Neutral Citation Number: [2021] EWHC 3301 (Comm)

Claim No: CL-2021-000554

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building

7 Rolls Buildings, Fetter Lane

London, EC4A 1NL

Date: 7 December 2021

Before :

MRS JUSTICE MOULDER DBE

- -

Between :

TENKE FUNGURUME MINING S.A. **Cla**

- and -

KATANGA CONTRACTING SERVICES S.A.S. **Defe**

- -

- -

JAMES LEABEATER QC (instructed by **Armstrong Teasdale Limited**) for the Claimant

CHARLES KIMMINS QC and **MARK TUSHINGHAM** (instructed by **Charles Fussell & Co LLP**) for the Defendant

Hearing dates: 5 and 8 November 2021

- -

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 7 December 2021.

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MRS JUSTICE MOULDER

Mrs Justice Moulder DBE :

Introduction

1.
The Claimant ("TFM") brings a challenge under section 68 of the Arbitration Act 1996 (the "Act") to an award dated 26 August 2021 issued by an ICC Tribunal comprising Mr Charles Kaplan, Mr Jeffrey Gruder QC and Dr Achille Ngwanza (the "Final Award"). By the Final Award, TFM was ordered to pay all sums claimed to the Defendant ("KCS") and TFM's counterclaims were dismissed.

Anonymity and publication of the judgment

2.
I understood it not to be contested by TFM that this judgment pertaining to a section 68 application should be published. KCS referred the court to the decision of the Court of Appeal in Manchester City Football Club Limited v The Football Association Premier League Limited[2021] EWCA Civ 1110 and the observations of Males LJ at [65] that:

"public scrutiny of the way in which the court exercises its jurisdiction to set aside or remit awards for substantial irregularity under section 68 of the 1996 Act is itself in the public interest".

3.
TFM originally sought to have its identity withheld in this judgment as well as "any pricing information concerning the agreements at issue". At the hearing KCS submitted that no such anonymity order should be made on the basis that TFM has made an application in the Democratic Republic of the Congo ("DRC") linked to the enforcement of the Award where it has referred publicly to the names of the parties and the underlying dispute. In response to an invitation from the court to make written submissions in response to that evidence, TFM has now accepted in light of the fact that the summons in the DRC is a public record, that it would not be appropriate to seek anonymisation of the parties in this judgment but it maintains its submission that "commercially important or sensitive information" should be redacted. In my view this judgment does not contain commercially sensitive information and the issue does not arise. I am not persuaded that the subject matter of the contracts in issue or the amounts awarded in the arbitration are sufficiently commercially sensitive to outweigh the public interest in understanding the judgment in context. Further to the extent that the proposed anonymity which is sought applies not to the identity of TFM but to details concerning its business and the arbitration such that the test in CPR 39.2(4) is engaged as discussed below, in my view the test of necessity with regard to the redactions is not satisfied. Accordingly I refuse to make any redactions as sought by the Claimant.

4.
However one of the grounds of the appeal relates to the unavailability of leading counsel who became ill in the course of the arbitration and was unable to participate in the merits hearing. Counsel on both sides have proposed that the identity of that counsel should not be disclosed.

5.
CPR 39.2 provides:

"(4) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness."

6.
CPR 39.2(4) does not extend to the identity of the particular counsel who is neither a party or a witness. However the anonymisation of this individual potentially engages the principle of open justice and as such the court has a general discretion to withhold the identity of another person only if satisfied that the test of necessity is met (Brearley v Higgins & Sons (A Firm)[2021] EWHC 1342 (Ch) at [13]-[14]). The counsel concerned is not involved in the application before this court as a party or a witness and I do not see that it is necessary in order to satisfy the principle of open justice in the circumstances of this case that his health should be placed in the public domain: his state of heath is a personal matter which he is entitled to regard as confidential and although I have no evidence on the point, it seems to be self-evident that knowledge of any health difficulties suffered could impact on his professional life. Accordingly, assuming the test is one of “necessity”, I find that the test of necessity is met in order to protect his interests and I propose not to identify the counsel concerned.

Evidence

7.
In opposition to the claim now brought by TFM the court has a witness statement of Mr Charles Fussell of the firm Charles Fussell & Co LLP, which represents KCS in these proceedings dated 8 October 2021.

8.
In response the court has a witness statement dated 25 October 2021 of Mr Peter Mantas of Fasken Martineau DuMoulin LLP, the Ontario incorporated branch of the international law firm operating under the global name “Fasken”, which represented TFM in the arbitration.

Hearing

9.
In accordance with the current practice of the Commercial Court, the hearing was held remotely. Both parties were represented at the hearing by leading counsel and filed skeleton arguments in advance of the hearing. As the appeal related to an arbitration and issues of confidentiality were raised, the court agreed to hold the hearing in private but without deciding the issue of publication of the judgment which it has now decided should be published as referred to above.

Background and key chronology

10.
The dispute relates to a mine in the DRC operated by TFM. TFM agreed various contracts with KCS, including contracts for the construction of tailing storage facilities ("Tailing Services Agreement") dated 1 March 2018 and removal of scats ("Scats Agreement") dated 18 April 2018.

11.
Both the Tailing Services Agreement and the Scats Agreement contained an arbitration clause in similar form. The contracts and the arbitration clauses were subject to English law and the arbitration was to be governed by ICC Rules with its seat in London.

12.
On 13 January 2020 KCS commenced two arbitrations, later consolidated, for US$13.666m.

13.

On 11 January 2021 TFM asked for a pre-hearing conference to apply for an adjournment of the hearing, on the basis that COVID-19 restrictions had prevented the parties' mining experts from visiting the site.

14.
A telephone conference took place on 25 January 2021. The Tribunal issued Procedural Order No. 3 the next day. The Tribunal refused to adjourn the hearing, and declined to rule on whether there should be a site visit prior to consideration of the counterclaims.

15.
On 4 February 2021 TFM wrote to the Tribunal notifying it of the illness of its leading counsel (COVID-19) and asking for an adjournment of two months until May 2021. On 9 February 2021, the Tribunal issued Procedural Order No. 4, ruling that the hearing should go ahead.

16.
On 28 February 2021, the day before the hearing started, Fasken advised the Tribunal and KCS that following its review of the evidence it had been decided that the allegations of bribery and corruption against KCS should be withdrawn.

17.
The merits hearing then took place from 1 March to 8 March 2021.

18.
On the final day of the hearing, the Tribunal asked for submissions on costs and interest prior to the issue of an award on the merits. The parties exchanged submissions on 26 March 2021. KCS submitted two witness statements from Mr Fussell and Mr Fourie.

19.
TFM asked the Tribunal for permission to cross examine the witnesses on the new statements produced by KCS and on 8 April 2021 the Tribunal issued Procedural Order No. 5 refusing any cross examination but ordering disclosure of certain documents.

20.
On 26 August 2021 the Tribunal issued the Final Award. KCS was awarded all sums claimed; the counterclaims were all dismissed; TFM was obliged to pay KCS's legal and expert costs of just under US$1.4m, plus US$1.7m for the litigation funding advanced by way of a shareholder loan; plus compound interest at 9% already accrued to about US$2m and continuing until payment.

21.
On 23 September 2021 TFM made this application by way of Arbitration Claim Form.

Grounds of challenge

22.
TFM challenges the Final Award under Section 68 of the Act on the grounds of serious irregularity affecting the Tribunal, the proceedings or the award, that has caused or will cause substantial injustice to TFM.

