Neutral Citation Number: [2019] EWHC 1832 (Comm)

Case No: CL-2019-000055

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

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

Date: 12/07/2019

Before:

THE HONOURABLE MRS JUSTICE MOULDER

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Between:

(1) THE ISLAMIC REPUBLIC OF PAKISTAN **(2) THE NATIONAL ACCOUNTABILITY BUREAU**	**Claimants/ Respondents in the Arbitration**
- and –	
BROADSHEET LLC	**Defendant/ Claimant in the Arbitration**

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- -

Mr M Levy QC & Ms K Limond (instructed by **Allen & Overy LLP**) for the Claimants
Mr B Pilling QC & Mr D Khoo (instructed by **Crowell & Moring**) for the Defendant

Hearing dates: 28 June 2019

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APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is the judgment on the claimants' application to challenge part of the Part Final Award (Quantum) dated 17 December 2018 (the "Quantum Award") pursuant to Section 68 of the Arbitration Act 1996 (the "Act").

2. In support of their application, the claimants rely on the first and second witness statements of Ms Limond, a solicitor with Allen & Overy LLP, acting for the claimants, dated 28 January 2019 and 20 March 2019.

Background

3. The first claimant is the State of Pakistan and the second claimant is the National Accountability Bureau which came into existence to combat white-collar crime and corruption-related offences.

4. The defendant, a company incorporated in the Isle of Man, is currently in liquidation.

5. The defendant was engaged pursuant to an asset recovery agreement dated 20 June 2000 (the "ARA") to trace and locate assets taken from the State and other institutions and transfer them back to the State. Under the ARA in relation to assets recovered, the defendant was to receive 20% of the "amount available to be transferred".

6. By a letter dated 28 October 2003, the second claimant gave notice to rescind the ARA to the defendant and stated that the defendant had committed repudiatory breaches of contract.

7. The defendant commenced arbitration proceedings against the claimants between 2009 and 2011.

8. The liability phase of the proceedings was heard in January 2016 and an award on liability was issued in favour of the defendant dated 1 August 2016.

9. The quantum hearing took place on 16 – 19 July 2018 and the Quantum Award was issued on 20 December 2018.

10. The tribunal awarded the defendant US$21,589,460 plus interest as damages for the breach and repudiation of the ARA by the claimants.

11. The majority of the claim related to the defendant's loss of the chance claim in relation to the Sharif family, namely the value of the chance it lost to receive payment under the ARA in respect of recoveries made from Mr Sharif and his family.

Proceedings under Section 68

12. These proceedings were commenced on 28 January 2019. The proceedings were originally brought primarily pursuant to section 68 (2)(d) of the Act which relates to a failure by the tribunal to deal with all issues that were put to it; namely an alleged failure by the tribunal to apply a "loss of chance" discount to the damages awarded in respect of the "Sharif Family Other Assets".

13. On 14 January 2019 the claimants made an application to the tribunal under Section 57 of the Act for certain corrections to the Quantum Award including the correction of the omission in relation to the application of the "loss of chance discount" in respect of the Sharif Family Other Assets. The tribunal made a ruling dated 19 February 2019 in which it determined that there was no omission in relation to the "loss of chance discount".

14. In the light of the Section 57 ruling, part of the claimants' challenge in these proceedings was withdrawn and the challenge was narrowed to a challenge under Section 68 (2)(c) and/or (h) of the Act.

Section 68 of the Act

15. Section 68 provides (so far as material):

> "(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) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

"(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—"

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

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

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

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

(4) The leave of the court is required for any appeal from a decision of the court under this section." [emphasis added]

16. Section 70 provides (so far as relevant):

"(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award—

(a) does not contain the tribunal's reasons, or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose."

Relevant law

17. The following principles relevant to a challenge under Section 68 were common ground:

i) Section 68 imposes a high hurdle for applicants – *Lesotho Highlands Development Authority* [2006] 1 AC 221 at [26]:

> "a major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process";

ii) there will only be a serious irregularity if what has occurred is "far removed from what could reasonably be expected from the arbitral process": Field J in *The Ojars Vacietis* [2012] 2 Lloyd's Rep 181 at [30];

iii) the importance of upholding arbitration awards has been repeatedly stressed: Bingham J in *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (cited in *The Ojars Vacietis* at [34]):

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

iv) The requirement of "substantial injustice" in Section 68 is additional to that of a serious irregularity and an applicant must establish both: *Terna Bahrain Holding Co YJJ v Bin Kamel Al Shamzi* [2013] 1 Lloyds Rep 86 at [85 (vi)]

Submissions

18. It was submitted for the claimants that:

i) Article 9 of the Chartered Institute of Arbitrators Rules 2000 (which applied to the arbitration in this case) provides that:

