Neutral Citation Number: [2021] EWHC 3376 (Comm)

Case No: CL-2021-000019
Case No: CL-2021-000403

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

AND IN THE MATTER OF THE ARBITRATION ACT 1996

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2021

Before :

SIR ANDREW SMITH
SITTING AS A JUDGE OF THE HIGH COURT

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B E T W E E N :

Andrei Mikhailovich Ovsyankin	**Claimant**
- and -	
(1) Angophora Holdings Limited	
(2) Valeriy Anatolievich Kirilov	
(3) Dr Georg von Segesser	
(4) Sir Jeremy Coooke	
(5) Mr Khawar Qureshi	**Defendants**

AND B E T W E E N :

(1) Andrei Mikhailovich Ovsyankin	
(2) Retemmy Finance Limited	**Claimant**
- and -	
(1) Angophora Holdings Limited	
(2) Valeriy Anatolievich Kirilov	
(3) Dr Georg von Segesser	
(4) Sir Jeremy Cooke	**Defendants**
(5) Mr Khawar Qureshi QC	

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Steven Gee QC, Mr Drew Holiner and Ms Kristina Lukacova (instructed by **Mansors** and **Holman Fenwick Willan LLP**) for the **Claimant**
Michael Swainston QC, Mr James Duffy and Mr Jacob Turner (instructed by **Enyo Law LLP**) for the **First Defendant**

Hearing dates: 1, 2 and 3 November 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ANDREW SMITH AS A JUDGE OF THE HIGH COURT

"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 14 December 2021 at 14:00."

Sir Andrew Smith :

Introduction

1. The applications before the Court concern three arbitrations under the rules of the London Court of International Arbitration ("LCIA"), which have been labelled the "Guarantee Arbitration", the "SHA Arbitration" and the "Non-Compete Arbitration". The same three Arbitrators have been appointed as the tribunal in each: Dr Georg von Segesser (as Chairman), Sir Jeremy Cooke and Mr Khawar Qureshi QC. The parties to the Guarantee Arbitration are Angophora Holdings Limited ("Angophora") as Claimant and Mr Andrei Mikhailovich Ovsyankin and Mr Valeriy Anatolievich Kirilov as Respondents. In that arbitration, the Tribunal has issued a final award (the "Award") dated 21 December 2020. The parties in the SHA Arbitration are Angophora as Claimant and Retemmy Finance Limited ("Retemmy") as Respondent, and in the Non-Compete Arbitration are Angophora as Claimant and Retemmy, Mr Ovsyankin and Mr Kirilov as Respondents.

2. The first application (the "GA Application") is about the Guarantee Arbitration. It is made by Mr Ovsyankin, the Respondents being Angophora, Mr Kirilov and the three Arbitrators. By it, Mr Ovsyankin (i) challenges the Award under section 68 of the Arbitration Act, 1968 (the "AA"); and (ii) seeks an order under section 24 of the AA that the three Arbitrators be removed, together with related relief regarding their fees and expenses.

3. The second application (the "SHA/NC Application") is about the SHA and the Non-Compete Arbitrations. It is made by Mr Ovsyankin and Retemmy, the Respondents being the same as in the GA Application. It seeks orders that the three Arbitrators be removed under section 24 of the AA, and related relief regarding their fees and expenses.

4. The applications are supported by evidence of Mr Richard Brown, a partner in Holman Fenwick Willan LLP ("HFW"), Mr Ovsyankin's solicitor. It was answered by a witness statement of Mr Konrad Rodgers, a partner in Enyo Law LLP ("Enyo"), who act for Angophora.

5. The argument before me was between the Applicants, Mr Ovsyankin in the GA Application and Mr Ovsyankin and Retemmy in the SHA/NC Application, represented by Mr Steven Gee QC, Mr Drew Holiner and Ms Kristina Lukacova, and the Angophora represented by Mr Michael Swainston QC, Mr James Duffy and Mr Jacob Turner.

6. Mr Kirilov did not appear and was not represented on either application, although he was duly served with both. He has not participated in any of the arbitrations.

