Côte d'Ivoire)'s application for membership. In my view what the majority of the council decided was to make further enquiries and to resume the discussion at the next quarterly meeting, in December 2020, after two of the three issues Mr Stolz raised seemed to require investigation. That was the approach of Mr Bourgeois. As he explained in his evidence, he had approached the application for membership with an open mind but after the discussion agreed with the decision that inquiries should be made so that the council could resume consideration of the application before the end of the year.
41. In fact there was no further discussion of AS (Côte d'Ivoire)'s application for membership. Following the meeting Mr Barnett Quaicoo, chair of the FCC membership committee, wrote on 18 September 2020 to AS (Côte d'Ivoire) as follows:

> "The FCC Council has requested additional information concerning your submission and we would be grateful if you would be able to assist us in two particular areas, namely Council requests:
>
> - Clarity on the technical status of the shareholder and the role the shareholder has in the operation of the company.
> - The company's reasons during 2018 to refer cocoa contract disputes to the French courts rather than to FCC Arbitration as per the FCC Rules.
>
> … Your reply will assist the Council on your membership application which is still under consideration."

42. There was no response to that letter. In his evidence Mr Folloroux said that at his meeting in October 2020 with Mr Hullot, chair of the FCC Council, Mr Hullot told him that Mr Stolz wrote this letter and that he, Mr Folloroux, should ignore it. Mr Hullot could have been called; the evidence is hearsay and fades in the light of Mr Stolz's denial (which I accept) that he had written the letter. In any event, whatever Mr Hullot might have said the fact is that AS (Côte d'Ivoire) did not pursue its application to join the FCC.

The Konan-Ferrand emails

43. Shortly before the Board of Appeal issued the Award in February 2022, Mr Folloroux approached Ms Catherine Konan-Ferrand, a manager at Africao Trading SA. His evidence is that he did this because of a line of questioning in the parallel arbitration, appeal 50 (see below). He told her about his dispute with Rockwinds. As a result, on 31 January 2022 she forwarded various emails. Some related to the three dinners, referred to earlier in the judgment.
44. In addition, there was an email dated 16 December 2020 from an unknown sender to an unknown recipient, in French, with 'Lunch Rockwinds – CCT' as the subject matter. The email records information from a lunch the preceding day between 'Frederic' of Rockwinds (Frederic Coudray) and 'Alex' of CCT (this might be Mr Alexandre Gedrinsky, since he worked for CCT in Geneva). According to the email, the two men discussed business in gloomy terms. As regards Rockwinds, Frederic is reported to have seen no future for the firm. It had won most of the arbitrations regarding exporters from Côte d'Ivoire which Rockwinds had put into default, but everyone knew that would lead to nothing.
45. There was a second email, dated 2 July 2021, also in French, with the subject matter 'Lunch Wednesday Rockwinds – CCT'. It again records a conversation about the state of the trade where 'we did not manage to find any positive points'. The Rockwinds

attendee is recorded as saying that (in translation) 'they have won all the arbitrations for the time being. There is still one important arbitration remaining. If they win that, they hope to recover some money.'