> "any award… shall contain sufficient reasons to show why the arbitrator has reached the decisions contained in it"
>
> Section 52 (4) of the Act also provides that the award:
>
> "shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons"

ii) the serious irregularity is that sufficient (or any) reasons were not given by the tribunal to enable the claimants to understand why the tribunal valued the loss of chance claim for the Sharif Family "Other Assets" at US$19 million and how the loss of chance discount has been applied; the damages awarded in respect of the Sharif Family Other Assets formed the most significant part of

the Quantum Award financially: US$19 million of the US$21.6 million awarded to the defendant; in respect of the other two targets for whom damages were awarded, Mr Sherpao and Mr Ansari, the tribunal provided reasons, identifying the relevant assets and their value, the deductions applied and the loss of a chance discount awarded. By contrast it was submitted that there is no explanation in the Quantum Award as to the "discount" that has been applied to the Sharif Family Other Assets or the method by which this was reached or what net figure it was applied to.

iii) a failure of reasoning may enable a challenge under Section 68(2)(h) *Compton Beauchamp Estates Ltd v Spence* [2013] EWHC 1101 (Ch); .

iv) the availability of relief under section 70(4) does not preclude an application being brought under section 68 (2) (c) and (h). In particular section 70(4) gives the court power "on an application or an appeal" to ask the tribunal for reasons if it needs to determine a challenge. It does not provide an applicant with a self-standing right of appeal. The courts' power under section 70(4) is contingent on an application under section 68 rather than being made independently.

19. It was submitted for the defendant that:

i) the claimants' case is that "not enough" reasons were given and not that the reasoning was "defective or analytically insufficient". The court is therefore concerned with whether or not more reasons should have been given and not whether the reasons were good or bad.

ii) there is a line of authority in the Commercial Court to the effect that there can be no challenge to an award under Section 68 for insufficient reasons: *Margulead v Exide Technologies* [2005] 1 Lloyd's Rep 324; *World Trade Corporation v Czarnikow Sugar* [2005] 1 Lloyd's Rep 422; *ABB v Hochtief Airport* [2006] 2 Lloyd's Rep 1 (cited with approval in *The Ojars Vacietis*) and *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm);

iii) These authorities were not apparently cited to the court in *Compton*. These authorities are irreconcilable with *Compton*. The authorities which were referred to in the judgment in *Compton* did not relate to section 68 (with the exception of *Benaim (UK) Ltd* [2005] EWHC 1370 which the judge declined to follow).

20. The issues for this court are therefore:

i) Can "inadequate reasons" (as such term is advanced by the claimants) found a challenge under section 68 (2)(c) or (h)?

ii) Were "adequate" reasons given in this case?

iii) If "inadequate reasons" were given, does this amount in this case to a serious irregularity and a substantial injustice?

Can "inadequate reasons" (as such term is advanced by the claimants) found a challenge under section 68 (2)(c) or (h)?

21. The claimants relied on *Compton* at [36] and [51]:

> "[36]…There is a difference between a failure to deal with an essential issue, which is an irregularity within section 68(2)(d) , and some other failure of reasoning, which is not. A failure of reasoning might in some cases allow a party to seek clarification under section 57(3) or might allow a party to seek an order from the court under section 70(4) . Further, a failure of reasoning may give rise to an irregularity within section 68(2)(f) or may mean that the form of the award does not comply with section 52(4) , thereby enabling a party to contend that there is an irregularity within section 68(2)(h) . I will, later in this judgment, consider in detail the scope of the duty of an arbitrator to give reasons for his award."

> "[51] It is clear from the above citations that an arbitrator should explain why he has decided the essential issues in the way in which he has. An award which did not contain such reasoning would not comply with section 52(4) of the 1996 Act and that would give rise to an irregularity within section 68(2)(h) of the 1996 Act. However, there will only be a "serious irregularity" if the failure of reasoning has caused or will cause substantial injustice to a party…" [emphasis added]

22. In *Margulead* it was submitted that contrary to Section 68(2)(d) in preparing his Final Award the arbitrator failed to consider or even refer to an argument advanced by Margulead that Exide had affirmed the contract in dispute and therefore could not rely on the allegation that the contract had been entered into by mutual mistake. Colman J said:

> "[39] The essence of Margulead's complaint is that the arbitrator made no reference in his Award to the argument that Exide could not rely on mutual mistake as a defence because it had affirmed the agreement.
>
> [40] Margulead had specifically raised the affirmation and election point in its post-hearing brief. Exide also dealt with the point in its post-hearing brief. The arbitrator stated in his Correction Award in response to Margulead's application that he had given full consideration to all Margulead's arguments....
>
> [41] A deficiency of reasons in a reasoned award is not capable of amounting to a serious irregularity within the meaning of Section 68 of 1996 Act unless it amounts to a "failure by the tribunal to deal with all the issues that were put to it" within Section 68(2)(d). In construing the meaning of (d) one must have regard to Section 70(4). This provides:

> "(4) If on an application or appeal it appears to the court that the award
>
> (a) does not contain the tribunal's reasons, or
>
> (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,
>
> the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose."
>
> [42] Deficiency of reasoning in an award is therefore the subject of a specific remedy under the 1996 Act. It is accordingly self-evident that:
>
> i) failure to deal with an "issue" under Section 68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it;
>
> ii) Parliament cannot have intended to create co-extensive remedies for deficiency of reasons one of which (Section 68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (Section 70(4)) was designed to provide a specific remedy for a specific problem;
>
> iii) the court's powers under Section 68(2) being engaged only in a case where the serious irregularity has caused substantial injustice, the availability of the facility to apply for reasons or further reasons under section 70(4) would make it impossible to contend that any "substantial injustice" had been caused by deficiency of reasons.
>
> 43.. The meaning of "failure to deal with all the issues" must therefore refer to a failure to deal with a claim or a distinct defence to a claim advanced before the tribunal and not merely to an omission to give reasons for the tribunal's conclusion in respect of such claim or defence. It is in those cases in which the award expresses no conclusion as to a specific claim or a specific defence that the Award can be said to have failed to deal with an issue." [emphasis added]

23. Whilst *Margulead* was dealing with section 68(2)(d), the reasoning in [41] and [42] appears to be of wider application, in particular in relation to the conclusion that a deficiency of reasons was not capable of amounting to a serious irregularity under section 68 having regard to what the judge described as the "specific remedy" under section 70(4).

24. In *Czarnikow Sugar* Colman J said at [9]:

> " In this connection [an application under section 57], it is clear that arbitrators are not in general required to set out in their reasons an explanation for each step taken by them in arriving at their evaluation of the evidence and in particular for their attaching more weight to some evidence than to other evidence or for attaching no weight at all to such other evidence."

25. *Czarnikow Sugar* was a case dealing with section 68(2)(d) as is clear from the following passages:

> "[45] On analysis, these criticisms are all directed to asserting that the arbitrators misdirected themselves on the facts or drew from the primary facts unjustified inferences. Those facts are said to be material to an "issue", namely what were the terms of the oral agreement. However, each stage of the evidential analysis directed to the resolution of that issue was not an "issue" within Section 68(2)(d). It was merely a step in the evaluation of the evidence. That the arbitrators failed to take into account evidence or a document said to be relevant to that issue is not properly to be regarded as a failure to deal with an issue. It is, in truth, a criticism which goes no further than asserting that the arbitrators made mistakes in their findings of primary fact or drew from the primary facts unsustainable inferences.
>
> [46] Accordingly, even assuming that each of the criticisms of the arbitrators' reasoning advanced on behalf of WTC was well-founded, such mistakes and omissions could not fall within Section 68(2)(d)."

No other basis under Section 68 was relied upon and the decision is therefore of little assistance in the present case.

26. In *ABB* one of the grounds of challenge under Section 68 was that the tribunal failed to decide or even to refer to the "Greek law issue". The court found*:*

> "77. By the time the arbitrators reached paragraph 174 of their award the dispute was already resolved in favour of HTA. The arbitrators had no formal need to set out their conclusions on the remaining matters argued…
>
> 80. Accordingly the attack on paragraph 174 of the award is in my judgment in substance a criticism of the adequacy of the reasons rather than an assertion of an irregularity such as is contemplated by s.68 . The points which each side were taking were fully canvassed in evidence and argument. Even if there was lingering uncertainty as to the extent of HTA's case on Greek law, which I do not think there was, still acceptance by the tribunal of ABB's case as to the restricted ambit of the nemo auditur doctrine would be sufficient to render its own bad faith completely irrelevant, whether as conduct debarring it

> from complaining of another's bad faith or as conduct rendering that which would otherwise be bad faith good faith. In presenting its argument ABB sought to establish that the foundation upon which either way of putting the point depended simply did not exist. ABB was not deprived of the opportunity fairly to deal with the point. The tribunal did not fail to deal with an issue that was put to it. The issue here was whether HTA was in breach of its duty of good faith in refusing to accept Horizon's unilateral declaration. The tribunal dealt with that submission by rejecting it. The reasoning set out in support thereof may be unsatisfactory but that is not of itself a serious irregularity such as is mentioned in s.68 . It is suggested that if the arbitrators did not apply Greek law in coming to their conclusion then they exceeded their powers, an irregularity under s.68(2)(b) . It is however in my judgment inconceivable that the arbitrators did not apply Greek law in coming to their conclusion. There are references to Greek law at paragraphs 154, 173 and 175 of the award and it is plain to me that the arbitrators fully understood that they were applying the provisions of Greek law to the relevant parts of the dispute. The bulk of the third day of the arbitration hearing was taken up with cross-examination of expert witnesses, including vigorous questioning by the tribunal, as to the law of Greece relevant to these issues. It would of course have been happier had the arbitrators made some overt reference, in however summary form, to the issue of Greek law upon which they had heard such extensive argument. But it is not for this court to tell an international commercial tribunal how to set out its award or the reasons therefor. Furthermore, strictly speaking the arbitrators did not need to address this issue at all as they had already conclusively decided the dispute in HTA's favour on the Article 37.8 point. In reality, looked at in the light of all the material now before the court, ABB's complaint is that the tribunal reached an erroneous conclusion as to the content of Greek law. That is not a serious irregularity even if it were made out." [emphasis added]

27. It was submitted for the claimants that in *ABB* the court was influenced by the fact that the tribunal had already decided the dispute before it reached the "Greek law issue" and had no formal need to set out their conclusions on the remaining matters argued. It was submitted that this is not the case here as the Sharif Family Other Assets were a "key part" of the Quantum Award and the insufficient reasons therefore give rise to a serious irregularity for the purposes of section 68 (2)(c) and (h) of the Act.