23.
TFM advances four grounds:

i)

Ground 1: Failure to adjourn the arbitration to allow a visit to the construction site;

ii)
Ground 2: Failure to adjourn the arbitration notwithstanding the illness of TFM's leading counsel;

iii)
Ground 3: Costs award;

iv)
Ground 4: Compound interest.

24.
TFM also seek to raise a further challenge to the uplift to the costs award (the “success fee”). This was not made in the Arbitration Claim Form and no formal application has been made to advance this challenge. It is opposed by KCS as out of time and on the basis that no explanation has been provided for the late challenge. This is dealt with below.

Ground 1: Failure to adjourn the arbitration to allow a visit to the construction site

25.
TFM counterclaimed in the arbitration for defective construction work performed by KCS. A site visit at the location of the work in the DRC was sought but it is TFM’s case that a site visit could not be conducted due to the COVID-19 pandemic and its expert, Deloitte, was not prepared to visit the site due to the pandemic restrictions and conditions. TFM therefore requested that the arbitral proceedings be adjourned until a site visit could take place. The Tribunal refused an adjournment and in the Final Award dismissed the counterclaim.

26.
TFM submitted that the Tribunal's decision not to adjourn the arbitration was a serious irregularity in that its decision failed to comply with Section 33 of the Act (which therefore amounts to an irregularity under Section 68(2)(a) of the Act):

i)
By not adjourning the arbitration, the Tribunal failed to give TFM a reasonable opportunity to put its case; and

ii)
The Tribunal also failed thereby to adopt procedures suitable to the circumstances of the case before it.

Ground 2: Failure to adjourn the arbitration notwithstanding the illness of TFM’s leading counsel

27.
TFM's English barrister, leading counsel for the hearing, contracted COVID-19 in January 2021. His illness was such that he could not appear at the merits hearing. TFM informed the Tribunal of counsel’s circumstances and requested that the hearing be adjourned for two months subject to the availability of the Tribunal and KCS. The Tribunal denied the adjournment request and ruled that the hearing should proceed.

28.

TFM submitted that the Tribunal's decision not to adjourn the hearing was a serious irregularity in that its decision failed to comply with Section 33 of the Act (which therefore amounts to an irregularity under Section 68(2)(a) of the Act):

i)
The Tribunal thereby failed to give TFM a fair and reasonable opportunity to put its case and meet the case of KCS. The case was a substantial and complicated one; leading counsel had been involved in the proceedings from the very beginning and had a detailed knowledge of the case. A late replacement could never be regarded as satisfactory.

ii)
There was no sufficiently serious countervailing prejudice to KCS in a short adjournment.

iii)
The Tribunal also thereby failed to adopt procedures suitable to the circumstances of the case before it.

Ground 3: Costs award

29.
During the cost submissions stage, which occurred after the hearing, KCS revealed for the first time that it had obtained a shareholder loan which it described as a "litigation funding agreement".

30.
Despite TFM's request, the Tribunal did not allow TFM to cross-examine KCS on the funding arrangement and only permitted document disclosure in relation to the loan.

31.
The Tribunal granted KCS more than $1m in costs relating to the litigation funding agreement.

32.
It was submitted for TFM that the Tribunal's decision to award costs arising out of the shareholder loan, and not to allow cross-examination and full disclosure was a serious irregularity. It was submitted for TFM that the decision also failed to comply with Sections 61, 62 and 63 of the Act as well as Section 33 of the Act (which therefore amounts to an irregularity under Section 68(2)(a) of the Act) in that:

i)
The Tribunal failed to give TFM a reasonable opportunity to meet KCS' costs case. This severely prejudiced TFM.

ii)
The Tribunal also thereby failed to adopt procedures suitable to the circumstances of the case before it.

iii)
By awarding costs arising out of the funding arrangement, the Tribunal committed a serious irregularity that caused substantial injustice to TFM. The Tribunal also failed to comply with its general duty to act fairly and impartially in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it

iv)

The Tribunal's award of costs is contrary to public policy, pursuant to Section 68(2)(g) of the Act.

Ground 4: Compound interest

33.
The Tribunal awarded compound interest at 9% with monthly rests. It was submitted that the amount awarded constitutes a serious irregularity in that it failed to comply with Section 33 of the Act (which therefore amounts to an irregularity under Section 68(2)(a) of the Act) and caused substantial injustice to TFM. Further, it was submitted that the Tribunal's interest award is contrary to public policy, pursuant to Section 68(2)(g) of the Act.

Section 68 relevant legal principles

34.
The relevant provisions of Section 68 of the Act are as follows:

"68.—(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. 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).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c)…"

35.
Section 33, referred to in Section 68 (2)(a) and relied upon by TFM in its claim, provides:

"(1) The tribunal shall— "

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

36.
Section 73 (Loss of right to object) referred to in Section 68(1) and relied upon by KCS in its defence of this claim provides:

"(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 (a) that the tribunal lacks substantive jurisdiction, (b) that the proceedings have been improperly conducted, (c) that there has been a failure to comply with

the arbitration agreement or with any provision of this Part, or (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.

(2)…"

37.
It was accepted for TFM that only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process, will the Court allow an application under section 68. Section 68 is designed as "a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in section 68, that justice calls out for it to be corrected": RAV Bahamas Ltd and another v Therapy Beach Club Inc[2021] UKPC 8; [2021] A.C. 907 at [30].

38.
It was further accepted for TFM that the applicant must establish that had the procedural irregularity not occurred, the outcome might well have been different, unless substantial injustice is obvious from the particular irregularity: RAV Bahamas at [34]-[37].

39.
As to section 68(2)(a) (failure to comply with section 33), the court was referred to the principle that the court should be extremely slow to interfere with these discretionary procedural decisions - Kalmneft v Glencore International AG and another[2002] 1 All ER 76 at [85]:

"Further, intervention under s 68 should be invoked only in a clear case of serious irregularity. The court's powers to interfere with an arbitrator's discretionary decision as to how he should exercise his jurisdiction under s 30(1) should not be engaged unless it is clear that in exercising his discretion he has failed to have regard to the relevant facts and to his duty under s 33. Unless he has arrived at a conclusion which no reasonable arbitrator could have arrived at in the case in question having regard to his duties under s 33, it cannot be said that his decision is capable of being characterised as a serious irregularity." [emphasis added]

40.
In relation to section 68(2)(b) (excess of powers) it was common ground that TFM must show that the Tribunal exercised a power which it did not have as distinct from the erroneous exercise of an available power: Lesotho Highlands v Impreglio SpA[2005] UKHL 43, [2006] 1 AC 221, as further discussed below.

41.
In relation to waiver KCS referred the court to Russell on Arbitration at [8-123]:

"A party who wishes to challenge an award for a serious irregularity should not only act promptly in making his application to the court but should also take care not to lose his right to object. A party who takes part or continues to take part in the proceedings must make his objection to the irregularity "either forthwith or within such time as is allowed by the arbitration agreement or the tribunal"… A waiver will arise in respect of an objection under s.68(2)(b)(excess of powers) where the relief was sought in the arbitration and the applicant took part without objecting that the tribunal lacked the powers in question. In the case of an alleged procedural irregularity committed by an

arbitrator during the conduct of proceedings, the point must therefore be raised immediately (unless there is no knowledge or means of knowledge, which will be a difficult hurdle to overcome)…"

Ground 1

42.
On 26 January 2021, following a hearing on 25 January 2021, the Tribunal issued Procedural Order No. 3 ("PO3"). This dealt with the issue of the Site visit as follows:

"The hearing will cover all the Parties' respective claims and counterclaims. Specifically, the Parties and their experts will address, among others, the issue of whether an on-site visit by the experts is required prior to the Tribunal's final award, in particular with regard to the Respondent's counterclaims."