7. The Arbitrators were served with these proceedings, but they have not appeared and were not represented before me. By letters dated 29 January 2021, under cover of which HFW served them with the proceedings and other documents, HFW wrote, "It would be of assistance … if you would state whether any irregularity is admitted". Apparently, the Arbitrators did not reply to this invitation.

8. In response to the applications, Mr Swainston advanced two contentions for Angophora in his skeleton argument: (i) that the applications have no proper basis, and (ii) that, even if they did, Mr Ovsyankin and Retemmy could not raise their complaints because they had continued to take part in the references despite their complaints about how they were

conducted, and so the applications are precluded by section 73 of the AA (the "section 73 argument").

9. The Applicants had not had notice of the section 73 argument until Angophora's skeleton argument was served shortly before the hearing. It seemed to me to raise questions of law that are not straightforward, and potentially of some general importance to arbitral procedure. I was troubled that those representing the Applicants had not had a fair opportunity to prepare their response to it, and also I did not wish to rule upon it without being satisfied that I had had full legal submissions. I therefore decided that I should not rule upon the section 73 argument in this judgment, but decide whether the applications otherwise have merit. I said that I would invite further submissions on the section 73 argument if necessary in light of my decision on Mr Swainston's first argument.

Background

10. Angophora is a wholly owned subsidiary of MIR Capital S.C.A. SICAR (Luxembourg) ("MIR"), which is owned by Intesa Sanpaolo S.p.a., an Italian bank, and Gazprombank JSC ("Gazprombank"), a Russian bank. Mr Ovsyankin and Mr Kirilov are the joint owners of Retemmy. On 30 November 2012 Angophora and Retemmy entered into a Shareholders Agreement (the "SHA") in relation to a joint venture to be effected through Grooks Global Limited ("Grooks"), a Cypriot company. Grooks and its subsidiaries, commonly known as the "Packer Group", provide coil tubing and hydraulic fracturing services and manufacture packing equipment for oil and gas companies in Russia and the Commonwealth of Independent States.

11. Under the SHA, Angophora acquired 34.59% of the shares in Grooks, and Retemmy held the remaining 65.41%. The SHA provided that the shareholders should cooperate in good faith with each other in order to sell the shares within four years. It also provided that Angophora should have so called "drag-along rights", whereby, before making a transfer of its shares to a third party, it was to give Retemmy a "Disposal Notice" offering to sell to Retemmy all its shares at a "Disposal Price" per share, and if the offer was refused, Angophora had the right to sell all the shares in Grooks to a third party at the Disposal Price, compelling Retemmy to include its shareholding in the sale.

12. By a Deed of Guarantee also dated 30 November 2012 entered into by Mr Ovsyankin and Mr Kirilov as guarantors and Angophora, Mr Ovsyankin and Mr Kirilov undertook that "If and whenever" Retemmy did not perform any of the "Guaranteed Obligations" under the SHA, the guarantors would, on demand, perform (or procure the performance of) and satisfy (or procure satisfaction of) them "so that [Angophora] would have received the same benefits if such obligation or liability had been duly performed and satisfied by [Retemmy]".

13. Angophora, Retemmy, Mr Ovsyankin and Mr Kirilov also entered into a "Non-Compete Agreement" dated 30 November 2012, whereby they agreed not to engage in competition with the activities of Grooks and the Packer Group.

14. The SHA, the Deed of Guarantee and the Non-Compete Agreement each contained or incorporated an arbitration agreement providing for LCIA arbitration in London. The parties expressly waived any right of appeal in respect of awards under section 69 of the AA (which would in any event have been excluded through the parties' agreement to the LCIA rules).

The Arbitrations

15. Angophora complained of breaches of the three agreements, and between August and November 2018 began separate arbitrations under each of them.

