IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2019] EWHC 2386 (Comm)

No. CL-2019-000136

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 9 July 2019

Before:

SIR JEREMY COOKE

(Sitting as a Judge of the High Court)

(**In Private**)

B E T W E E N :

K — Claimant

- and -

S — Defendant

ANONYMISATION APPLIES

MR N. TSE (Brown Rudnick LLP) appeared on behalf of the Claimant.

MR R. HARDING QC (instructed by Clyde & Co) appeared on behalf of the Defendant.

J U D G M E N T

SIR JEREMY COOKE:

1 In this judgment, in order to preserve the confidentiality of the parties in an ongoing arbitration where a two week hearing was held from 18 February 2019 onwards and an award is, I understanding, pending until the determination of this current application, I shall refer to the respondent in the arbitration as "K" and the claimant in the arbitration as "S".

2 This is K's application under section 68 of the Arbitration Act 1996 ("the Act") in respect of a decision made by a three-person Tribunal in the form of what was termed "Procedural Order 5" which ran to seven pages of description of the arguments of the parties on the points at issues, two pages of reasoning for the decision made, and a conclusion which read as follows:

> "Based on the foregoing, the Arbitral Tribunal, having thoroughly reviewed and considered both parties' position as set out in the background above and having regard to its duty to ensure that each party has a reasonable opportunity of putting its case forward and dealing with that of its opponent and to adopt procedures suitable to the circumstances of the case so as to provide a fair means of resolution of the dispute pursuant to Article 14.4 of the LCIA Rules and Section 33 of the 1996 Arbitration Act, the Arbitral Tribunal directs the following:
>
> 1. The expert report of RN advances a new claim which was not pleaded, or sufficiently pleaded, and accordingly shall not be allowed by the Tribunal in these proceedings..."

3 K's application is for an order that the relevant paragraphs of reasons set out in paragraphs 70 to 78 of that Procedural Order be set aside and remitted to the Tribunal for reconsideration of whether the expert report referred to should be struck from the record or for such further or other relief as the court deems appropriate.

4 I asked exactly what order was being sought and was told it was either to set aside those paragraphs of the decision (which do not, in fact, cover the conclusion that I have read out but must have been intended to do so) or for a remission, and in either case with the direction of the law from the court to the Tribunal to the following effect:

(1) The Tribunal should not exclude material evidence; and

(2) The Tribunal should not determine admissibility of evidence by reference to the quantum of the claim referred to in the report.

5 When pressed on the basis that the first direction amounted to nothing other than a direction to the Tribunal to admit the report, an alternative was suggested, namely a direction that the Tribunal should not exclude evidence on an issue that had been raised and adequately pleaded. The incongruity of the application will be immediately apparent to anyone familiar with section 68.

6 The complaint is made that the Tribunal excluded the expert report. The relief sought is not expressly that the court should order its admission which is obviously outside the proper exercise of any power of the court, but that the Tribunal should reconsider its decision when the current decision is set aside on the grounds that the court considers that decision is wrong.

7 In its 25-page skeleton argument, K maintained in paragraph 69 that the Tribunal decision was wrong and at paragraph 74, that the Tribunal's decision to exclude the report was not the legitimate exercise of a case management function under section 34 of the Act but was, instead, an improper exclusion of material evidence and contrary to the Tribunal's duties under section 33. That was the position adopted throughout oral argument this morning.

8 The reality of the matter is that the Tribunal reached a decision not to permit K to rely upon a report because it considered that the matters raised in it had not been pleaded, or adequately pleaded, and it would not be just to allow it to be relied on at a hearing due to take place shortly thereafter out of fairness to the other party. K challenges that finding on the basis of an alleged failure of the Tribunal to comply with its general duties under section 33 of the Act. This is an ambitious submission in the context of what is clearly a Procedural Order which not only recited the parties' submissions in it, but came to a reasoned conclusion that the evidence of the expert in the report should not be permitted as a matter of procedural fairness. There is no suggestion of any lack of due process in the procedure by which that decision to exclude the evidence was reached, only dissatisfaction with the result.

9 It is contended that there is a failure f due process because the effect of that decision reached by the Tribunal in the course of its exercise of its procedural powers was to deprive K of the opportunity in presenting its case on lost profits as a result of the collapse of its business allegedly caused by the breaches of contract of S. It is said that the court must enquire into the decision made by the Tribunal and into its legitimacy because its effect is to exclude material from its consideration which had been filed in time in accordance with the timetable set by the Tribunal as amended by agreement between the parties.