The FCC arbitration and the first award

46. The claimants applied to the FCC on 25 January 2021 for an arbitration tribunal to be appointed. It sought a ruling that the FCC had no jurisdiction to determine their disputes with Rockwinds arising from its non-payment on the three November 2017 contracts. The FCC gave each contract dispute a separate reference number. The three contracts referred to above at paragraph 17 thus each had a reference number; there was also a further dispute on another contract, which was also given its own reference number. All four claims were heard together.
47. Four days later, on 29 January 2021, the FCC appointed a tribunal with members drawn from the FCC arbitration and appeal panel. The claimants challenged the appointment of one of the arbitrators, as they were entitled to do under the rules, and he was replaced. The three members of the tribunal who heard the case were Mr Majdi El Arabi (chair), Mr Snellenberg, and Mr Hubert Hoondert.
48. The tribunal ruled on the 28 April 2021 that it had jurisdiction in the arbitration proceedings and that the claims were not time barred. It proceeded to hear the merits of the dispute, although the claimants had not requested this.
49. In mid-May 2021 the claimants applied to this court in London for a worldwide freezing order in support of the claims being made in the arbitration. HHJ Pelling QC granted the order. On the return date a week later, Cockerill J discharged the order on the basis that there was no jurisdiction to grant the injunction.
50. In September 2021 the tribunal issued its award on the claims. It held in the claimants' favour. It restated that it had jurisdiction and that the claims were not time barred. The fact that the claimants had brought proceedings in France (and in this court) should not influence it, it said, since it merely judged the case on the facts and the evidence. The tribunal went on to hold that Rockwinds was liable to pay AS (Cameroon) €4,650,000 plus interest, and AS (Côte d'Ivoire) £843,480 plus interest.
51. Rockwinds appealed on various grounds, including that the tribunal had gone beyond the claimants' original reference, which was an application for a declaration that it did not have jurisdiction; that it had wrongly decided that the proceedings were not time barred; that it reached that decision without hearing submissions on the point and without explanation; and that the tribunal ignored the significance of the claimants' litigating in the Bordeaux court and before this court (the application for the freezing order) despite the FCC arbitration clauses in the contracts. Rockwinds sought an order dismissing the claimants' claims since the proceedings were time barred by operation of rule 20.2 of the FCC Contract Rules for Cocoa Beans ('the contract rules'). It also sought damages for breach of the contracts if the Board of Appeal determined that the contracts were valid.
52. The FCC split the appeals into two separate appeals: AA050 and AA051. The appeal from the decision on the first three contracts (above, para 17) was given the reference AA051. It is the decision of the Board of Appeal in this appeal. The appeal from the other contract was given the reference AA 050 and was heard by a different Board of Appeal.

The Award, February 2022

53. The FCC appointed a Board of Appeal on 15 October 2021 from among the FCC's panel of arbitrators. It comprised Mr Bourgeois, Mr Cees Boer from Cargill, and Mr James E Green from Olam Europe Ltd. Mr Boer and Mr Green are both experienced arbitrators; Mr Boer gives speeches about arbitration and conducts training sessions. After discussions between the three Mr Bourgeois became the tribunal's chair. In accepting the appointment Mr Bourgeois confirmed that he was not aware of any circumstances that might affect his impartiality. His evidence, which I accept, is that he did not recall the September 2020 council meeting at the time he was appointed in October 2021, but that he remembered the meeting when reading through Rockwinds' submissions on the appeal.
54. The Board issued its award on 28 February 2022 ('the Award'). It did not concern itself with the merits of the underlying dispute.
55. First, the Board determined that it had jurisdiction even if the contracts represented futures transactions. Although rules 1.1 and 1.2 of the Arbitration and Appeal Rules ('the arbitration rules') appeared to restrict disputes referred to the FCC to those over physical commodities, rule 1.2 permitted the parties to refer 'any other dispute' to FCC arbitration. That, the Board said, is what the parties in this case had expressly agreed under the FCC clauses in the three contracts.
56. The Board then determined that the time bar provisions in rule 20.2 of the contract rules did not apply, which is what Rockwinds had submitted. However, the Board continued, the time bar in rule 2.1 of the arbitration rules did apply, requiring that an application for FCC arbitration had to be made within 56 consecutive days of the dispute having arisen. The dispute arose not when the Bordeaux Court declined jurisdiction on 1 December 2020 but when the claimants referred their dispute to the court in December 2018. Thus, the Board concluded, the dispute was time barred.
57. The Board then considered whether it could exercise its discretion under rule 2.3 of the arbitration rules to determine that the bar did not apply. It declined to do so. It said:

    > '[T]he respondents must have been aware of the applicable FCC time limits but nonetheless chose to refer the case to another Court when the dispute arose and only commenced FCC arbitration when, some two years later, that court declined to determine the case.'