43.
In the Final Award the Tribunal dealt with the issue as follows (so far as relevant):

"368 In accordance with Procedural Order N°1, the Experts met and produced a Joint Experts' Report. The Experts agreed that allegation (i), regarding flood control facilities involved a factual or contractual issue and that a site visit was not necessary to form a view. They also agreed that allegation (ii), regarding the embankment toe drain, was a factual or contractual issue and that a site visit was not necessary. With regard to allegation (iii) this concerned the location of two groundwater drainage pipes, respectively in the eastern and western embankments. The experts disagreed as to the need for a site visit, Mr Legg considering that a visit was unnecessary, Mr Chirisa considering that it would be necessary to speak to the new contractor on site and to confirm that the work described by Golder as having been completed had indeed been completed. Mr Chirisa further believed that site visits were an established industry practice. With respect to allegation (iv) particle size and compaction, the Experts agreed that a site visit would not be necessary. The Experts disagreed as to allegation (v) slope ratio of embankment downstream slope, with Mr Legg considering that the issue could be resolved without the need for a site visit, Mr Chirisa being of the view that a site visit was necessary to view the workings and confirm that the site of the allegedly defective work had been covered over and how the new contractor had executed its work.

369. In cross-examination, Mr Legg recognized that, with respect to some of his conclusions, a site visit might have been useful. However, he added, in each case, that he believed a site visit would no longer be useful.

370. Mr Chirisa was cross-examined with respect to the alleged construction defects in respect of which the experts disagree as to the need or usefulness of a site visit. As to allegation (iii) concerning the location of groundwater drainage pipes, he agreed with the proposition that a site visit would be of no practical utility because it would not be possible to see or inspect the pipelines concerned. With regard to allegation (v) concerning the downstream slope ratio, Mr Chirisa confirmed that if the new contractor had completed the construction of the embankments it would no longer be possible to see or inspect the downstream slope ratio which was the subject-matter of this allegation. He also agreed that there would be a photographic record of construction by the new contractor and that once the liner had been placed it would no longer be possible to inspect the earthworks beneath it.

371. At the conclusion of the evidence, then, both experts agree that a site visit would not allow a visual inspection of the areas of the works concerned by the Respondent's allegations of defective work. Nor would it be necessary to verify the actual state of completion of the TSF by the new

contractor. The Tribunal recognizes of course that Mr Chirisa is still of the view that an on-site visit would be useful for the purpose of face to face interviews, in context, with the new contractor and the relevant mine personnel. However, given the circumstances of this case, and the uncertainties surrounding the possibility of travel given the restrictions imposed as a result of the covid pandemic, the Tribunal does not think it would be reasonable or fair to adjourn this arbitration for an uncertain period, for the sole purpose of conducting interviews face to face on site rather than by videoconference or telephone.

372. The Tribunal also has difficulty accepting, even if it were possible or useful to carry out visual inspections on site, that that reason alone would be sufficient to justify the current situation in which the Respondent finds itself with respect to its counterclaim. The Tribunal notes in this regard that, in its closing submissions, the Respondent pointed out that Mr Legg recognized that he would have been interested to see the execution records of the new contractor. But the Respondent does not address the question of why it did not itself produce those records.

…

374. The Respondent clearly bears a procedural as well an evidentiary burden with regard to its counterclaim. It was incumbent upon it to submit evidence in support of that claim, in particular evidence regarding any remedial works made necessary by the claimed defective work and their cost. The Respondent cannot rely on the impossibility or difficulty of organising a site visit in order to justify this failure to discharge its burden.

375. For these reasons, the arbitration will not be adjourned and the counterclaim will be dismissed.” [emphasis added]

44.
It was submitted for TFM in summary that:

i)
TFM always said that a site visit was needed and was a "fundamental right of due process" (TFM’s letter of 11 January 2021 to the Tribunal);

ii)
After PO3 left the position uncertain as to whether the counterclaims would be addressed at the substantive hearing, TFM made it clear in its skeleton for the hearing that a site visit was “needed” and “industry standard”;

iii)
The counterclaims were dismissed summarily – it was not TFM's case that it could establish its case on the documents and the Tribunal did not consider for example that some form of opening up of the works could have been carried out;

iv)
TFM was not permitted to adduce evidence that it wanted to adduce and the counterclaims were not fairly considered;

v)
There was a real chance that the result of the counterclaims might have been different and thus a substantial injustice;

vi)

TFM did not waive its right to object – it maintained its position in oral closing submissions that a site visit should be made.

45.
The starting point is that TFM has to show that the Tribunal has gone so wrong in its conduct of the arbitration that “justice calls out for it to be corrected”.

46.
In my view the relevant paragraphs of the Final Award show that the Tribunal considered whether a site visit was necessary or useful and concluded in the circumstances that it was not. There were five alleged defects. The experts agreed in relation to three of the issues ((i) (ii) and (iv)) that a site visit was not necessary and Mr Legg was of the view that even if it might have been useful, it was no longer useful because a site visit would not allow a visual inspection of the areas of work concerned. In relation to (iii) Mr Chirisa agreed a site visit would be of no practical utility and with regard to (v) he said that once the liner had been placed it would no longer be possible to inspect the earthworks. The utility of the visit was said by Mr Chirisa to be face to face interviews but the Tribunal took the view that an adjournment for this purpose was not reasonable or fair.

47.
The issue raised by TFM in its submissions to this court of whether a site visit would have permitted exploratory works to examine the work which had been covered up was explored during the merits hearing and the likelihood of sonic drilling identifying voids was said by Mr Legg during his evidence to be “very unlikely”.

48.
In my view the Tribunal exercised its discretion having regard to the evidence of the experts as to the utility of a site visit and weighed this evidence against the effect of an adjournment. There is no basis to conclude that this decision surmounted the high hurdle of a successful challenge under section 68 as being a conclusion which no reasonable arbitrator could have arrived at.

49.
In my view there is no need to consider the further arguments of “substantial injustice” and waiver. However had I needed to decide the point in my view TFM has not shown that the outcome of the counterclaim “might well have been different”. I note that the Tribunal stated (as set out above) that:

“The Tribunal also has difficulty accepting, even if it were possible or useful to carry out visual inspections on site, that that reason alone would be sufficient to justify the current situation in which the Respondent finds itself with respect to its counterclaim…

…It was incumbent upon it to submit evidence in support of that claim, in particular evidence regarding any remedial works made necessary by the claimed defective work and their cost. The Respondent cannot rely on the impossibility or difficulty of organising a site visit in order to justify this failure to discharge its burden”.

50.
The Final Award in my view makes the position concerning the counterclaim clear. It failed not because of a lack of a site visit but because the Respondent failed to adduce evidence regarding the remedial works which it alleged were necessary by reason of defective work. TFM have therefore failed to show that a site visit might have made a difference to the outcome of the counterclaim.