28. The defendant relied on [67] of the judgment in *ABB* where Tomlinson J stated:

> "67. All of these authorities and judicial observations emphasise the restricted ambit of the jurisdiction under s.68 . It is not a ground for intervention that the court considers that it

> might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore it is particularly to be borne in mind in the context of international arbitrations that the arbitrators may not all have been brought up in the same legal tradition. In order to express the reasons for their award they must find language with which each is comfortable. Directing myself in accordance with these principles I turn to consider ABB's challenge to this award under each head." [emphasis added]

29. It is true that the court in *ABB* was not concerned with a challenge under subsection (c) or (h) and the observations at [67] should be read in that context. However, in my view, paragraph [80] of the judgment is support for the view that "inadequate" reasons do not amount to a serious irregularity within the meaning of section 68.

30. That view was the approach taken by Field J in *The Ojars Vacietis* [2012] EWHC 1412 (Comm) at [30]:

> "30. The authorities on s. 68 of the Act were extensively reviewed by Tomlinson J in *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1. I agree with the conclusions Tomlinson J came to on the basis of these decisions. He held that their effect is that an applicant under s.68 has a high hurdle to overcome: there will only be a serious irregularity if what has occurred is far removed from what could reasonably be expected from the arbitral process (p. 17). If the issues in question have been "put into the arena", there is no serious irregularity in extracting an alternative case from the submissions of the parties (p. 18, citing *Warborough Investments v Robinson* [2003] EGLR 149). It is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length (p.19). If a party had a fair opportunity to address its arguments on all of the essential building blocks in the Tribunal's conclusion, the fact that the Tribunal did not refer back to the parties its analysis of the material before it and the conclusion it reached on it does not constitute a serious irregularity resulting in substantial injustice (p.21)." [emphasis added]

31. The most recent decision is that of Teare J in *UMS*. In *UMS* the alleged serious irregularities were said to be either within section 68(2)(a), a breach of the Tribunal's duty to act fairly pursuant to section 33 of the Act, or within section 68(2)(d), a failure by the Tribunal to deal with the issues that were put to it. It is clear from the judgment in *UMS* that section 68 is not concerned with whether the decision of the tribunal is right or wrong and that a tribunal's reasons may be "unsatisfactory" but that is not a serious irregularity within section 68. Teare J said:

> "[28] Having considered these authorities my understanding of the law regarding allegations that an arbitral tribunal has overlooked evidence is as follows. A contention that the

> tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within section 68(2)(a) or (d), for several reasons. First, the tribunal's duty is to decide the essential issues put to it for decision and to give its reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all the relevant evidence. Second, the assessment and evaluation of such evidence is a matter exclusively for the tribunal. The court has no role in that regard. Third, where a tribunal in its reasons has not referred to a piece of evidence which one party says is crucial the tribunal may have (i) considered it, but regarded it as not determinative, (ii) considered it, but assessed it as coming from an unreliable source, (iii) considered it, but misunderstood it or (iv) overlooked it. There may be other possibilities. Were the court to seek to determine why the tribunal had not referred to certain evidence it would have to consider the entirety of the evidence which was before the tribunal and which was relevant to the decision under challenge. Such evidence would include not only documentary evidence but also the transcripts of factual and expert evidence. Such an enquiry (in addition to being lengthy, as it certainly would be in the present case) would be an impermissible exercise for the court to undertake because it is the tribunal, not the court, that assesses the evidence adduced by the parties. Further, for the court to decide that the tribunal had overlooked certain evidence the court would have to conclude that the only inference to be drawn from the tribunal's failure to mention such evidence was that the tribunal had overlooked it. But the tribunal may have had a different view of the importance, relevance or reliability of the evidence from that of the court and so the required inference cannot be drawn. Fourth, section 68 is concerned with due process. Section 68 is not concerned with whether the tribunal has made the "right" finding of fact, any more than it is concerned with whether the tribunal has made the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact." [emphasis added]

32. Teare J, having considered the individual complaints of serious irregularities, then returned to the submission that this was an exceptional case of failing to dealing with key evidence such as to amount to a breach of a tribunal's duty to deal with the losing party's case fairly.