58. Finally, the Board determined that the parties should bear the costs of the arbitrations equally and that each party should bear its own legal costs.

Events post-Award

59. Mr Folloroux's evidence was that when the Award was published he saw a parallel in the basis for refusing to disapply the time bar and the contents of the 18 September 2020 letter. Thus his solicitor made various inquiries of the FCC in March 2022 requesting information on the names of the members of the FCC council in August/September 2020 and later those on the membership committee. There was then an email of 21 March 2022 referring to the Award and raising some 10-15 points, including about Mr Bourgeois' attendance at lunches and dinners, his relationship with Mr Stolz, and about Mr Boer's and Mr Green's involvement with the FCC and their knowledge of the dispute between the claimants and Mr Stolz. Subsequently, the claimants' solicitor asked for minutes or other documents relating to any discussions in the FCC's council, board, or any committee from 2018 referring to the claimants or Mr Folloroux.

60. The FCC refused to disclose the information and any such minutes or documents, which under the rules were confidential. As one of the three directors of the FCC, Mr Bourgeois was a party to that decision. The justification given by the FCC to the claimants' solicitor was that it was not appropriate to disclose the information and documents because they related to potential proceedings over an FCC award. The FCC also said in correspondence that the members of the Board of Appeal had said that they had properly and fully considered their position when they were appointed and were satisfied that there was no obstacle to their accepting their appointments.
61. Mr Folloroux spoke with Mr Bamba, who provided him with part of the minutes of the September 2020 council meeting and told him what he recalled had happened there.
62. On 26 April 2022 the Board of Appeal concerning appeal AA050 issued its award. The tribunal comprised Mr Gedrinsky (chair), Mr Amit Suri and Mr Antoine Bonnot. In that arbitration Rockwinds had not pursued the time bar issue and the Board proceeded on the basis that the first instance award was not challenged on that ground. The Board regarded the contract before it as fully executed..

LEGAL FRAMEWORK

Statutory provisions

63. Section 68 (1) of the 1996 Act provides that a party to arbitral proceedings may challenge an award on the ground of serious irregularity affecting the tribunal, the proceedings, or the award. It adds that a party may lose the right to challenge under the section as a result of section 73.
64. Section 73(1)(d) of the Act provides that a party to arbitral proceedings who takes part in them without making any objection that there has been any irregularity affecting the tribunal may not raise that objection before the court unless they can show that at the time they took part in the proceedings they did not know, and could not with reasonable diligence have discovered, the grounds of objection.
65. Section 68(2)(a) provides that serious irregularity means a failure by the tribunal to comply with its general duty under section 33 which the court considers has caused or will cause substantial injustice. Section 33 of the Act requires the tribunal to (a) act fairly and impartially as between the parties, and (b) adopt procedures suitable to the circumstances of the particular case so as to provide a fair means for the resolution of the matters falling to be determined.
66. The power of the court to remove an arbitrator, contained in section 24(1) of the 1996 Act, is that an application may be made on the ground '(a) that circumstances exist that give rise to justifiable doubts as to his impartiality'.

Application of s.68 to bias

67. In giving the opinion of the Privy Council in *RAV Bahamas v Therapy Beach Club Inc* [2021] UKPC 8, Lords Hamblen and Burrows synthesised the relevant considerations in the application of the equivalent provision to section 68 in the Bahamian legislation at issue in that appeal. Without citation of the underlying authorities they are: (i) the test of "serious irregularity" is intended to limit judicial intervention to cases where the arbitral tribunal has gone so wrong in its conduct that justice cries out for it to be corrected:[30]; (ii) the test of serious irregularity imposes a high threshold to be surmounted:[31]; (iii) the focus is on due process, not the correctness of the decision reached:[32]; (iv) even if a case falls within one of the categories provided in sub-section 68(2), that will only amount to a serious irregularity if the court considers that

it has caused substantial injustice - a state of affairs which is 'more than some injustice':[33]; (v) there will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different. In general, there will be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity:[34], [37]; (vi) some irregularities may be so serious that substantial justice is 'inherently likely' or 'likely in the very nature of things' to result:[35]; (vii) in such cases substantial injustice may be inferred from the nature of the irregularity and that inference may be so strong that 'it almost goes without saying':[35], [36].