Ground 2

51.
As referred to above, a pre-hearing conference was held on 25 January 2021. At the conference TFM indicated that leading counsel was recovering from COVID-19 and would not be taking an active part in the conference. It was hoped that he would have sufficiently recovered in order to take part in the merits hearing, if necessary, at the originally scheduled date.

52.
By letter dated 4 February 2021 TFM informed the Tribunal that its leading counsel had not sufficiently recovered from COVID-19 and was unable to prepare for the hearing. TFM accordingly requested that the hearing be adjourned until May, subject to the availability of the Tribunal and KCS. By letter of the same date, KCS objected to TFM's application, pointing out that leading counsel's ill-health and therefore potential unavailability for the hearing had been known at least since the pre-hearing conference of 25 January and quite probably before then.

53.
On 9 February 2021, the Tribunal issued Procedural Order No. 4, rejecting TFM's application for an adjournment of the hearing.

54.
In his witness statement Mr Mantas stated that Fasken was informed on 12 January 2021 that leading counsel had contracted COVID-19. He states that at this stage, there was no reason for Fasken to anticipate that this would impact his ability to continue to represent TFM in the lead up to and during the merits hearing, although it did have an impact on his involvement in the pre-hearing conference that took place on 25 January 2021.

55.
On the day following the conference on 25 January 2021, Mr Mantas was contacted by leading counsel who advised him that he would be unable to prepare for or attend the merits hearing as scheduled due to his increasingly poor health as a result of COVID-19. He was further informed that his doctor had advised him that he should take several months off work to recover from the illness. TFM's lawyers believed that counsel might be able to recover within several months, but not before the scheduled hearing date at the beginning of March.

56.
Mr Mantas states that new leading counsel was engaged on 27 January 2021 but then was unable to proceed. The evidence is that Mr. Paul Wright was then engaged on 6 February 2021 but it is the evidence of Mr Mantas that due to the insufficient time and the thousands of pages of materials to become familiar with prior to the hearing, he was able to conduct only a portion of the case, with the rest of the case having to be divided up and prepared by two Canadian (not English) qualified lawyers, one of whom, Mr. Gavin Cameron (based in the Vancouver office), had also only very belatedly been brought to the team as a direct consequence of counsel's illness and withdrawal.

57.
It was submitted for TFM that:

i)
Leading counsel was involved in advising and representing TFM in the Arbitration from the very outset and his participation was vital to TFM.

ii)

TFM in its letter to the Tribunal of 4 February 2021 requested an adjournment and pointed out that it had a bearing on the “fundamental right of due process”.

iii)
TFM could not have done anything to find an alternative counsel prior to 25 January 2021 as no counsel will take a booking on a provisional basis and from 26 January 2021 TFM looked for a replacement. The order of 9 February 2021 refusing an adjournment was only 10 working days before the hearing.

iv)
There comes a time when fairness demands an adjournment. Most tribunals would have adjourned in the circumstances.

v)
As to whether the decision not to adjourn was a serious irregularity where the outcome might have been different, TFM might not have lost on the estoppel argument or the adjournment to obtain expert evidence.

58.
In Procedural Order No. 4 the reasons given by the Tribunal for refusing an adjournment were as follows:

i)
the Parties’ agreement to arbitrate expressed their intention that “any arbitral proceedings [be] concluded as expeditiously as possible” and provides that such proceedings should result, if possible, in the issue of an award “within 90 days” after the “first meeting” of the Arbitral Tribunal. Recognising the impossibility of issuing an award within 90 days, the Parties and the Tribunal nonetheless established a timetable in this arbitration intended to be as expeditious as possible, including a hearing scheduled to last for up to 2 weeks, beginning on 1 March 2021.

ii)
TFM raised a “potential health issue” affecting its leading counsel, at the pre-hearing conference held on 25 January 2021. TFM indicated that counsel was suffering from COVID-19, but that he was “out of isolation” and that, although he was still not well enough to participate actively in the pre-hearing conference, he would attend it. TFM wished to inform the Tribunal of the risk that counsel might nonetheless not recover in sufficient time to be available for the hearing. It follows from this conversation that TFM must have been aware of counsel’s potential unavailability at some time prior to 25 January 2021.

iii)
Had TFM taken the view then that it must in any event have the assistance of English leading counsel at the hearing, it could have taken steps at that point to ensure counsel’s replacement, if necessary. It should, at any rate, have done so without delay after the procedural conference of 25 January 2021, when the Tribunal made clear that it did not wish to adjourn the hearing.

iv)
TFM was assisted in the proceedings by a highly-qualified legal team from a reputed international law firm, including a senior partner with considerable experience as counsel in international arbitration. It was also advised by junior counsel at the English Bar.

v)

If TFM nonetheless considered it necessary to have the assistance of leading English counsel, it was still in a position to obtain such assistance, provided it acted promptly.

59.
As referred to above, to succeed on Ground 2, TFM needs to show that this was a decision which no reasonable tribunal could have reached and that the Tribunal had gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.

60.
The Tribunal was required to consider all the circumstances and did so: TFM may not have been able to instruct alternative counsel before 25 January 2021 but as at 25 January it was aware of the risk that counsel might not recover in time for the merits hearing and by 26 January (some 4½ weeks before the merits hearing) TFM knew counsel would not be able to attend. (TFM did not raise with the Tribunal that the initial replacement which TFM appointed subsequently withdrew.) Further the Tribunal had to weigh up the delay which would be caused by an adjournment against the fact that TFM could still appoint someone to act and they would have the support of a highly experienced team of arbitration lawyers. Further in considering the delay caused by any adjournment the Tribunal was entitled to take into account the provision in the arbitration agreement which required the arbitration to be conducted as expeditiously as possible.

61.
The evidence before this court of Mr Fussell confirms that the Tribunal was entitled to take the view that TFM was assisted in the proceedings by a highly-qualified legal team from a reputed international law firm, including a senior partner with considerable experience as counsel in international arbitration (that is Mr Mantas). The evidence of Mr Fussell in this regard is as follows:

“38 In the event, TFM did instruct new counsel, Mr Paul Wright of Brick Court Chambers, who cross examined certain of KCS’s witnesses at the hearing. TFM also engaged another partner in Fasken’s Vancouver office, Mr Gavin Cameron, who cross-examined the remainder of KCS's witnesses (at least, those whom TFM chose to cross-examine following the withdrawal of the Illicit Payment Allegations) and KCS's expert (Mr Legg). Mr Wright has over thirty years' experience as a barrister at a leading set of commercial chambers. Mr Cameron is a partner in Fasken's Vancouver office who regularly acts as counsel in international arbitrations.

39 In addition, TFM’s core team of litigators at Fasken (who had been involved since the commencement of the Arbitration) included:

(1) Mr Peter Mantas, who was called to the Ontario Bar in 1994, and whose profile states that he is one of the 25 most influential lawyers in Canada who has "experience in investigations, trials, appeals, administrative hearings, and domestic and international arbitrations";

(2) Ms Alexandra Logvin, who was called to the Bar in Belarus in 1998, obtained a Master of Laws degree in Canada specialising in international commercial arbitration in 2003, and was called to the bar in Ottawa in 2010. Her profile states that she has extensive experience in arbitration; and

(3) Ms Nabila Abdul Malik, who is qualified in multiple jurisdictions (including England and Wales in 2011) and whose profile states that she has "acted as counsel in numerous international arbitration proceedings, both commercial and investment, conducted under various arbitration rules including ICSID, UNCITRAL, ICC, SIAC, LCIA and DIAC".” [emphasis added]

62.