THE BACKGROUND FACTS IN THE PROCEEDINGS

10 These are not in dispute and I summarise them from the witness statements of Mr Thukral and that of Mr Lowrie. I need not refer to the substantive dispute save to mention, in passing, that it arose out of an EPC subcontract in the Middle East where each party maintained that the other was in breach with letters of termination flowing from both sides. K then defaulted under a head contract. Performance bonds were called on in respect of both the head contract and the EPC subcontract.

11 This led to S commencing arbitration under the LCIA rules against K and 14 pages of detailed rules of procedure were submitted to the Tribunal on 13 April and approved by the Tribunal on 26 April 2017. Paragraph 1.1 of those procedural rules provided for the parties to exchange statements of case. These were:

> "...to set out a full statement of case including a statement of the relief sought; a full presentation of factual and contractual and/or legal basis for each claim and defence as well as the documents referred to therein..."

12 The procedural rules also required that the parties indicate in their written submission the nature of the evidence relied on "in a specific manner" and provide "reasonable specific references to such evidence".

13 Paragraph 6 of the procedural rules provided that if a party wished to file a report or statement of an expert witness, it should elect to do so in accordance with the procedural timetable set and went on to provide for oral testimony of such experts. In due course, references appeared in the parties' exchanges to the need for forensic accountancy expertise in the context of lost profits claims.

14 Pursuant to these procedural rules, S served a statement of case on 28 April 2017 and K served a statement of defence and counterclaim on 16 October 2017. The latter included the following at paragraph 382:

> "(1) As at entry into the Contract and the Prime Contract, K had an excellent commercial reputation as a reliable supplier of construction services. It had not in the entirety of its operational history prior to the date of the Project had a contract terminated for fault. Termination for fault adversely affected K's commercial reputation accordingly. For the reasons set out above, the termination of the Prime Contract was caused by S's defaults, including defaults which amount to breach of the duty of good faith.
>
> (2) The Head Contract Operator called K's Advance Payment Guarantees and K's Performance Bond, all as already set out above, and did so at the same time as and consequent upon termination of the Prime Contract. Having its bonds called in this way further damaged K's commercial reputation for reliability.
>
> (3) Since termination of the Prime Contract and the calling of the bonds as set out above, K has found it harder to obtain and maintain financing facilities, and has had its contractual counterparts treat it with a stricter, more legalistic and increasingly "contractual" approach, with those contractual counterparts taking a harder line in relation to their contractual rights (and in relation to K's rights and obligations). Those things have impeded K's ability to maintain performance of its contractual obligations. They arise directly from K's loss of reputation consequent on S's breaches of the Contract and the resulting termination of the Prime Contract and the calling of K's bonds."

15 Following a preliminary hearing on 24 November 2017, the Tribunal issued its first Procedural Order on 7 January 2018 which set out the timetable for the conduct of the arbitration. This included provision for the service by 6 February 2018 of schedules of loss by both parties, for a list of topics for expert determination to be provided by 7 August 2018 and gave permission for expert evidence to be served by 12 October 2018 which was later extended by agreement between the parties to 14 November of that year. The expert evidence could be served by the party on whom the burden lay of proving their case.

16 In the timetable itself, there was a reference, in the context of experts' reports, to reports in respect of expert issues raised in the statement of claim, i.e. engineering, delay, and quantum, and expert reports in respect of issues raised in the counterclaim, i.e. engineering, delay, quantum, and loss of profits. There was provision for reply reports and for an expert joint memorandum in the usual way.

17 On 6 February 2018, K served its schedule of loss which referred to two heads of loss with three different ways of putting the case. The first head of loss related to losses which arose out of the EPC subcontract itself amounting to some KD78,271,574. This was then particularised in a further five or six pages of detail.

18 The second head of damage was described as "moral damages" and was further explained in the following way:

> "S's breaches resulted in damage to K's reputation, business standing and profitability (as well as causing actual loss to K's business in addition to the losses set out above). The damage caused by S caused a reduction in the tenders for which K was able to bid, a reduction in available bank credit, problems on other projects and resulting delays and detriment to K's financial and reputational position, ultimately leading to the closure of the proposals department within K. K will address this head of loss in expert evidence in due course."