68. Apparent bias on the part of an arbitration tribunal would amount to a breach of the general duty in section 33 and would constitute an irregularity under section 68(2)(a) of the Act.

69. Mr Kulkarni submitted that a finding of apparent bias would lead to the necessary additional requirement in section 68(2) of substantial injustice being assumed without the need to establish it separately. Consequently, the award could be remitted for serious irregularity for the dispute to be heard by another Board of Appeal. Mr Kulkarni cited three High Court decision in support of his submission: *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), [144], per Colman J, citing Morison J in *ASM Shipping Ltd of India v TTMI Ltd* [2005] EWHC 2238 (Comm); *Cofely Ltd v Bingham* [2016] EWHC 240 (Comm), [116], per Hamblen J (as he then was); and *Dadoun v Biton* [2019] EWHC 3441 (Ch), [36], per Mr Michael Green QC (as he then was).

70. I am not persuaded that all these authorities are as clear as Mr Kulkarni suggested that in an apparent bias case substantial injustice follows as a matter of course. In *Norbrook Laboratories Ltd v Tank*, although Colman J said that he agreed with what Morison J had said in *ASM Shipping Ltd of India v TTMI Ltd*, he went on to refer to sole arbitrator cases, but also expressed the principle as being that with bias 'in any award already made, substantial injustice will *normally* be inferred and where an award has yet to be made substantial injustice will *normally* be anticipated' (my emphasis): [145]. The passage Mr Michael Green QC relied on from *Russell on Arbitration in Dadoun v Biton* is similarly qualified, 'substantial injustice will normally be imputed as a matter of course' para 7-129.

71. In any event, there is no support in *RAV Bahamas v Therapy Beach Club Inc* [2021] UKPC 8 for the suggestion that in a section 68 application a finding of apparent bias in an arbitration tribunal will lead as a matter of course to a finding of substantial injustice. Rather, as we have seen, the effect of the Privy Council advice is that a case within section 68(2)(a) will not constitute a serious irregularity unless the court considers that it has caused substantial injustice, although the nature of the irregularity may be such that the inference of substantial injustice almost goes without saying. Moreover, there will be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity. This court follows a Privy Council authority like *RAV Bahamas* in preference to any High Court authority to the contrary: *Willers v Joyce* [2016] UKSC 44, [12], [16].

Duty of disclosure and bias

72. The serious irregularity alleged in this case focuses on an arbitrator's duty of disclosure. The law on this is conveniently summarised in Lord Hodge's judgment in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, with which other members of the court agreed. Lord Hodge first recounted that the test for apparent bias is an objective one, the question being (as Lord Hope had stated in *Porter v Magill* [2001]

UKHL 67) whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased:[52] Lord Hodge then turned to the position with arbitrators. Although the test for apparent bias may be the same for judges and arbitrators, in applying the test to arbitrators it was important to bear in mind (he said) that arbitration is generally conducted in private with limited public oversight and powers of review, so that there is a 'premium on frank disclosure' by arbitrators of circumstances which may give rise to doubts as to their impartiality:[56], [58].