> 133. It has long been established that the court's power to intervene in an arbitration pursuant to section 68 is not concerned with whether the decision of the tribunal is right or wrong. For that reason Akenhead J. said in Secretary of State v

Raytheon that it does not matter whether a tribunal dealt with an issue "well, badly or indifferently." What matters is whether it has dealt with the issue. It follows from this well-established position that so long as the tribunal has dealt with the issue and given "the reasons for the award" that is sufficient. The parties have agreed to be bound by the decision of its chosen tribunal. There is no scope for objecting to what the reasons do or do not contain (save that when the reasons are not sufficient to enable an application under section 67, 68 or 69 to be properly considered additional reasons may be ordered pursuant to section 70). [emphasis added]

134. When an arbitral tribunal chooses to deal concisely with the essential issues and to express its reasons by reference to the evidence regarded by the tribunal as key, without dealing with the objections to that evidence or with the evidence that each party submitted was key the tribunal has, in my judgment, discharged its duty of dealing with the essential issues and of giving the reasons for its award. When an arbitral tribunal chooses to do that it is not unjust or unfair; the duty to act fairly imposed by section 33 does not require the tribunal to refer in its award to all of the evidence regarded by the losing party as key or to deal with all of the submissions made in relation to the evidence but simply, in the language of section 52(4) , to set out "the reasons for the award". All that can be said is that such an approach to writing the reasons for an award is different from the current practice of the courts when writing judgments. It is true that where the evidence alleged to be key by the losing party is not referred to by the tribunal that party may sometimes be left in doubt as to what the tribunal thought of that evidence, but in circumstances where the parties have agreed that their chosen tribunal is the sole judge of fact they cannot expect the court to review the evidence in order to form a view as to whether, as is likely to be the case, the tribunal has regarded the evidence as unhelpful (for one or more reasons) or, as is unlikely to be the case, the tribunal has ignored or overlooked the evidence. As was noted by the DAC in its report (paragraph 280) "the test is not what would have happened had had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate." Were the court able to scrutinise the content or quality of a tribunal's reasons the court would have something akin to a general supervisory jurisdiction over arbitrations which it does not have. Such scrutiny would frustrate one of the principal purposes of the Arbitration Act 1996 which was, as explained in Lesotho , to limit the court's intervention in arbitration. As Tomlinson J. said in ABB AG v Hochtief Airport , at paragraph 80, a tribunal's reasons may be "unsatisfactory" but that is not a serious irregularity within section 68 . "It is not for this court to

> tell an international commercial tribunal how to set out its award or the reasons therefor." [emphasis added]

33. The submissions for the claimants were in effect that the arbitrator had overlooked evidence or failed to deal with it in his reasons; counsel for the claimants referred to the four expert reports that were before the arbitrator on the issue of the assets and their valuation and the time devoted to such evidence in the hearing. In the claimants' skeleton argument for the hearing before this court it was submitted that:

> "[22] The damages awarded in respect of the Sharif family Other Assets… was… the most important part of the dispute to the parties… It is not just an "essential issue"… It is the essential issue."
>
> "[30] There is.… no explanation in the Quantum Award as to the "discount" that has been applied, or the method by which this was reached, or what net figure it was applied to. The Tribunal has therefore failed to give any reason… as to how, or why, it reached its award of US$19 million in relation to the Sharif Family Other Assets."
>
> "[33]… The tribunal has given no explanation at all as to how it reached the "overall assessment"… There is no way the parties can understand how the decision was reached or on the basis of what evidence." [emphasis added]

34. As was made clear by Teare J in *UMS* firstly, the tribunal does not have to deal in its reasons with each point made by a party in relation to the essential issues or refer to all the relevant evidence. Secondly, the assessment and evaluation of such evidence is a matter exclusively for the tribunal.

35. Counsel for the defendant accepted that the Commercial Court authorities relied on by the defendant were irreconcilable with *Compton.* In that judgment the judge stated:

> "42. There is no shortage of reported cases which discuss the issue as to what reasons ought to be provided for a judicial decision. These cases can be grouped as follows: (1) reasons to be given by a court (particularly in cases involving disputes between experts) (Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 and English v Emery Reimbold Strick Ltd [2002] 1 WLR 2409) ; (2) reasons by arbitrators (Re Poyser & Mills' Arbitration [1964] 2 QB 467 and Bremer Handelgessellschaft v Westzucker (No. 2) [1981] 2 Lloyd's Rep 130); (3) reasons by statutory tribunals (Mountview Court Properties Ltd v Devlin (1970) 21 P&CR 689 and Curtis v London Rent Assessment Committee [1997] 4 All ER 842); and (4) reasons for planning decisions (Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153 and South Bucks DC v Porter (No. 2) [2004] 1 WLR 1953). It is also relevant to single out cases which discuss the giving of reasons in relation

> to valuation disputes: see Mountview and Curtis…" [emphasis added]

36. It is noteworthy that *Re Poyser & Mills' Arbitration* referred to in this context concerned an arbitration under the Agricultural Holdings Act 1948 and Section 12(1) of the Tribunals and Inquiries Act 1958. In relation to the other arbitration case, *Bremer Handelsgessellschaft*, the judge observed:

> "45. In Bremer Handelgessellschaft v Westzucker (No. 2) , at pages 132–133, Donaldson LJ described what was required for a reasoned award in the context of the Arbitration Act 1979 , in these terms:
>
> "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a 'reasoned award'."