19 Further on in the same document, appeared the following under the heading "Moral damages":

> "39. (see paragraph 381 of the counterclaim).
>
> 40. Pursuant to Articles 231(2) and 301 of the KCC, K is entitled to moral damages in addition to damages to be assessed under clause 52 or damages following dissolution of the contract at law. Moral damages relate to K's losses arising in relation to other contracts, its position in the marketplace, its financial position, and its reputation generally.
>
> 41. K further claims moral damages in respect of the damage to K's business (set out at paragraph 18 above) caused by S's conduct.
>
> 42. K will provide full details of the calculation of its claim to moral damages by way of expert evidence at the appropriate time and by way of submissions on Kuwait law, in accordance with the Tribunal's directions given on 7 January 2018."

20 Complaint was made at the time that this schedule of loss served by K represented a departure from K's pleaded case. Some form of accommodation was, however, reached, it being later agreed between the parties that no amendment of the defence and counterclaim was required because the schedule of loss set out the new case whilst K continued to maintain that the schedule made merely computational changes in any event. By a letter of 23 March 2018, S sought a breakdown of the "Moral damages" sought by K in paragraphs 18 and 42 of the Schedule of Loss to which I have already referred. No response was ever provided.

21 The list of topics for expert evidence stated at the outset:

> "The list is intended to be a guide to the headline topics for expert consideration. It is not exhaustive of every topic for expert consideration arising on the pleadings for which the parties will refer to their submissions including the statements of case through to the reply to defence to counterclaim and to both parties' Schedules of Loss."

22 The list included under the heading "Counterclaim brought for costs incurred as a result of termination" the following words:

> "What is the proper quantification of K's wasted costs and losses, if any, resulting from the termination of the prime contract?"

23 The expert's report, which was served by K on 14 November 2018 from a forensic accountant, included the following:

> "I am instructed to identify, as far as I am able, the causes of the collapse of K's business. In the event that I conclude that the collapse of K's business was caused partially or wholly by the defaults of S, or the 2016 termination of the head project, to quantify the financial losses of K on its projects and business other than that project consequent to this collapse."

24 The conclusion reached in that report was that the defaults of S resulted in the statement by the owner of its intention to terminate the head contract and that the termination of the head contract project, which he understood to result from the defaults of S, both had an important and direct impact on K's construction activity decline from 2014 and the collapse of its business in 2016. He went on to assess the losses at some KD459 million.

25 Unsurprisingly, perhaps, this led to a letter of 22 November from S in protest. In that letter, S pointed out that the questions upon which the forensic accountant had been asked to opine, namely, the causes of the collapse of K's business and the quantification of the resulting financial losses were not included in the list of topics for expert determination. It was also contended that the report was based on entirely new legal and factual allegations which were not known to or accepted by S including, by way of example: allegations regarding S's actions in an unconnected contract between the parties governed by a different institutional arbitration clause; allegations regarding S's responsibility for K's termination of 22 other projects from 2016 onwards; allegations regarding S's responsibility for K's blacklisting from the tender bid list made by the government authorities; the freezing of nine of K's bank accounts; and, lastly, allegations regarding S's responsibility for K's failure to obtain certain bonds by banks and win various projects.

26 It was pointed out also that none of K's factual witness statements which had already been served referred to S being responsible for the collapse of K's business or provided any support for such an allegation which demonstrated in itself that the business collapse claim, as it came to be called by S, which K was now seeking to advance by way of the expert report, was new to the arbitration and involved wholly new and unpleaded facts. S's position from the outset following service of the report was that there was no permission to introduce that report into evidence and that there was insufficient time properly to address it in advance of the hearing which was then set for February 2019. The letter of 22 November asked K to confirm that the report would be withdrawn.

27 Equally unsurprisingly, on 28 November 2018, K replied refusing to withdraw the report and S then made its application of 4 December to the Tribunal to have the report "struck out from the record of the arbitration" or for alternative relief.

28 On 10 December 2018, K provided a 23-page response arguing that the business collapse claim had been pleaded and was within the list of topics for expert determination. It also sought an oral hearing in front of the Tribunal to deal with S's application to exclude the report. On 10 January 2019, S filed a reply and on 23 January, K filed a further response with submissions in respect of the application.

29 On 24 January, there was a hearing in front of the Tribunal where the matter was fully argued along with an application for security for costs. This led to the decision of 5 February 2019, to which I have already referred, with the hearing then less than two weeks away.

THE DECISION

30 In whatever way that K would like to put its case, the real question here is whether the decision made is one with which this court can interfere in accordance with the terms of section 68. The answer to that question, in my judgment, is clearly 'no'.