73. As to disclosure, Lord Hodge said that there is a legal duty of disclosure in English law which is encompassed within the statutory duties of an arbitrator under section 33 of the 1996 Act. As to the content of the duty, Lord Hodge said that an arbitrator must disclose facts and circumstances which would or might reasonably give rise to the appearance of bias:[70]-[81], [116]. The legal obligation can arise when the matters to be disclosed fall short of matters which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality:[73]. An arbitrator may be bound to make inquiries to comply with the duty of disclosure:[107].
74. Lord Hodge went on to say that the failure to disclose such facts and circumstances will be one factor which the fair-minded and informed observer will take into account in considering whether there was a real possibility of bias:[117]-[118]. Compliance with this duty should be assessed regarding the circumstances at the time the disclosure fell to be made:[119]. It is a continuing duty:[120]. The question of whether the relevant circumstances in any case amount to apparent bias must be assessed at the time of the hearing of the challenge to the arbitrator:[123].
75. In adopting the approach in *Halliburton,* it has been said that the duty to disclose applies to a potentially wider group of circumstances which might on ultimate examination justify recusal, and that the rationale for this is that unless there is disclosure the parties may not know the circumstances enabling them to decide whether to challenge the appointment. 'Not every circumstance that an arbitrator will be under a duty to disclose will justify recusal but the failure to disclose even that which on investigation does not justify recusal or removal may support a conclusion that an arbitrator is apparently biased': *Newcastle United Football Company Limited v The Football Association Premier League Limited* [2021] EWHC 349 (Comm), [27], per HHJ Pelling QC.
76. Detailed analysis of this can be left for another day. However, two points need to be made in the context of this appeal. First, *Halliburton* was a case where there was an application to remove an arbitrator under section 24(1)(a) of the 1996 Act on the ground of circumstances giving rise to justifiable doubts as to their impartiality. The present case is a challenge to an award under section 68 of the Act. Even though the basis of challenge is also non-disclosure by an arbitrator, the statutory context of the challenge is different. Secondly, in considering disclosure the arbitrator like the judge must be alive to opportunistic or tactical challenges, a possibility recognised by Lord Hodge in *Halliburton*: [68]. Putting it in general terms the arbitrator like the judge must anxiously consider whether disclosure is necessary to give the parties an assurance that there are no justifiable doubts about their impartiality. By the same token the arbitrator like the judge must not set hares running, with the additional delay and expense it might entail, by disclosing matters which could not possibly give rise to the fair-minded and informed observer having such doubts.

Loss of right to object, s.73

77. As to section 73, the loss of the right to object, in *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm) Eder J held that where a party knows of a serious irregularity but takes a deliberate decision to take part in proceedings without objection and takes the point only after losing the arbitration, they will usually be precluded from raising the irregularity at that later stage (citing Cooke J at para. 18 of *Thyssen Canada Ltd v Mariana Maritime SA* [2005] EWHC 219 (Comm), who referred to parties participating in proceedings they believed to be fundamentally flawed but keeping that up their sleeve if they were unsuccessful): [10]. Eder J added that if the respondent can show that the applicant continued to take part in the arbitral proceedings without objection, after the grounds of objection arose, 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: [11].

DISCUSSION

Failure to disclose and the appearance of bias

78. The claimants' case is that there were four key factors which ought to have been disclosed by Mr Bourgeois to the claimants at the time of accepting his appointment, and which would or might cause the fair-minded and informed observer to conclude that there was a real possibility that Mr Bourgeois was biased.
79. First, there was Mr Bourgeois' presence 13 months prior to accepting his appointment at the FCC council meeting in September 2020 where there had been a discussion of AS (Côte D'Ivoire)'s application for FCC membership. Mr Stolz had initiated a 30-40 minute discussion which included reference to the claim being brought by the claimants against Rockwinds then proceeding in the Bordeaux court and not by way of FCC arbitration. That was the basis on which the Board of Appeal later refused to exercise its discretion to extend time. Mr Bourgeois accepts that he remembered the meeting when reading the parties' submissions during the appeal. In the claimants' submission he should have disclosed the meeting and his vote to postpone consideration of the application for membership.
80. In the claimants' submission the fair-minded and informed observer would conclude that there was at least a real possibility that Mr Bourgeois had, prior to his appointment, formed a view on the appropriateness of their conduct in commencing a claim in the Bordeaux Court and the consequences which should follow. Non-disclosure by Mr Bourgeois in this regard must inevitably colour the thinking of the fair-minded and informed observer, who would be suspicious of a failure to disclose such an important matter, and that non-disclosure alone might lead that observer to believe that there was a real possibility that Mr Bourgeois was biased.
81. Similarly, there were the three dinners Mr Bourgeois had attended in 2018 and 2019 when Mr Stolz was at the first and his colleague, Mr Coudray, at all three. In the claimants' submission there was evidence from the Konan-Ferrand emails showing that Mr Coudray discussed Rockwinds' arbitrations with others at lunches with Alexandre Gedrinsky. A fair-minded and informed observer would consider the fact that, as Mr Coudray had done, industry individuals at such informal dinners might realistically discuss ongoing arbitrations with arbitrators, giving rise to a real perceived risk that the claimants' claim against Rockwinds might have been discussed at one or more of the dinners. Regardless of what was discussed at those dinners, in the claimants' submission Mr Bourgeois ought to have disclosed the fact that he had, in the period