The duty of the Tribunal is to adopt procedures suitable to the circumstances of the case avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters to be determined. As stated in Kalmneft, “the court’s powers to interfere with an arbitrator’s discretionary decision …should not be engaged unless it is clear that he has failed to have regard to the relevant facts and to his duty under section 33”. The fact that a different tribunal may have arrived at a different decision is not sufficient to interfere: it has to be a “conclusion which no reasonable arbitrator could have arrived at in the case in question having regard to his duties under s33”. That threshold has not been met on this Ground for the reasons discussed above.

Ground 3

63.
There were 2 bases on which this ground was advanced:

i)
a challenge under section 68(2)(a) arising out of the refusal of the Tribunal to allow TFM to cross examine the witnesses, Mr Fourie, the chief financial officer of KCS and Mr Fussell; and

ii)
a challenge under section 68(2)(b) asserting an excess of power.

Procedural challenge: refusal to allow cross examination of the witnesses

64.
In Procedural Order No. 5 (“PO5”) the Tribunal stated:

“The Tribunal agrees that the Claimant’s costs submission raises new factual and evidentiary issues, specifically with regard, firstly, to the recovery of the costs of funding its claims, through an agreement with a funder, Logos Agvet Limited, which is recognised by the Claimant to be a related entity. This includes issues as to whether recourse to such funding was justified by reason of the Claimant’s precarious financial situation, as to the terms and cost of the funding and their reasonableness. Secondly, the Claimant’s claim for pre and post-award compound interest at a rate of 9.5%, with monthly rests, allegedly based on the Claimant’s actual costs of borrowing, also gives rise to factual and evidentiary issues regarding the Claimant’s choice of finance providers and the forms and terms of the financing to which it had recourse.

The Tribunal considers it just and appropriate that, prior to replying on these two points, the Respondent should have the opportunity to examine the facts underlying these two claims and specifically to request the production of relevant documents which have not been spontaneously made available by the Claimant.

“However, the Tribunal does not consider it vital, for the Respondent to challenge the Claimant’s claims, that it should cross-examine Messrs. Fourie and Fussell on their respective witness statements, particularly at this late stage in the proceedings and in the light of the disclosure which the Tribunal is ordering. ” [emphasis added]

65.
However the Tribunal did make an order (in PO5) entitling TFM to request disclosure of documents relevant to the following issues:

i)
the financial and commercial position of KCS in 2020 and 2021;

ii)
the availability to KCS of sources and modes of financing, including sources other than those mentioned by the Claimant in its submissions and evidence; and

iii)
the terms and negotiation of funding KCS's claims by Logos Agvet Limited, including copies of any relevant agreement(s).

66.
It was submitted for TFM that:

i)
In P v D[2019] EWHC 1277 (Comm); [2019] 2 Lloyd's Rep. 150, Sir Michael Burton held that arbitrators had breached their duty under s.33 of the Act to act fairly and impartially as between the parties by reaching a decision on a core issue without the losing party's main witness being cross-examined on that issue.

ii)
Here, the issue of the lending fee was a core issue on costs. Factual testimony had been given by way of witness statements which were problematic. There was a real and unexplained tension between KCS's assertions of financial difficulty, and the warranty given in the funding agreement that it was solvent. These issues were also relevant to the very high rates of interest sought and awarded. There was no clarity about why the loan agreement had been taken out, or why it had been advanced by Logos. There would have been no further delay caused by a short hearing for cross examination on this subject.

67.
It was submitted for KCS that it is clear from the evidence of the correspondence that when TFM first raised the need for cross examination, KCS asked TFM to identify the questions that would be put to the witnesses. TFM stated in its submissions to the Tribunal in support of its application to cross-examine the witnesses, that the witness statement of Mr Fourie:

"raises fresh questions as to what KCS's financial situation was and is, and who its shareholders are."

TFM also sought to question Mr Fussell as to the size of the premium. It was submitted for KCS that TFM could make submissions as to the market rate and did not need to cross-examine Mr Fussell for this purpose and that the financial position of KCS and whether it was "brought to its knees" by the transaction was irrelevant. It was acknowledged for KCS in its submissions to the court that in correspondence about the requested disclosure, KCS admitted that it had not sought funding from third parties but it was submitted for KCS that no point was taken by TFM in response to this statement.

68.
The Tribunal set out the issue and its reasoning in the following extracts from the Final Award:

"410. The Respondent disputes this characterization, stressing that the Claimant's financial difficulties were essentially its own doing and that the funding agreement with Logos Agvet is little more than an opportunistic and unjustified attempt to confer a windfall benefit on a related party, i.e. on itself and its shareholders through "ill-considered funding agreements".

411. As appears from the legal authorities discussed above, the principal issue that the Tribunal needs to decide in relation to the claimed funding costs is whether they are "reasonable" in two respects: as to the principle of the Claimant having recourse to this type of funding and as to the amount.

412. With regard to the principle of the Claimant's having recourse to litigation funding (as opposed to having recourse to loan finance on commercial terms) it is not, in the Tribunal's view, a determining factor whether the Claimant's financial difficulties, which are not disputed, were caused exclusively by TFM's non-payment of KCS' invoices, together with the recourse to complex, expensive and ultimately, unjustified litigation, or whether TFM's conduct merely contributed to these difficulties, thus making a bad situation worse. The issue, in both cases, is whether the Claimant's recourse to this kind of funding was reasonable in the circumstances. In other terms, KCS' position does not have to be on all fours with that of Norscot in relation to Essar in order for KCS' funding choice to be considered reasonable.

413. The same is true of the fact that the funder Logos Agvet Limited is controlled by a shareholder of KCS and that the funding transaction is therefore not considered as an arms' length transaction. Subject to the terms, i.e. the cost of the transaction, discussed below, the question remains whether such a choice by KCS was reasonable in the circumstances.

414. Based on the facts of this case, the Tribunal considers that KCS' decision to obtain funding from Logos Agvet is not inherently unreasonable. In the first place, it is clearly not designed to enrich KCS. It is not disputed that, under the terms of the funding agreement, the funding fee will be payable to Logos Agvet which, despite their common shareholder, cannot be conflated with KCS. Furthermore, the fact that Logos Agvet was a related party, controlled by a shareholder of KCS, may well have been an advantage from the viewpoint of KCS, given the knowledge that the funder may thereby be presumed to have had of KCS' affairs, including its dispute with TFM. This would certainly have helped KCS to reach agreement for the required funding more quickly, without the need for the "extensive" evaluation and due diligence process which is usual with professional third-party litigation funders, as described by the Respondent's expert. This process would not have been made any easier by the nature and amount of the counterclaims advanced by TFM against KCS.

415. In any case, it is doubtful, on the basis of the available evidence, whether KCS, given its financial position, would have been able to obtain funding for its arbitration costs on the basis of normal commercial financing such as bank loans or overdrafts." [emphasis added]

69.
The court was not taken to the authority of P v D in oral submissions. However it is clear that the factual situation was very different. In that case the credibility of the witness was a core issue and the Tribunal had reached its conclusion on credibility in the absence of any cross examination. That is not the position here.