16. In the Guarantee Arbitration, it alleged that Retemmy was in breach of its obligations under the SHA because of conduct of Mr Ovsyankin, who served as the Managing Director of Services Management LLC, the Grooks subsidiary that manages the operating companies of the Packer Group, and effectively, as it was put in the Award, acted as the "CEO of the Group". According to Angophora, inter alia he caused the operating companies to enter into a series of transactions that constituted breaches of the SHA on the part of Retemmy: transactions that were outside the ordinary course of business; purchase and lease transactions with third parties that were at inflated prices or had no commercial purpose for the operating services' business; transactions with "interested parties" without proper disclosure to and approval of the directors of Services Management LLC; and other transactions which should have been, but were not, disclosed to and approved by the directors. These matters were said to have put Mr Ovsyankin and Mr Kirilov in breach of, and to have made them liable under, the Guarantee Agreement.

17. In the SHA Arbitration, Angophora's case is that Retemmy had been in breach of the SHA by reason of the matters of which it complained in the Guarantee Arbitration and its failure to prevent by Mr Ovsyankin's fraudulent conduct.

18. In the Non-Compete Arbitration, Angophora claims that Retemmy, Mr Ovsyankin and Mr Kirilov are in breach of the Non-Compete Agreement by reason of the fraudulent activities and diversion of the assets of the Packer Group.

19. The SHA Arbitration was brought first, and the three Arbitrators were nominated by the parties as the Tribunal. Thereafter, the parties to the Guarantee Arbitration and the Non-Compete Arbitration agreed to appoint the same Tribunal. It was also agreed that one arbitration should be chosen to be decided before the others: there was no agreement about which arbitration that should be, but it was determined that it should be the Guarantee Arbitration.

20. There was a hearing in the Guarantee Arbitration over six days between 6 and 14 February 2020. After opening submissions, the Tribunal heard evidence from witnesses of fact and expert witnesses, namely: Mr Viktor Komanov, a Deputy Chairman of the Management Board of Gazprombank, Mr Alexander Kulik, a Managing Director in Gazprombank's Corporate Finance Division, and Mr Alexander Sapozhnikov, the First Vice President and head of the Corporate Finance Department of Gazprombank, all of whom gave evidence of fact on behalf of Angophora; as witnesses of fact for Mr Ovsyankin, Mr Alexey Kutznetsov of Packer Service LLC, Mr Victor Mariankov, who was engaged by Gazprombank as a Project Manager, Mr Oleg Koval, the Chief Engineer of the Packer Service Group, Mr Andrey Sinitsin, who had worked for Gazprombank and Mr Ovsyankin himself; Mr Gervase MacGregor, a Chartered Accountant, who gave expert evidence for Angophora; and Mr James Gilbey, a Chartered Accountant, who gave evidence for Mr Ovsyankin. There were also experts in Russian law, but no reference was made to their evidence on these applications.

21. As I have said, the Tribunal issued the Award on 21 December 2020.

The grounds of the section 68 application.

22. In the Award, the Tribunal upheld most, but not all, of the allegations about Mr Ovsyankin's improper conduct and the complaints about the transactions. No challenge to those findings is made on these applications. It ordered that Mr Ovsyankin and Mr Kirilov pay Angophora US$43,200,000, together with interest and costs. The challenge under section 68 of the AA is about the quantum awarded, or rather about the procedure and proceedings relating to this part of the Award.

23. Section 68 provides that a party to an arbitration may challenge an award on the grounds of "serious irregularity affecting the tribunal, the proceedings or the award". It was described in the 1996 Report on the Arbitration Bill of the Departmental Advisory Committee on Arbitration Law as a "long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls for it to be corrected", a description recently endorsed by the Privy Council in RAV Bahamas Ltd and anor v Therapy Beach Club Inc (Bahamas), [2021] UKPC 8 at para 30.

24. The expression "serious irregularity" means an irregularity of a kind specified in the section "which the court considers has caused or will cause substantial injustice to the applicant". The kinds of irregularity of which Mr Ovsyankin complains are:

    i) Under section 68(2)(a) of the AA, that the Tribunal failed to comply with section 33, that is to say that it did not "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" or with a different case from that actually advanced by Angophora in the arbitration. Mr Ovsyankin alleged that the Tribunal acted neither fairly nor impartially.

    ii) Under section 68(2)(c), that the Tribunal failed to conduct the proceedings in accordance with the procedure agreed by the parties, that is to say in accordance with the LCIA rules.

    iii) Under section 68(2)(d), that the Tribunal failed to deal with issues that were put to it.