37. Having reviewed the authorities identified at [42] of the judgment (and notwithstanding the dicta of Donaldson LJ cited above) the judge concluded at [50] and [51]*:*

> "50. It was said in Curtis that the duty on the tribunal in that case to give reasons for its decision was less onerous than the duty on a court to give reasons for its decision. The same is sometimes said about the duty of an arbitrator to give reasons. Whatever the precise difference between the duties, I consider that the duty on an arbitrator to provide a reasoned award under section 52(4) of the 1996 Act is not less than the duty as described in the above cases dealing, in broadly similar ways, with arbitrators, tribunals and planning inspectors. The two cases which I have cited dealing with reasons to be given for court decisions (Flannery and English) involved the need to give reasons in relation to disputes as to expert evidence. In a case like the present, where the arbitrator is chosen for his experience in the relevant expert discipline, I do not see any particular reason why the duty on such an arbitrator to explain why he has preferred one expert to another should be fundamentally different from the duty on a court in such a case.
>
> [51] It is clear from the above citations that an arbitrator should explain why he has decided the essential issues in the way in which he has. An award which did not contain such reasoning would not comply with section 52(4) of the 1996 Act and that would give rise to an irregularity within section 68(2)(h) of the 1996 Act. However, there will only be a "serious irregularity" if the failure of reasoning has caused or will cause substantial injustice to a party…"

38. It would seem that only the claimant appeared in *Compton*, although written submissions had been provided by both parties. As a strict matter therefore, it should not be cited pursuant to the terms of the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 unless "it clearly indicates that it purports to establish a new principle or to extend the present law". The way that the case developed before the judge was set out in the judgment as follows:

> "38. In the course of Mr Peters' oral submissions on this application, he identified a number of alleged irregularities in relation to the proceedings and/or the award. However, it became more and more clear to me as the argument developed that his case involved to a large extent multiple criticisms of the adequacy of the arbitrator's reasons for his award. Indeed, the possibility emerged that if the Claimant were not able to succeed in its challenge to the adequacy of the arbitrator's reasons, then it might be difficult for the Claimant to succeed on other grounds. Conversely, if the Claimant's criticisms of the arbitrator's reasons resulted in the matter being remitted to the arbitrator for further reasons, then the giving of those further reasons might be highly relevant to the other grounds of challenge which should only be finally determined in the light of any further reasons provided by the arbitrator."
>
> 39. Mr Peters did not refer in his skeleton argument to any authorities as to the standard which an arbitrator should be expected to achieve in relation to giving reasons for an award. Mr Batstone's written submissions in opposition to this claim did not refer to any such authorities either, although he had referred to some relevant authorities as to the need to give reasons when seeking further reasons pursuant to section 57 of the 1996 Act. At the end of the hearing, I asked Mr Peters to provide me with the principal authorities on the subject of adequacy of reasons and, in particular, authorities dealing with reasons in awards or other decisions determining disputes as to valuation or involving expert evidence. After the hearing, Mr Peters promptly provided me with copies of a number of authorities which have indeed been very helpful to me in the course of considering this judgment. Those acting for the Defendant were informed of the further authorities which Mr Peters provided to me." [emphasis added]

39. I note that in the light of the way the case evolved and the request in particular for authorities determining disputes as to valuation or involving expert evidence, it is perhaps not surprising that the Commercial Court authorities relied upon by the defendant in these proceedings were not before the court in *Compton.*

40. The most recent decision is that in *UMS* where the authorities (other than *Compton*) on Section 68 were fully considered. Although *UMS* was dealing with a challenge under Section 68(2)(a) and (d), as is clear from the extracts of the judgment set out above, the reasoning is of broader application. In particular the following principles

referred to by Teare J are equally applicable to a challenge under section 68(2) (c) and (h) of the Act:

i) section 68 is concerned with "due process" and not with whether the tribunal has made the "right" decision (paragraph [28] and [133]);

ii) in order for a court to assess the adequacy of reasons, the court would have to evaluate the evidence and the assessment of evidence is for the tribunal as the sole judge of fact; and

iii) scrutiny of a tribunal's reasons would amount to supervision by the court over arbitrations which would frustrate one of the principal purposes of the Act which was to limit the court's intervention in arbitration.

41. Since the authorities which relate to Section 68 challenges under the Act (other than the *Benaim* and *Bremer Handelgessellschaft*) were not cited to the court in *Compton*, and in the light of the more recent decision in *UMS*, it seems to me that it must be doubtful that *Compton* reflects the correct approach in relation to a challenge for inadequate reasons under Section 68. In the circumstances it is open to this court to decline to follow the decision in *Compton*, being a decision of another puisne judge. For the reasons discussed it seems to me that, in relation to a challenge for inadequate reasons under section 68, the decision in *UMS* which reflects and endorses the approach of the courts in the earlier decisions on section 68 (other than *Compton*) should be followed rather than *Compton*.