31 The Tribunal, in its decision, recited the nature of the application, referring to the letter of 4 December 2018 by which S had made that application. It referred to a request to the Tribunal to order the following:

> "(a) Mr N's expert report be struck out from the record of the expert evidence exchanged in this reference and that it cannot be referred to by the respondent's advocates or witnesses, expert or factual, at trial;
>
> (b) To the extent that the Tribunal has already considered Mr N's report, or will do so in relation to this application, that such considerations be disregarded;
>
> (c) Alternatively, should the N report not be struck out by the Tribunal, the claimant asks for directions so that it might have a reasonable opportunity to respond to the new allegations and claims with such directions to include:
>
> (i) Requiring the respondent to set out its case on the alleged collapse of its business and the cause of that collapse in full by way of amended to the statement of defence or counterclaim, or otherwise..."

Then there followed a series of provisions for service of amended statements of case, disclosure of documents, fact witness statements, and expert evidence in rebuttal to the forensic accountants' report.

32 After reciting the nature of the application, there followed seven pages in which the Tribunal set out the parties' respective arguments as to whether a new unpleaded case was being made with new unpleaded facts included in the report. At paragraphs 68 to 78, the Tribunal set out its reasons and conclusions. Paragraph 68 records the Tribunal request to the parties to focus their submissions on whether or not the end report related to pleaded issues in the arbitration and, if so, in what respects. The members of the Tribunal considered that question as the crux of the matter. It is easiest if, at this stage, the judgment sets out paragraphs 70 through to 78 of the decision:

> "[70] The Tribunal first notes that N's Report was introduced on 14 November 2018 in support of a claim amounting to KD 458.5 million and purportedly resulting from the collapse of the Respondent's business. To that end, the Report makes reference to a number of contributing factors, namely:
>
> (i) The blacklisting of the Respondent from the tender bid lists made by the Central Agency of Public Tenders;
>
> (ii) The freezing of the Respondent's bank accounts; and
>
> (iii) The termination for default of 22 additional projects
>
> [71] On 4 December 2018, the Claimant submitted an application to 'strike-out' N's Report for the reasons set out in the background

above. The Respondent, in its Communication no 23 dated 10 December 2018 confirmed that 'the Claimant is correct to say that the figure for the losses suffered as a result of the collapse of the Respondent's business was seen by the Claimant for the first time in the N Report'.

[72] The Tribunal notes that the N Report, while being timely introduced as per the Procedural Timetable, nonetheless advances a claim for KD 458.5 million more than a year after the submission of the Defense(sic) and Counterclaim in October 2017 and 9 months after the submission of the Respondent's Schedule of Loss submitted on 6 February 2018.

[73] Upon careful consideration of the Parties' written and oral pleadings with respect to the N Application, the Tribunal finds that the factual circumstances upon which the KD 458.5 million claim relies were not previously pleaded, or sufficiently pleaded, by the Respondent in its written submissions. For instance, the termination of 22 contracts should have been pleaded, in normal circumstances, in paragraph 18 of the Respondent's Schedule of Loss, a point in effect conceded by the Respondent which admitted to a defect in particularisation. Similarly, the blacklisting of the Respondent from tender bid lists and the freezing of its bank accounts which allegedly triggered the collapse of K's business were all not previously pleaded, or sufficiently pleaded, by the Respondent in its written submissions but were addressed for the first time in the N Report.

[74] Procedural fairness dictates that any new claim ought to be advanced and particularized first in the Parties' written submissions and submitted by way of an amended statement of claim, defense(sic) and/or counterclaim followed by a proper round of responsive submissions, witness of fact (where relevant) and experts in order to preserve due process. The LCIA Rules, under Article 22.1, provide the possibility for a Party to amend any claim, counterclaim defence and reply, if an application is made to that effect and the Tribunal accepts the same after giving the parties a reasonable opportunity to state their views on the matter. The Tribunal indeed considers that expert reports are not meant to advance new claims but rather quantify or opine on existing pleaded claims.

[75] The Tribunal is not convinced by the Respondent's argument that the wording of paragraph 18 and 42 of the Schedule of Loss was particularized enough to allow the admission of a claim amounting to KD 458.5 million and submitted for the first time in (sic) N's report. The Respondent's statement that it 'will address this head of loss in expert evidence in due course' or that 'it will provide full details of the calculation of its claim to moral damages by way of expert 20 evidence' should have been pleaded in the Respondent's written submissions, and the facts and particulars of the head of loss regarding the collapse of K's business should have been properly pleaded in order to permit the opposing party to analyse them and respond to as it deems appropriate.