preceding his appointment, attended these relatively small networking dinners with the owner and a senior employee of one of the parties to the arbitration.

82. In addition, the claimants contended that Mr Bourgeois should have disclosed the previous trade between Rockwinds and his employer, Walter Matter, in December 2017, even if it was exceptional. Finally, there was the long-standing relationship which Mr Bourgeois had with Mr Stolz. Even if they were not friends, he had known Mr Stolz for about 15-20 years, and had seen him at various FCC events, where they both sat on the council. That too should have been disclosed.
83. Coupled with non-disclosure of these four matters, Mr Kulkarni added four additional factors which the fair minded and informed observer would be entitled to consider in assessing apparent bias on Mr Bourgeois's part: the Appeal Board was the only FCC tribunal out of three to find the claimants' claims to be time-barred; the basis on which the Appeal Board refused to disapply the time bar and its harshness; there was an acknowledgement of debt by Rockwinds; and Mr Bourgeois as one of the three directors was involved after the Award in the FCC's refusal to disclose a list of attendees at the FCC council on 2 September 2020, the minutes of that meeting, and the other information requested.
84. Before considering Mr Kulkarni's submissions, it is necessary to recall that the fair minded and informed observer considering whether there is a real possibility of bias informs themselves on relevant matters and appreciates that context forms an important part of the material which must be considered before passing judgment: *Halliburton*, at [52]. In this case the context is of traders in a relatively small commodities market competing against each other for business. Members are likely to know or at least to know about others in the market. Moreover, the context is also of a trade association, which like other trade associations provides arbitration services for settling disputes with arbitrators drawn from among its members. This has the advantage that arbitrators are likely to be expert in the type of disputes which can arise, and that arbitration costs are a fraction of those associated with other types of international commercial arbitration. It also means that arbitrators will likely be known or known about to those in the trade with disputes and may include those with whom they have dealt.
85. In my view Mr Bourgeois had no duty to disclose the fact of his attendance at the September 2020 council meeting upon being appointed as arbitrator or later when after his appointment he made the connection between the discussion and the dispute before his Board of Appeal. What was discussed and decided at the council meeting on 2 September 2020 were not circumstances which would or might reasonably give rise to the appearance of bias. There cannot be any justified doubts about Mr Bourgeois' impartiality arising from the fact that he learnt about the existence of the claimants' disputes with Rockwinds and the issue as to whether those disputes should have been submitted to FCC arbitration. He certainly did not learn any fact about those disputes which would not have been apparent to him upon reading the parties' detailed submissions in the arbitration appeal. At that later point he had detailed submissions about the matter, well beyond what was before the FCC council.
86. The fair-minded and informed observer would appreciate that at the September 2020 meeting Mr Stolz in raising three points about the application for membership of AS (Côte d'Ivoire) did so in a neutral manner, and that the council rejected Mr Stolz's first point about the applicant's 'political' character. In relation to the other two they would know that the decision taken was not to reject the application but to postpone consideration of it until the council's next quarterly meeting with inquiries being made of the applicant in the meanwhile as regards its shareholder and its taking the action it did in the Bordeaux court. In voting the way they did the majority of the council

(including Mr Bourgeois) were not accepting, agreeing with, or endorsing what Mr Stolz told them about Rockwinds' disputes with the claimants.