42. It was submitted for the claimants that the authorities do not deal with the fact that section 70 does not provide a remedy. It was submitted for the claimants that since it was not open to an applicant to bring an application under section 70(4) but only a power for the court, this would mean that there was "no sanction" if an arbitrator failed to provide reasons. However, it is clear that the interrelationship with section 70 was considered by Colman J in *Margulead* and assumed by Teare J (at [133]) to complement the remedy under section 68. The claimants appear to assume that an applicant should have a self-standing right of appeal in this regard. However it seems to me that the Act sets down the limited circumstances in which the courts can intervene in an arbitration award and in order to make such intervention effective, has given the right for the courts to require the arbitrator to provide further reasons in conjunction with an application under section 67, 68 or 69. As referred to above, a major purpose of the Act was to reduce the extent of intervention of the courts in the arbitral process and it would be inconsistent with that approach to interpret section 68 broadly. There is no basis to infer that Parliament intended that the claimant should have any other remedy, bearing in mind that section 57 already provides a vehicle for a party to seek clarification where an award is ambiguous and an application under that section is not contingent on a section 68/69 application.

43. In my view for the reasons discussed, it is not open to the claimants to assert that there has been a failure to conduct the proceedings in accordance with the procedure agreed by the parties amounting to a "serious irregularity" by reason of a failure to provide a more detailed explanation on how the arbitrator reached his conclusions on the evidence in relation to the US$ 19 million: the award contains reasons for its conclusion on the issues and the parties have agreed that the tribunal should determine matters of fact. By requiring a further explanation of how aspects of the evidence

were dealt with, the court would have to review the findings of fact and the evaluation of such evidence by the tribunal. On the authorities that is not a permissible approach and would be contrary to the limited role for the courts given by the Act. For these reasons, it is equally not open to the claimants to assert that there has been a failure to comply with the requirements as to the form of the award and thus a "serious irregularity" under section 68.

Conclusion

44. Accordingly, for the reasons discussed I find that "inadequate" reasons (as such term is advanced by the claimants) cannot amount to a serious irregularity under section 68(2)(c) or (h).

Were "adequate" reasons given in this case?

45. If I am wrong on that I will address whether "adequate" or "sufficient" reasons were given in this case.

46. A challenge in the courts to an alleged failure in an arbitration to comply with the requirement to give reasons for an award under section 52(4) of the Act and to give "sufficient reasons" under the CIArb rules must be considered in the light of the general approach of the courts in reviewing arbitration awards referred to above. In particular:

    i) That the purpose of the Act was to reduce drastically the extent of intervention of courts in the arbitral process (*Lesotho Highlands Development Authority*);

    ii) It is not a ground for intervention that the court might have done things differently or expressed its conclusions at greater length (*ABB*);

    iii) The tribunal has to give reasons for the decisions on the essential issues but does not have to deal with each point made by a party in relation to those essential issues or refer to all the relevant evidence (*UMS*).

47. I do not accept the submission that the approach of the courts should in any way be modified merely because one of the parties is a state and therefore funded by its citizens. No authority was provided to support this submission. In circumstances where the parties have voluntarily chosen to submit their disputes to arbitration rather than the courts, the parties have elected to abide by the rules which pertain to that arbitration and must be taken as a consequence to have accepted the limited supervisory role afforded to the courts by the law.

48. The court was referred to passages in the liability award, the Quantum Award and the section 57 ruling (which under section 57(7) forms part of the award).

49. Paragraphs 18-22 of the Ruling on the Section 57 application stated:

> "Respondents contend that there is an "apparent omission" in the valuation of the potential recovery from the Sharif family in paragraph Q6 .10 (xii) of the Quantum Award:

> *"Q6 .10 (xii) Having regard to all of the evidence I find that the appropriate valuation of the potential recovery from the Sharif family is US$100 million to be realised at some future date."*
>
> They say that this figure should have been reduced to take account of the "loss of chance discount" "to reflect the percentage chance of success of making a recovery"…
>
> [19] The Quantum Award applied that discount expressly in the cases of…Sherpao and …Ansari… where the approach was, as respondents admit, first value the relevant asset, secondly work out the net recovery that was likely, before applying the "loss of chance discount".
>
> [20]…
>
> [21] In the [Sherpao and …Ansari] cases it was necessary to assess what net recovery the respondent would have made after deducting costs that would have been incurred as fees, expenses etc. and then apply an appropriate "loss of chance discount" to the net figure. The situation in relation to the Sharif family assets was wholly different although some factors were common to both. The assets had first to be identified, then a value established for them, and the costs of recovery or realisation estimated, before an overall "loss of chance discount" could be applied. There was a lack of specific evidence enabling this to be done for many and even all of the specific items in the list, and some form of overall assessment was inevitable. The purpose of the exercise was to assess the potential net recovery by respondents after taking account of all relevant factors.
>
> [22] The figure of US$100 million was my assessment of the potential net recovery for the relevant assets, based on the evidence available to me, and bearing in mind claimant's burden of proving loss of a "real or substantial chance"… It was my finding as to the appropriate valuation of the potential recovery from the Sharif family, at some future date,… No further discount is necessary or would be appropriate." [emphasis added]

50. It was submitted for the claimants that the tribunal has not explained how it has quantified a loss of chance discount within its "overall assessment" (paragraph 25 2nd Limond witness statement), whether the tribunal disagreed with the claimants' case that reductions of 72% and 90% may be appropriate discounts and on what basis the tribunal rejected the claimants' expert evidence as to the prospects of net recovery.