70.
I do not accept the relevance of the "unexplained tension" between the assertions of financial difficulty and the warranty of solvency: the financial difficulties of KCS were not disputed (paragraph 412 of the Final Award) and it was acknowledged that the funder Logos Agvet Limited was controlled by a shareholder of KCS and that the funding transaction was therefore not considered as an arms' length transaction (paragraph 413 of the Final Award).

71.

The issue for the Tribunal was whether the recourse to this kind of funding was reasonable in the circumstances, not whether KCS could have obtained funding from other sources. The Tribunal was entitled to reach the conclusion that cross examination was not necessary having regard to the stage of the proceedings and the disclosure. TFM has not shown that the refusal to allow cross examination was a decision which no arbitrator could reasonably have reached in the circumstances of the case.

Excess of power

72.
The power to award costs is in Section 61 of the Act:

"(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties."

73.
Section 59 of the Act provides:

"(1) References in this Part to the costs of the arbitration are to – (a) the arbitrators' fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties."

74.
The relevant sections of the Final Award dealing with the costs of funding obtained by KCS from its ultimate shareholder and the power to award such costs are as follows:

"405. The Claimant also claims USD 1,514,217 as the cost of funding obtained from Logos Agvet Limited, a company owned by one of the Claimant's shareholders, as discussed below. This amount includes a fixed fee or markup, payable in the event of a successful outcome for the Claimant, of 100% of the amount of the funding, namely USD 1,300,000 plus a variable fee of USD 214,317.

406. Under the Arbitration Act 1996, section 59(1), includes in the definition of "costs of the Arbitration" "the legal or other costs of the parties". Similarly, the ICC Rules, Article 38(1) define the costs of the arbitration as including "the reasonable legal and other costs incurred by the parties for the arbitration".

407. The first question which arises is therefore whether as a matter of English Law and under the ICC Rules funding costs as claimed are to be considered as "other costs" of the parties for the purpose of the arbitration. Essar Oilfields Services v. Norscot Rig Management is cited by the Claimant as authority for the proposition that funding costs are "other cost" of the parties.

408. It is notable that the Court in Essar relied on an ICC Bulletin dealing with costs in international arbitration as a basis for its decision that funding costs could constitute recoverable costs. The ICC Bulletin states, in particular, that "a tribunal only needs to satisfy itself that a cost was incurred specifically to pursue the arbitration, has been paid or is payable, and was reasonable". The Court reached its conclusion that the decision to award funding costs fell within the arbitrator's discretion and was subject to the requirement of reasonableness.

409. The Claimant also emphasizes what it describes as the "strikingly similar" facts of the Essar case to the present arbitration. The arbitrator in Essar found that Essar, a large company which employed Norscot, a small service-provider, had set out to "cripple" Norscot and to exert pressure on it before and during the arbitration. Essar had made "unjustified personal attacks and allegations of fraud and dishonesty" against Norscot, which had had no choice but to enter into a funding agreement at a cost

of 300% of the funding advanced, or 35% of the sum recovered. The Claimant, on the basis of the evidence of Mr Fourie, asserts that TFM's behaviour was essentially on all fours with that of Essar, leaving KCS with no option but to have recourse to a funding agreement.

410. The Respondent disputes this characterization, stressing that the Claimant's financial difficulties were essentially its own doing and that the funding agreement with Logos Agvet is little more than an opportunistic and unjustified attempt to confer a windfall benefit on a related party, i.e. on itself and its shareholders through "ill-considered funding agreements".

411. As appears from the legal authorities discussed above, the principal issue that the Tribunal needs to decide in relation to the claimed funding costs is whether they are "reasonable" in two respects: as to the principle of the Claimant having recourse to this type of funding and as to the amount."

75.
As set out above the Tribunal accepted the argument that as a matter of English Law the funding costs claimed are to be considered as "other costs" of the parties for the purpose of the arbitration by virtue of section 59(1) of the Act. Essar Oilfields Services v. Norscot Rig Management[2016] EWHC 2361 (Comm), [2017] Bus LR 227 was cited by KCS as authority for the proposition that funding costs are "other costs" of the parties within the meaning of the Act.

76.
TFM submitted that:

i)
Any power of the Tribunal to award costs could only have come from the Act. By s.61(1), the Tribunal was entitled to make an award allocating the "costs of the arbitration" as between the parties. By s. 59, costs of the arbitration meant, among other things, "the legal or other costs of the parties".

ii)
The power is limited to a power to order the "costs of the arbitration" and that the definition of that term "costs of the arbitration" which extends to "legal costs and other costs" must be read as subject to the phrase "costs of the arbitration" and thus costs which "relate to" the arbitration are not within the power to award the "costs of the arbitration".

iii)
When the Act was passed, no one could reasonably have thought that Parliament intended that either "costs of the arbitration" or the "legal or other costs of the parties" could possibly have encompassed any of (a) a fee paid to a litigation funder, (b) costs relating to a loan taken out to pay for legal costs.

iv)
As to (a), it was clear in 1996 and has remained clear that a fee payable to a litigation funder is not recoverable in litigation, and there is no reason to think Parliament intended any different for arbitrations. It is not a cost "of the arbitration", but a cost payable to a funder if the arbitration is successful. As to (b), costs relating to a loan taken out to pay for legal costs were in 1996 and remain irrecoverable.

v)
The decision in Essar Oilfields is wrong and has been met with surprise and concern in the field of international arbitration. This case, however, is much worse than Essar Oilfields. This is not a case where litigation funding was provided by a regulated third party funder. This is a case where the funding came from a related company owned by one of KCS's shareholders. There was no finding that

KCS needed the funding in order to pursue the arbitration – in the loan agreement it warranted its solvency (which must have included its ability to pay the legal fees already accrued). If this Award is permitted to stand, it will encourage claimants to take out shareholder loans, so that shareholders can try to recover further "fees", safe in the knowledge that, unlike third party funders in the world of litigation, they are beyond the reach of the arbitral tribunal and the Courts if they fund arbitrations which fail.

77.
It was submitted for KCS that:

i)
TFM seeks to dress up an alleged error of law as an excess of powers; an error of law is not an excess of power;

ii)
There is power to award legal and other costs under s.59(1)(c); the meaning and scope of that term was for the Tribunal – if there had been an error in construction that would be error of law under s.69 (any challenge to which was excluded by agreement);

iii)
A court should "generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so": Willers v Joyce (No 2)[2016] UKSC 44, [2018] AC 843 at [9]. TFM has not identified any powerful reason not to follow Essar. The Court's reasoning in Essar at [41]-[47] is detailed and compelling. Further, TFM has not identified any case (in any jurisdiction) where this element of Essar has been doubted.

iv)
TFM waived its right to object; TFM did not argue in the arbitration that Essar was wrongly decided and did not object at the time that the Tribunal lacked power to award funding costs.

78.
It was common ground that it is not sufficient for TFM to show that either the Award or the decision in Essar Oilfields is merely wrong as a matter of law. TFM must show that amounted to an excess of powers for the purposes of section 68(2)(b) of the Act.

79.
The starting point is the House of Lords decision in Lesotho Highlands Development Authority v Impregilo SpA[2005] UKHL 43, [2006] 1 AC 221. In that case Lord Steyn had to consider the relationship between section 69 and section 68 in relation to the interpretation of the underlying contract.