87. Similarly, the fair-minded and informed observer would not in my view conclude that the Geneva dinners in 2018 and 2019 needed to be disclosed and that Mr Bourgeois should have appreciated that they gave rise to justifiable doubts as to his impartiality and a real possibility of bias. He had attended a single dinner when Mr Stolz was present with 20 to 25 others in the cocoa trade in the Geneva area three years before the Board of Appeal was convened. There were another two dinners the following year when Mr Stolz's colleague, Mr Coudray, was present but Mr Stolz wasn't.
88. As I have explained, Mr Kulkarni submitted that a fair-minded and informed observer would be entitled to have in mind that there is a realistic risk of people talking shop at dinners like this, including about on-going arbitrations. He referred to the discussion of arbitrations recorded in the Konan-Ferrand emails. First, I do not draw the same conclusion from those emails. Arbitrations are mentioned, but in general terms. As regards the arbitrations against defaulting exporters which are mentioned, Mr Stolz explained that in these circumstances the information is public. Secondly, Mr Kulkarni accepted that individuals are discreet with confidential information, although some more so than others. But there is no evidence that any of the traders at these dinners who were sitting as FCC arbitrators were indiscreet so as to betray confidences and undermine their reputation as arbitrators. As to those traders attending who were not arbitrators but involved in arbitrations, it seems to me that many would not want their competitors knowing about the arbitrations in which they or their firms were involved. Thirdly, Mr Bourgeois' evidence (which I have accepted) is that on all three occasions he heard no discussion about the dispute Rockwinds had with the claimants. I note in passing that other people who attended the same dinners (and the council meeting in September 2020) have found when sitting as arbitrators in favour of the claimants and against Rockwinds.
89. The same analysis applies to the relationship between Mr Bourgeois and Mr Stolz and the trade they did in 2017. As Mr Kenny KC put it, there was no friendship and no identity of interest between the two; it was an acquaintanceship formed in the course of their work in the same, relatively small commodities market. As I remarked previously traders are bound to know or know about others who have been in the market for any length of time, and the fair-minded and informed observer would understand this. As to the 2017 transaction between Mr Stolz and Mr Bourgeois, this was a single transaction for the sale and purchase of cocoa four years before Mr Bourgeois' appointment to the Appeal Board. In all, Mr Bourgeois' relationship with Mr Stolz does not give rise to any justifiable doubt as to the former's impartiality, and no justifiable appearance of bias could arise from the fact of the 2017 trade.
90. As to Mr Kulkarni's additional points relevant to assessing apparent bias, in my view they offer no assistance to the claimants' case. First, it is not entirely accurate to say that the Appeal Board was the only FCC tribunal out of three to find the claimants' claims to be time-barred when, as indicated earlier in the judgment, in appeal No.50 the time-bar issue was not agitated. In his ruling on the section 69 application, Foxton J held that the Appeal Board in this appeal was entitled to apply the time bar for the reasons that it gave, their knowledge of the FCC arbitration clauses in the contracts and the two years' time lapse against the 56-day time limit. As Foxton J pointed out, a refusal to extend a time bar can have drastic consequences and result in a significant windfall to one side, but this does not lead to the conclusion that the only lawful exercise of discretion is to extend time. Thirdly, whether there was an acknowledged debt on Rockwinds' part – which Rockwinds has denied - was not conclusively addressed in

the Award and is not before the court in this appeal. While it would have been politic for the FCC to have provided the publicly available information about those on the council and on the membership committee in September 2020, the FCC board was entitled to decide to withhold confidential information and to refuse to become embroiled in a dispute by answering the 10 to 15 points raised in the email of 21 March 2022. In disputes between members a trade association must act in an even-handed manner. In any event the claimants obtained documents through Mr Bamba.