Angophora's pleaded case on quantum

25. In its Request for Arbitration of 23 November 2018 (at paragraphs 96 to 97) and in its Amended Statement of Case of 14 October 2019 (at paragraphs 96 to 97), Angophora pleaded its case about the remedy to which it was entitled as a result of the breaches of the Deed of Guarantee as follows: in paragraph 96 (in each pleading), that, by reason of breaches of the SHA, "Losses" had been caused, for which Mr Ovsyankin and Mr Kirilov were liable under the Deed of Guarantee, and that Angophora "has incurred 'Losses' in the form of the diminution of the value of its shareholding". I set out in paragraph 97 (of each pleading), in full:

> "The precise quantum of this loss will be a matter for expert evidence in due course, but the best particulars that [Angophora] can currently provide are that Retemmy and [Mr Ovsyankin's and Mr Kirilov's] conduct has deprived [Angophora's] shareholding in Grooks of any value, such that [Angophora's] interest is worth nothing, instead of the substantial value that it should have had.

> Further or alternatively, because of the lost value of [Angophora's] shares, [Angophora's] investment in Grooks has been wasted. The absence of value of the shares arises from the facts that the majority shareholders, who have de facto control of the Group, are not acting in the best interests of the Group; Grooks has not paid any dividends to [Angophora]; and there is no realistic prospect of [Angophora] being able to sell its shareholding on commercial terms to a third party purchaser. The best estimate that [Angophora] can presently provide in relation to quantum is as follows:
>
> 97.1 But for the actions of Retemmy and [Mr Ovsyankin and Mr Kirilov] described above, Grooks would be worth between USD $96 million to $133 million, and in turn [Angophora's] 34.59% shareholding, rather than having no value, ought to have been worth between USD $33 million to $46 million. [Angophora] has lost that value.
>
> 97.2 Further or alternatively to this primary case that [Mr Ovsyankin and Mr Kirilov] are required to indemnify [Angophora] in the sum of between USD$33 million to $46 million, Angophora's investment has been wasted, consisting of the full price it paid for its Shares".

At paragraph 105 (of both pleadings), Angophora similarly pleaded, "As a result of the losses to the Group …. [Angophora] has suffered 'Losses' (which will be a matter for expert evidence) through diminution in the value of its shares in Grooks and/or loss of dividends …".

The "Different Case"

26. On 14 February 2020, the last day of the evidential hearing and after the oral evidence had been concluded, the Tribunal, through Dr von Segesser, raised with the parties a question in the following terms:

> "We actually wanted to ask both experts whether they have actually thought about what the value of the shares are in the case of a distressed sale, as was mentioned before, if for instance a vulture fund would appear and make an offer, because from what was have heard we are of the view that the value of the shares cannot have been nil because here is a company or a group of companies that is still producing revenues and on the basis of that we think that there is value in this business, and in the end for the damages calculation which is in issue in this dispute, it will be relevant to know what is the bottom and what is the higher end. I don't know whether counsel have discussed that approach with the experts".

27. In the Claim Form in the GA Application, it is said that the Tribunal thereby "instructed the Parties to obtain new evidence to support a different case from that pursued by Angophora to and at the taking of oral evidence". Without subscribing to any

controversial connotations and only as a matter of convenience, I adopt the term "Different Case" in my judgment.

28. I shall also set out some of the exchanges between the Tribunal and counsel that followed after the Tribunal had raised this question. Sir Jeremy Cooke, responding to observations of Mr Swainston on behalf of Angophora and referring to Angophora's contention that it could not sell its shares because it was not in a position properly to provide financial information about the Packer Group, explained the context in which the question about the Different Case might arise: "The hypothesis that we are asking you to explore is on the basis that you can't find a buyer on a commercial basis because due process becomes impossible and you can't produce the right figures". Mr Swainston reiterated arguments going to Angophora's contention that the shares had no value, and then, after further exchanges between Mr Swainston and the Tribunal, including about whether, in various circumstances, Angophora could properly retain the shares and also receive compensation, Sir Jeremy reiterated, "All this is on an entirely hypothetical basis. We want you to explore this as part of your arguments and whatever evidence there is".