80.
At [3] he said:

“The question arises how section 68(2)(b) and section 69, so far as the latter excludes a right of appeal on a question of law, are to operate. Specifically, can an alleged error of arbitrators in interpreting the underlying or principal contract be an excess of power under section 68(2)(b), so as to give the court the power to intervene, rather than an error of law, which can only be challenged under section 69 if the right of appeal has not been excluded?”

81.

The issue in that case was whether there was a power to make an award in different currencies. The arbitrators relied on section 48(4) of the Act:

“(4) The tribunal may order the payment of a sum of money, in any currency.”

82.
The arbitrators stated:

"... section 48 applies 'unless otherwise agreed by the parties'. The respondent contended that the matter of currencies was dealt with under the contract. While this may provide for the currencies in which payment under the contract is to be made, the contract is silent as to the currency in which any arbitral award is to be given. The tribunal is of the opinion that the parties have not 'otherwise agreed' on the powers available to the tribunal, and the tribunal accordingly concludes that it has the power to order payment of any sum of money found to be due in any currency. Accordingly, while the tribunal takes careful note of the contract currencies and their stated proportions, the tribunal will express its awards in such currencies as are considered appropriate in the circumstances."

83.
The Court of Appeal held that Section 48(4) does not create a free-standing power to choose whatever currency arbitrators might think appropriate when the terms of a contract are clear.

84.
The issues were formulated by Lord Steyn at [16] as:

“(a) Did the tribunal have the power to express the award in the currencies they did pursuant to section 48(4) of the Act or was any power that might otherwise have been available under that section excluded or modified by the terms of the principal contract?

(b) If the decision of the tribunal on the currency point amounted to an error of law, did it constitute an excess of jurisdiction under section 68(2)(b)?”

85.
Lord Steyn noted at [18] the “ethos” behind the Act as expressed by Lord Wilberforce:

"...It has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors."

86.
Lord Steyn continued at [22]-[32]:

“22. Section 48 provides that unless otherwise agreed by the parties, the tribunal may order the payment of a sum of money, in any currency. Any agreement to the contrary is only effective if in writing: section 5(1). The Court of Appeal did not take into account the radical nature of the alteration of our arbitration law brought about by the 1996 Act...But for this approach [having regard to case law pre 1996 Act] the Court of Appeal would have had no reason to disagree with the natural and commercially sensible construction of the wide words of section 48(4) which the tribunal adopted. I would hold that the power of the tribunal under section 48(4) was unconstrained and was available to the tribunal...”

23. Contrary to the view I have expressed, I will now assume that the tribunal committed an error of law. That error of law could have taken more than one form. The judge (para 25) and the Court of

Appeal (para 35) approached the matter on the basis that the tribunal erred in the interpretation of the underlying contract. Another possibility is that the tribunal misinterpreted its powers, under section 48(4) to express the award in any currency. Let me approach the matter on the basis that there was a mistake by the tribunal in one of these forms. Whichever is the case, the highest the case can be put is that the tribunal committed an error of law.

24. But the issue was whether the tribunal "exceeded its powers" within the meaning of section 68(2)(b). This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail.

25 The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 which is so well known to the public law field. It is, however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the 1996 Act. Sir Michael J Mustill (now Lord Mustill) and Steward Boyd QC (Law and Practice of Commercial Arbitration in England, 2nd ed (1989) p 555) explained:

"If … [the arbitrator] applies the correct remedy, but does so in an incorrect way - for example by miscalculating the damages which the submission empowers him to award - then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure."…

29… But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the "correct decision" could afford a ground for challenge under section 68. On the other hand, section 68 has a meaningful role to play. An example of an excess of power under section 68(2)(b) may be where, in conflict with an agreement in writing of the parties under section 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between section 68(2)(b) and section 68(2)(e) . The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator…

32. In order to decide whether section 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under section 68(2)(b).” [emphasis added]

87.
In Essar essentially the same arguments as were advanced by TFM before this court were rejected by HHJ Waksman QC. HHJ Waksman considered the authorities including Lesotho and Lord Steyn's

judgment at [24], [31] and [32]. HHJ Waksman's reasoning for rejecting the proposition that this was an excess of powers within s.68(2)(b) is essentially at [41] and [42] of the judgment:

"41. As Lord Steyn noted, in order to see if what the arbitrator did fell within s.68(2)(b) as being in excess of his powers or whether it was no more than an erroneous exercise of a power that he did have, it is necessary to focus "intensely on the power concerned". In my judgment, the relevant power here is the undoubted power to award costs. If the arbitrator fell into error, it was an error as to the scope of such costs by reason of his allegedly erroneous interpretation of s.69(1)(c) and Rule 31(1).

42. I accept that, if one characterised the relevant power as being the power to order that one side pays the other side's costs of obtaining litigation funding, or conversely, the power to order by way of costs such sums which do not include the costs of litigation funding, one could say as a matter of language that he was exercising a power that he did not have. But, if that was the correct approach, one could re-describe many, if not all, errors of law in that way. Indeed, an erroneous exercise of power itself could in theory almost always be re-described as an excess of power. However, according to the Lesotho Highlands Development Authority case [2006] 1 AC 221, there is a real and vital distinction to be made between the two. In my judgment, to characterise the arbitrator's error here in that way would be wholly unrealistic and artificial, and it goes against the grain of the strict and narrow confines in which s.68 is to operate." [emphasis added]

88.
HHJ Waksman concluded at [45] that the case was "analogous to Lesotho" and there was no serious irregularity.

89.
HHJ Waksman then went onto consider the construction of "other costs" although in light of his finding it was not necessary to his decision. HHJ Waksman held that a litigation funding agreement was within the scope of the section as falling within "other costs".

90.
TFM submitted that HHJ Waksman was wrong to find at [53] that ""costs of arbitration" is not some prior limiting definition" and at [58] to ask whether the costs "relate to the arbitration".

91.
TFM's submissions focussed on the decision in Essar and submitted that its conclusion that a litigation funding agreement was within the scope of the relevant provision as "costs of the arbitration" has led to an undesirable distinction between the position in proceedings before the courts where such costs are not recoverable and the position in arbitration. It was submitted for TFM that the decision in Essar was wrong and should not be followed.

92.
In light of Willers v Joyce this court should "generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so". In my view the decision of HHJ Waksman on section 68 was an application of the approach laid down by Lord Steyn in Lesotho and I concur with his view.

93.
Whilst I note the submissions for TFM of the effect of HHJ Waksman's judgment on the construction of the section, this does not go to the issue of whether there was an excess of power which is within section 68 or merely the erroneous exercise of an available power. In my view the submissions for

TFM before this court as to what constitutes an excess of power were considered and rejected by Lord Steyn in Lesotho having regard to “the radical nature of the alteration of our arbitration law brought about by the 1996 Act”. In Essar HHJ Waksman then applied those principles to section 61 and litigation funding agreements.

94.
I decline to depart from the finding of HHJ Waksman in Essar on the ambit of section 68; in my view he was correct to conclude that at its highest this was an erroneous exercise of an available power and not susceptible to challenge under section 68.

95.
It was submitted for TFM that the Tribunal has purported to award as costs, costs which are not “costs of the arbitration” and that requires a remedy. If there was such an error of law there is a remedy under section 69. However in the present case that remedy is excluded by agreement. Having reached such an agreement it is not open to a party to circumvent it by characterising an alleged error of law as an excess of power.