The section 68 application

91. Assume that I am wrong and that (i) there was a failure by Mr Bourgeois to disclose facts and circumstances which give rise to justifiable concerns as to his impartiality; and (ii) the fair-minded and informed observer, having considered the Award, would conclude that there was a real possibility that the Appeal Board was biased in making it. In this section 68 application the claimants must still establish that they have surmounted the very high threshold imposed by the section - that the Appeal Board went so wrong in its conduct that justice cries out for it to be corrected: *RAV Bahamas v Therapy Beach Club Inc* [2021] UKPC 8. In my view they cannot. Foxton J has ruled that the Board was entitled to reach the conclusion it did taking into account the factors it did, and no actual bias is alleged. At its highest what we have is a process error in the failure of Mr Bourgeois to disclose the September 2020 council meeting, the 2018-2019 dinners, the Bourgeois-Stolz relationship and the 2017 trade.
92. In terms of the statutory language, the claimants need to establish that this irregularity is so serious that substantial injustice can be inferred since it is 'inherently likely' or 'likely in the very nature of things'. Given the non-disclosure alleged in this case I would not be persuaded that it is so egregious that substantial injustice is inherently likely' or 'likely in the very nature of things'. That means that substantial injustice must be established if this Award is to be set aside.
93. In this case, there is no reason to believe that the outcome of the arbitration would have been different even if Mr Bourgeois had not participated. As Mr Mitchell KC put it, the claimants were seeking an extension of time against an unpromising background of where they had approached the Bordeaux court despite the FCC arbitration clauses, had informed that court that they could never obtain justice from an FCC arbitration, and two years later when they lost had then submitted to FCC arbitration. Moreover, there were two other well experienced arbitrators on the Board of Appeal besides Mr Bourgeois making this award. No actual bias is alleged against Mr Bourgeois but as Mr Mitchell submitted the argument must be that somehow he, with his unconscious bias, persuaded them to make an Award which, as Foxton J has ruled, is unimpeachable on the facts.

Section 73 and loss of the right to object

94. Finally, there is section 73. Rockwinds' submission is that the claimants are precluded under the section from raising an objection now when they could have taken the bias point earlier. In response to this Mr Kulkarni submitted that this was not a case where the claimants with reasonable diligence could have discovered what they are now alleging was non-disclosure and apparent bias on Mr Bourgeois' part. The fact is that Mr Bourgeois only entered the picture, along with his co-arbitrators, when appointed in mid-October 2021. It was not a case of the claimants keeping a matter up their sleeve if they were unsuccessful in the Award.

95. The serious irregularity (which I have rejected) concerns Mr Bourgeois and his non-disclosure in October 2021. At that point the claimants had asserted before the Bordeaux court that any FCC arbitral tribunal would be biased against them because Rockwinds and Mr Stolz were leading members of the FCC. On Mr Folloroux's account he was told by Mr Hullot in October 2020 that Mr Stolz had presented a biased picture of the dispute with Rockwinds to the FCC council in September 2020. There is no reason to explore Mr Folloroux's evidence about why he did not finally contact Mr Bamba or Ms Konan-Ferrand until March 2022 after the Award was issued. The fact is that when the Board of Appeal was appointed in mid-October 2021 he might at that stage have asked himself the question whether they were also on the council, so that they would have heard Mr Stolz's presentation at that meeting and been affected by it, to his and the claimants' disadvantage, given what on his account he was told had been said. Against that background, the claimants could have made the inquiries at the time of the outset of the arbitral proceedings which they later made in March 2022. They failed to act with reasonable diligence and are precluded from raising these matters now.

CONCLUSION

96. For the reasons given in the judgment I dismiss the application.