[76] The Tribunal is also not convinced that until the N Report was prepared, the Respondent was not aware of the particulars of its losses, at least the ones that related to the termination of 22 contracts, the blacklisting of the company and the freezing of the accounts.

[77] While the Tribunal is not in a position at this stage of the proceedings to determine the merits of N's Report, with the Final Hearing taking place in two weeks' time, the Tribunal is of the view that expert evidence should be tested properly and that a claim of KD 458.5 million advanced for the first time in an expert report should have been sufficiently pleaded in advance of the submission of an expert report.

[78] Therefore, the Tribunal decides not to admit N's report in these proceedings."

33 Following that summary of their reasons, concluding that the report would not be admitted, there then follows the final conclusion which I set out at the beginning of this judgment. The basis, as appears from what was said by the Tribunal, was that the report had made reference to a number of factors which had not been pleaded, or pleaded adequately, or sufficiently particularised, so that, having regard to the need for each party to have a reasonable opportunity of putting its case and dealing with that of its opponent and the need to adopt procedures suitable to the circumstances of the case so as to provide a fair means for the resolution of the dispute, the report advanced a new claim which was not pleaded or sufficiently pleaded and should not be allowed in evidence.

THE AMBIT OF SECTION 68 OF THE ACT

34 Section 68 of the Act provides as follows under the heading "Challenging the award: serious irregularity":

"(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...

(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..."

35 Time and again this court has stated that applications under section 68 are not the place for appeals on points of law or fact, nor is there any room for appeals against procedural or case management decisions where there has been no procedural unfairness in reaching those decisions. Nor is there any scope for a challenge under the section to anything other than an award. The grounds set out in section 68 represent a closed list of what constitutes "serious irregularity". The only ground relied on here is that to which I have referred in section 68(2)(a), namely, "failure by the Tribunal to comply with section 33" and the general duties imposed thereby on the Tribunal.

36 Sections 33 and 34 provided as follows:

"**33 General duty of the Tribunal.**

(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.

34 Procedural and evidential matters.

(1) It shall be for the Tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include..."

Amongst the various matters there set out are reference to application of:

> "...the strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material ... sought to be tendered on any matters of fact or opinion."

37 In the documents served with the arbitration claim form headed "Remedy claimed and grounds of claim", it was argued that the Tribunal had excluded evidence on a material matter raised before it and that this constituted misconduct under the law of arbitration preceding the 1996 Act and amounted to a breach of section 33 of that Act in as much as the Tribunal had failed to give each party a reasonable opportunity of putting its case.

38 The first point to note is that section 68 and the other parts of the Act which provide for challenges to awards replaced the old law of misconduct. Whilst some authorities under the preceding law may still have some relevance to the position of arbitration under the Act, the Act itself is very specific as to grounds of challenge. Section 68 is exhaustive as to what constitutes "serious irregularity affecting the ... proceedings or the award" and the height of the hurdle presented by the section is a constant refrain of all the authorities relating to it. Irregularity must be serious, must fit into one of the subsections of section 68(2), and be such as has caused or will cause serious injustice. Reliance on authorities such as *Williams v Wallis & Cox* [1914] 2 KB 478 and *Trayfoot v Lock* [1957] 1 WLR 351 as direct authority for grounds to challenge arbitral decision is therefore misplaced.

39 K's case falls at each hurdle presented by section 68:

(1) The decision in Procedural Order 5 was a decision on procedural matters which fell within section 34 of the Act. It ruled out expert evidence produced in support of the case which had not been pleaded sufficiently to put the other side on proper notice of it in the eyes of the Tribunal. The Tribunal decided, in much more gentle language that I would probably have used, that facts were asserted in support of new claims

where the facts relied on had not featured in the pleadings or witness statements previously produced. I might add that to the extent that this court is permitted, which in my judgment it is not, to examine the matter, no amount of dressing up of the points asserted as facts in the expert report could bring them within the compass of what was pleaded in the statement of defence and counterclaim or the schedule of loss. That appears clearly from the way in which the Tribunal expressed its view;

(2) K was given every opportunity to put its case as to why it should be allowed to adduce this evidence. It made submissions in writing and it made submissions at an oral hearing. Those submissions were rejected. There was no failure in due process in the Tribunal reaching its decision to exclude the evidence and no complaint is made that there was;