29. Mr Gee then made observations on the Tribunal's intervention on behalf of Mr Ovsyankin. He objected that the Tribunal was introducing a proposition that was not, he said, pleaded by Angophora and was not the case that Angophora had presented through its expert evidence. He said that, if Angophora had presented the Different Case, Mr Ovsyankin "would have come with completely different evidence on this case". Instead, Mr Ovsyankin had, he said, answered Angophora's case that the shares had no value at all, and submitted "There is no halfway house. We regard it as most unfair that the Tribunal, having heard all the evidence, would go and come up with a measure of damages which is totally different from the pleaded case against us, and we reserve all our rights". Sir Jeremy Cooke responded that it was "always open to a tribunal, looking at the submissions which are made, to come to a view about what are appropriate damages somewhere between the various extremes that the parties adopt, so long as the parties are given an appropriate chance to deal with it". Mr Gee submitted that, in these circumstances, Angophora would have to apply to amend its pleading, and Mr Ovsyankin given an opportunity "to actually adduce evidence".

30. There were further observations by both counsel, in the course of which Sir Jeremy Cooke said to Mr Swainston that his points were open for him to argue "just as Mr Gee's points are open to him to argue". Then, after a short adjournment, the Tribunal, through Dr von Segesser, made this request, or, as Mr Gee would say, gave this instruction: "What we would like you to do is the following. First, I think that your experts should provide us with a short additional report on the distressed value of the shares". Mr Gee raised again his point that Mr Ovsyankin might wish to adduce further evidence, other than expert evidence, and he was told by Sir Jeremy, "I think you probably have to apply to us saying what it is you want". Mr Gee also raised again his point about the pleadings, and Dr von Segesser said, "At this stage, we are confident with what we have heard as pleadings …".

31. After the hearing, on 17 February 2020, Dr von Segesser, on behalf of the Tribunal, sent the parties an email in which it confirmed a schedule for the future conduct of the proceedings, confirming what had been stated at the hearing on 14 February 2020. It included this: "Report by the corporate valuation experts on the value of the shares of Grooks in case of a distressed sale by 13 March 2020". The email continued with an indication "without any prejudice" of issues that the parties were invited to focus on in

their post-hearing briefs, including "The ascertainment of the reduction in the value of Angophora's shareholding caused by the actions of Retemmy which are alleged to constitute breaches of the SHA". It also identified some matters on which the Tribunal considered itself "sufficiently informed", including "the attempts/efforts to sell the shares in Grooks".

32. Mr Gee made numerous complaints about the conduct of the Tribunal on 14 and 17 February 2020. I can deal with Mr Ovsyankin's main points by grouping them into three categories: (i) that, in view of the pleadings, the Tribunal should not have introduced the Different Case for consideration because it had not been pleaded or raised by Angophora; (ii) that the terms in which the Tribunal introduced the Different Case improperly limited its inquiry, reflecting that the Arbitrators had prematurely closed their minds about the measure of damages; and (iii) that, having introduced the Different Case, the Tribunal did not give Mr Ovsyankin a proper opportunity to answer it.

Was the Tribunal wrong to introduce the Different Case?

33. Mr Gee's arguments included these:

    i) That Angophora's pleadings did not cover the Different Case, namely that the value of Angophora's shareholding was reduced because of breaches of the SHA, but it still had some residual value, rather than no value as pleaded.

    ii) That, even if, under the usual rules, the Different Case was covered by Angophora's pleadings, the Tribunal had by a Procedural Order stipulated stricter rules of pleading for the reference, and it was inconsistent with those stricter requirements for the Tribunal to entertain the Different Case.

    iii) That, even if the Different Case was covered by Angophora's pleadings, Angophora had not pursued it and had so advanced its case in the reference that it had, in effect, dropped or abandoned it, and in these circumstances, Tribunal was wrong to resurrect it.