96.
As to the public policy ground this was not pursued in written or oral submissions for TFM. In order for the challenge under Ground 3 to succeed on public policy grounds it has to be shown that:

“there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.” (Process & Industrial Developments v Republic of Nigeria [2019] EWHC 2241 (Comm) at [98]).

97.
Further, in considering whether there should be a refusal of enforcement of an award on the grounds of public policy:

“it is necessary to have regard to, and take into account, the strong public policy in favour of enforcing arbitral awards” (Process & Industrial Developments at [100]).

98.
In my view having regard to the relevant legal principles in the circumstances the challenge on Ground 3 on the basis of public policy must fail.

Ground 4

99.
It was submitted for TFM that the Tribunal decided not to give TFM an opportunity to cross-examine KCS’s witness (Mr Fourie) about the very limited evidence that had been put forward by KCS to support its claim for compound interest (notwithstanding that PO5 makes it clear that it was the Tribunal’s view that KCS’s “claim for pre and post-award compound interest at a rate of 9.5%, with monthly rests, allegedly based on KCS’s actual cost of borrowing, also gives rise to factual and evidentiary issues regarding KCS’s choice of finance providers and the forms and terms of the financing to which it had recourse”), and instead TFM was left to rely on documents produced by KCS and its written submissions based on those documents to raise its concerns which was not an effective or adequate substitute.

100.

PO5 is set out above in relation to the procedural challenge on Ground 3. Under section 49(3) of the Act the power to award interest is at such rates and with such rests as the tribunal considers meets the justice of the case. The decision not to allow cross examination is a procedural matter within the discretion of the Tribunal. As referred to above, in the exercise of its discretion the Tribunal ordered disclosure of certain documents but was of the view that cross examination was not "vital". Again P v D can be distinguished on its facts. TFM has not established that in the circumstances this was a decision that no reasonable arbitrator could have reached.

101.
Further in my view TFM has not established that had cross examination been permitted the outcome might well have been different. The Tribunal held as follows:

"380 In order to determine the applicable rate which would "best meet the justice of the case", the Tribunal considers it appropriate to have regard, among other things, to the creditor's cost of borrowing. The Claimant has provided a list of its outstanding loans and other credit facilities. This shows that, at 31 December 2020, KCS had 21 outstanding credit facilities, including bank overdraft and asset-based facilities and that the applicable annual interest rates ranged from 7.5% to 13.5%. Although only some of the documents are available, it seems that in a number of cases, including bank overdrafts and supplier credits, applicable interest was compounded monthly.

381. The Respondent argues that such high cost of finance reflects the compromised financial position and poor management of KCS prior to the dispute which has arisen with TFM; It is, contrary to KCS' allegations, due to problems with other projects, unrelated to the TSF and unrecovered sums due by other KCS debtors, unrelated to TFM. It is also due to a general business decline.

382. The Tribunal agrees that the evidence shows that KCS' financial position in 2019-2020 was fragile and suffered a decline, but that this seems in significant part to have stretched back to previous years and cannot have been entirely caused by the dispute with TFM and the unpaid receivables relating to the TSF and the SCATS Agreements. At the same time, KCS' financial position, already weakened as it was, must necessarily have been further weakened by TFM's failure, in 2019, to pay amounts due in excess of USD 10 million.

383. In reality, it matters little to the Tribunal's decision on interest whether KCS' weak financial position, which is undisputed, was caused exclusively or even principally by the actions of the Respondent. What matters is that the interest rate chosen reflect as closely as possible the actual cost of borrowing of KCS, based on relevant market rates (as opposed to penalty or default interest rates). " [emphasis added]

102.
The Tribunal had evidence as to the rates of interest under KCS's outstanding credit facilities. It was of the view that the interest rate awarded should reflect the cost of borrowing. It was able to form a view as to the cost of borrowing from the evidence. TFM have not established that cross examination might have led to a different outcome on the award of compound interest at 9%. TFM raised no objection at the time as to the disclosure.

103.
As to the ground of public policy this was not pursued in written or oral submissions for TFM. In my view TFM has not met the test set out in Process & Industrial Developments referred to above. This basis for the challenge under Ground 4 falls to be dismissed.

Additional ground

104.
CPR 62.9 provides for an extension of the period of 28 days for challenging an award under section 68 but requires an application to be made stating the grounds on which the application is made.

105.
The principles to be applied by the court were set out by Popplewell J in Terna Bahrain v Bin Kamil [2012] EWHC 3283 (Comm) at [27]:

"The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities, most notably in Kalmneft JSC v Glencore International AG [2001] 2 All ER (Comm) 577, Nagusina Naviera v Allied Maritime Inc[2002] EWCA Civ 1147, [2003] 2 CLC 1, L Brown & Sons Ltd v Crosby Homes (North West) Ltd [2008] EWHC 817 (TCC), [2008] BLR 366, Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH[2010] EWCA Civ 1100, [2011] 2 All ER (Comm) 327, and Nestor Maritime SA v Sea Anchor Shipping Co Ltd [2012] EWHC 996 (Comm), [2012] 2 Lloyd's Rep 144, from which I derive the following principles. (1) Section 70(3) of the 1996 Act requires challenges to an award under ss 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the 1996 Act, and which is enshrined in s1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the 1996 Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the 1996 Act. (2) The relevant factors are: (i) the length of the delay; (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so; (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 in respect of the arbitration, 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. (3) Factors (i), (ii), and (iii) are the primary factors" [emphasis added]

106.
The length of the delay in this case is significant at 69 days. No reasons have been given for the application being made out of time. I note that Popplewell J stated at [29] that:

"In seeking relief from the court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible"

107.
It is merely submitted for TFM that KCS did not identify the issue at the time.

108.
However I also note that Popplewell J was of the view at [32]-[33] that the court should have regard to the merits of the challenge where it has heard the substantive application:

"[32] The position, however, is different where, as has happened in the current case, 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. The court is in a position to decide whether the challenge is a good or a bad one. If the challenge is a bad one, this should be determinative of the application to extend time. Whilst it may not matter in practice whether the extension is allowed and the application dismissed, or whether the extension is simply refused, logical purity suggests that it would be wrong to extend time in those circumstances: there can be no justification for departing from the principle of speedy finality in order to enable a party to advance a challenge which will not succeed.

“[33] Conversely, where the court can determine that the challenge will succeed, if allowed to proceed by the 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 cases 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. Given the high threshold which this involves, the other factors which fall to be weighed in the balance must be seen in the context of the applicant suffering substantial injustice in respect of the underlying dispute by being deprived of the opportunity to make his challenge if an extension of time is refused. 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”

109.
It was submitted for TFM that a success fee payable to a solicitor or barrister is not within the intended meaning of “costs of the arbitration” or “legal or other costs of the parties”. It was further submitted for TFM that a success fee was not recoverable in 1996 and although it was recoverable between 2000 and 2015 such a fee is no longer recoverable by virtue of statute.

110.
For the reasons discussed above in relation to Ground 3, this challenge goes to the construction of the relevant sections and could only be brought under section 69 and is not an excess of power. It is not therefore necessary for this court to decide whether as a matter of construction “other costs” would include a CFA.

111.
Accordingly even if the court were to grant an extension of time, this additional ground would fail under section 68.

Conclusion

112.
The application by TFM falls to be dismissed for the reasons set out above on all grounds.