51. To the extent that it was necessary for the arbitrator to explain his conclusion on the valuation of the potential recovery which in turn led to the figure of US$19 million, he has done so in the section 57 ruling. The arbitrator explained why his approach was different in relation to the Sharif Family Other Assets from the approach in relation to

Sherpao and Ansari, namely that there was a lack of specific evidence enabling this to be done for many and even all of the specific items in the list, and some form of overall assessment was inevitable.

52. In my view it is clear that the award (read with the section 57 ruling which forms part of the award) does contain reasons to show why the arbitrator reached his decision on the "essential issue". The requirement to provide "sufficient" reasons does not require the arbitrator to provide further explanation as to how he assessed the evidence and arrived at his conclusion.

53. For the reasons discussed, there was no failure in this case to provide "adequate" or "sufficient" reasons.

Substantial injustice

54. If I am wrong and there was a failure to give "adequate" reasons in this case and this did amount to a serious irregularity within the meaning of section 68 (2)(c) and/or (h), I will consider whether this would amount to a substantial injustice in this case.

55. Counsel for the defendant observed that in her original witness statement (at paragraph 72) Ms Limond for the claimant stated that an order under section 70(4) for further reasons, might then identify a substantial injustice and that would therefore enable the claimants to determine whether a substantial injustice had occurred.

56. This position was maintained in her second witness statement at paragraph 28 but in the claimants' skeleton in response to the summary dismissal application the substantial injustice was expressed as being that, if reasons were required to be given, there was a reasonable chance that the tribunal may apply a different loss of chance.

57. In the skeleton for this hearing at paragraphs 40 and 41, counsel for the claimants asserted that there would be a substantial injustice if inadequate reasoning related to something important: *Compton* at [55]:

> "…I can accept that in many cases there will be substantial injustice where a party does not know the reasons for an award but I would not be prepared to hold that every failure of reasoning which amounts to an irregularity for the purposes of section 68(2)(h) will automatically give rise to substantial injustice. An obvious example is where the point in relation to which the reasoning is inadequate is a point of very little substance, even though it is relevant to the outcome. That might give rise to a case of some injustice but not substantial injustice. Further, in Lesotho Development at [35], Lord Steyn explained that the burden is squarely on an applicant relying on section 68 to secure (if he can) findings of fact which can establish the precondition of substantial injustice."

58. It was submitted for the claimants that a failure to give reasons may be capable of giving rise to a substantial injustice, otherwise there would be no recourse if reasons were not given. It was submitted that in this case the tribunal had not explained a substantial issue relating to the bulk of the award in financial terms and that it was an

essential part of the bargain in arbitration that a party should be given reasons, particularly when it was a state funded by the taxpayers.

59. It was further submitted that the claimants were not required to show that the result would necessarily or even probably have been different: *Terna Bahrain Holding Co* at [85(vii)]:

> "(7) In determining whether there has been substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

60. It was submitted for the claimants that had the tribunal given sufficient reasons to explain how it reached the figure of US$19 million the tribunal might well have found that different valuation or assets or further discount should be applied to this figure. Therefore, the lack of sufficient reasons has caused substantial injustice to the claimants.

61. It was submitted for the defendant that;

i) there was no realistic prospect that if the arbitrator was asked for further reasons or the matter was remitted for reconsideration it would lead to a different result. The tribunal has been asked about the loss of chance discount in the section 57 application and has stated in the clearest terms that no further discount is "necessary" or "appropriate";

ii) there is no basis in this case to conclude that the tribunal might well have reached a different view;

iii) it is certainly not a case where justice calls out for it to be corrected – *ABB*

62. As has been stated above, the complaint in this case is that the decision called for a further explanation as to how it was arrived at on the evidence. In my view even if that were a "serious irregularity" there is no substantial injustice in the light of the clear statement in the section 57 ruling (paragraph 22 cited above), in my view there is no possibility that the tribunal might well have reached a different view and produced a significantly different outcome.

Conclusion

63. It was submitted for the claimants that even if the court held that a challenge could not be brought under section 68(2) (c) and/or (h) for inadequate reasons the court should request further reasons under section 70(4) so that the section 68 application can remain on foot. It seems to me that the section 57 application resolved any doubt as to the reasoning of the tribunal and the claimants are not entitled to seek (and

accordingly it is not appropriate for the court to require), any further explanation as to how the conclusions were arrived at.

64. For all these reasons the claimants' application is dismissed.