(3) There is no exception to the rule that section 68 is concerned only with due process and the court cannot take it upon itself to assess whether the Tribunal reached a correct decision in the exercise of its arbitral functions, whether in assessing factual evidence, in assessing expert evidence, or making procedural decisions provided that due process was followed in reaching those decisions. The decision was taken to exclude a new case and new evidence shortly before the hearing and this constitutes a paradigm example of a case management procedural decision of the kind that no court of appeal would interfere with, if made by a court of first instance in this jurisdiction;

(4) It is clear that the exclusion of evidence is within the arbitrator's case management powers and that the decision reached was one reached with due process and was a rational determination. It is hard to see, therefore, how any question of serious irregularity could possibly arise. The suggestion that the court can overrule a decision by a Tribunal in the exercise of its procedural powers if it has followed due process in reaching that decision, would, in my judgment, run counter to the whole regime and tenor of the 1996 Act. There is no room under the Act for a review of a decision made under section 34(2)(f) or section 34(3) without a failure in due process;

(5) Procedural Order 5 was not a decision which determined any matter of substance against K. It was open to K on the exclusion of the evidence from the hearing to apply to amend its case, if necessary to seek an adjournment of the hearing, and to seek orders allowing for S to be given the opportunity to respond to the new case and to put in evidence contrary to that in the forensic accountancy report. It could have sought any number of possible procedural orders, whether consequential upon that or otherwise, but whether or not the Tribunal would have been unlikely to grant such an application is neither here nor there. What is clear is that the decision was a procedural one, just as would have been the case if an application to amend had been made and adjournment sought on the basis of the new case put; and

(6) Procedural Order 5 was not an award within the meaning of the Act which is capable of challenge under section 68. It will be recalled that section 68 provides only for a challenge to an award on the ground of serious irregularity. The parties agreed that the judgment of Cockerill J in *ZCCM Investments Holdings Plc v Kansanshi Holdings PLC and Kansanshi Mining PLC* [2019] EWHC 1285 (Comm) at [39] to [40] sets out the relevant principles to be garnered from earlier authorities as to what is and what is not an award. Of the factors listed there, in my judgment, the factor to be accorded the most weight in accordance with earlier authority, is whether or not there was a final determination on the merits of a substantive point in the arbitration. Here, there was no finding on the recoverability of the "moral damages" at all. Those were capable of being pursued on the existing factual evidence to the extent that it referred to them at

all, which it does not appear to have done, or indeed I suppose at a further stage in the arbitration if an adjournment had been sought in respect of that part of the case. There was no final determination of that element nor were the arbitrators functus in respect of it.

40 In the circumstances, it cannot, in my judgment, be said that there has been any irregularity let alone a serious irregularity. It cannot be said that this is an extreme case where what has happened is so far removed from what could reasonably be expected of the arbitral process that the court will take action. To the contrary, the Tribunal, conscious of the need for each party to have the reasonable opportunity to put its case and to be able to deal with that of the opponent and to provide a fair means of resolution of the dispute, made a decision which, on its face, seems eminently fair and sensible when making its procedural ruling. It is a decision which any court could have reached had it been charged with such a decision. Nor can it, in my judgment, be said that that substantial injustice has or will result, not only because there was no final decision on the merits of that element of the claim but because in the light of the history as recorded in this judgment as well as the Tribunal's decision, K was given every opportunity to make submissions on the exclusion of the evidence.

41 The point is made that the Tribunal laid some stress on the size of the counterclaim to which the report referred. It is true that quantum is not relevant to the admissibility of a claim, but the Tribunal did not err in thinking that it did. The size of the claim does, however, bear on the degree of particularity required if a party is going to meet it. There cannot be any doubt that the Tribunal was entitled to take that matter into account when looking at the adequacy or inadequacy of the pleading advanced.

42 There is therefore, in my judgment, no basis for the court to interfere with the decision of the Tribunal whether to set aside or remit it, to give any directions in relation to it, or to form any conclusion as to whether it was right or wrong. If this court was to trespass into the very area where it appears to me it should not, namely the rightness or wrongness of the decision taken by the Tribunal. I would, in fact, have no hesitation at all in saying that it was correct in its decision and that no serious injustice was caused by the exclusion of the evidence. In my judgment, any court faced with that position would be likely to adopt exactly the same conclusion as the Tribunal did.

43 I have not dismissed this application on the sole ground that Procedural Order 5 was not an award because I would not want K to think that it could resurrect this point following any award which the Tribunal might make. There are, as I hope this judgment makes clear, a number of reasons why the application could not succeed, many of which hold good regardless of the time of which such an application is made.

44 For all these reasons, therefore, the application must fail.

CERTIFICATE

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