34. Before examining Angophora's pleading, I should say that a tribunal can sometimes properly decide a case on a basis that has not been pleaded. As is said in Russell on Arbitration (24th Ed, 2015) para 8-092, "it will not amount to a serious irregularity if a tribunal decides the case on the basis of a point not strictly argued or pleaded by a party: it will be enough if the issue was "in play" or, to use a different expression, "in the arena" in the proceedings". This statement is fully justified by judicial authority: see RAV Bahamas v Therapy Beach Club Inc, [2021] PC 8, and the authorities cited in that judgment.

35. In support of his submission that Angophora had not pleaded the Different Case, Mr Gee cited paragraph 428 of the Award, which is under the heading "Total or Partial Loss": "… [Angophora] alleges that it has suffered loss, for which [Mr Ovsyankin and Mr Kirilov] are liable to indemnify it as a result of losses of the SHA by Retemmy, inasmuch as its shares in Grooks have been rendered valueless. In its pleaded case, it did not advance a claim that the shares had some reduced value by reason of the breaches, contending that the shares were unsaleable and therefore of no monetary worth at all. In such circumstances, on recovery of the difference between the value that they should have had in the absence of breach and their worthlessness. … [Mr Ovsyankin] submitted that it was not open to [Angophora] to pursue an alternative claim based on a reduced

value of the shares as opposed to a nil value and that, should the Tribunal find that the shares had some value, the claim as put forward by [Angophora] should fail in limine". Accordingly, Mr Gee argued that the Tribunal itself concluded that the Different Case was not pleaded.

36. I accept Mr Swainston's response to this argument, that Mr Gee places too much weight on the second sentence in the passage that I have cited, and that the point that the Tribunal was making was that Angophora's pleading had not quantified a diminished value of the shares, if they were still worth something. I would so interpret the Award because the Tribunal goes on to state, at paragraph 432, that it was "satisfied that not only was the claim for a reduced value of the shares open to [Angophora] but that the procedure adopted gave [Mr Ovsyankin] every chance to meet the alternative case and to adduce evidence in relation to it". I understand that, when the Tribunal said that the claim for a reduced value was "open" to Angophora, it meant that it was open on the pleadings, because it goes on at paragraphs 433 and 434 to cite passages from the pleadings by way of justification of its view that the case was "open". This interpretation of the Award is also supported by this statement at paragraph 502, where the Tribunal considered costs: "Despite [Mr Ovsyankin's] repeated assertions to the contrary, [Angophora's] procedural conduct was beyond reproach – also with regard to its pleadings on the measure of loss …".

37. In any case, for my part I would consider the Different Case was pleaded by Angophora. The measure of damages which it pleaded at paragraph 96, and also at paragraph 105, of the Request for Arbitration and the Amended Statement of Case was "diminution in the value of its shareholding". Of course, Angophora also pleaded in paragraph 97, taking its argument forward another step, that the value was so diminished, because there was no realistic prospect of a commercial sale, that the "best estimate" that Angophora could "currently" provide was that it was extinguished entirely. As a matter of ordinary pleading, Angophora did not thereby restrict its case on diminished value to its primary case of nil value. In paragraph 97, it developed its primary case by pleading that the "absence of value" resulted from (i) Retemmy, who had de facto control of the Packer Group, not acting in its best interests, (ii) Grooks not having paid any dividends to Angophora, and (iii) there being no realistic prospect of Angophora being able to sell its shareholding on "commercial terms". It was clearly possible that Angophora might succeed in proving these matters, but fail to persuade the Tribunal that therefore its shareholding had no value at all, as opposed to some reduced residual value. It was quite unnecessary for Angophora to spell out that in these circumstances, it fell back on its more general plea of losses by way of diminution in value. Nor was it necessary for Angophora to plead by how much the value was reduced: as the pleading said, that depended on the evidence, and the reduced value could only be assessed in light of the evidence.

38. I therefore reject Mr Gee's argument that, conventionally interpreted, Angophora's pleadings do not cover the Different Case. Is this affected by Procedural Order no 1 of the Tribunal, made on 23 April 2019, after the parties had served what was called the "first round" of submissions, namely Angophora's Statement of Case in its Request for Arbitration and Mr Ovsyankin's Statement of Defence and Cross-Claim? By the Order, the Tribunal directed (at paragraph 6.3) that "The second round of Parties' submissions (Statement of Reply and Defence to Counterclaim, Statement of Rejoinder, Statement of Reply and Defence to Counterclaim, and Rejoinder to Counterclaim) shall strive to be all-inclusive, addressing all issues of both fact and law in sufficient detail and attaching

all available documents relied upon in this submission, including witness statements, expert reports, legal materials, etc".

39. This Order was made after a Case Management Conference held on 23 April 2019. During it, Sir Jeremy Cooke had inquired of Angophora about how it put its case on loss of value, asking "how does it work?" if the shareholding had some value at the date of breach. Mr Swainston responded that he would not commit himself before the expert evidence, but emphasised Angophora's contention that it had "lost the value of [its] investment". Mr Ovsyankin, represented by Mr Holiner, complained that Angophora's case on damages was "opaque", and expressed concern that, as a matter of procedural fairness, Mr Ovsyankin "should not learn of the full case against [him] only by way of the claimant's final reply or after disclosure or witness and expert evidence". Mr Gee submitted before me, if I understood his argument correctly, that against this background, it is clear that Procedural Order No 1 required Angophora, if it pursued a claim based on the shares having some residual, albeit diminished, value, to make this clear in the "all-inclusive" "second round of submissions" and the (factual and expert) evidence presented in support; and that it did not do so.

40. I do not accept either step in Mr Gee's submission. I do not consider that either the exchanges at the Case Management Conference or Procedural Order no 1 required Angophora to do more by way of pleading its case about the diminished value of the shares. On the contrary, Sir Jeremy Cooke's intervention indicated that the Tribunal might, in due course, come to the view that the shares had some reduced value. Mr Swainston's response to the intervention made clear that that suggestion would fall to be assessed in light of the expert evidence: that had already been stated in paragraph 97 of the pleading, and his response was perhaps not illuminating, but the exchange does not, to my mind, suggest that the Tribunal intended, unless the case was developed further in the "second round", to treat Angophora's case about diminished value as being confined, as a matter of pleading, to an argument that the shares had no value.

41. In the so-called second round of pleadings, Angophora served a Reply and Defence to Counterclaim. It pleaded (at paragraph 508) that the conduct of Mr Ovsyankin and Mr Kirilov had "deprived [Angophora's] shareholding in Grooks of any value such that [Angophora's] interest is now worth nothing instead of the substantial value that it should have had". It continued, at paragraph 509: "[Angophora's] case on quantum will be updated on finalisation of its expert's report on this matter, which will follow submission of this Reply". Therefore, and particularly in view of the terms of Procedural Order no 1, it is relevant to consider Angophora's expert evidence.

42. Mr MacGregor's first expert report was dated 28 October 2019. His instructions were, according to paragraph 2.15 of the report, to provide an opinion about the value of Angophora's minority shareholding in Grooks in two scenarios: an opinion in what he called the "Actual Scenario", by which he meant an opinion based on valuing Grooks "as it is"; and an opinion about the value in a "But For Scenario", valuing Grooks as it would have been but for the matters of which Angophora complained. It is clear from his explanation of the "Actual Scenario" that Mr MacGregor was not instructed to consider only whether in these circumstances the value was nil: his explanation puts the matter in general terms, namely in terms of an opinion of the value of the shareholding "in the circumstances where, in [Angophora's] case, [Angophora] has been obstructed from participating in the management of the Group and repeatedly denied access to financial and other information to which it is entitled under the SHA, whilst at the same time the

other shareholder, through the actions of Mr Ovsyankin, has acted in breach of its obligations under the SHA, has acted in bad faith in the management of the Group and caused the Group to enter into a number of sham transactions with no proper commercial purpose, which have had the effect of impairing the value of Grooks". While Mr MacGregor concludes in his report that, in the "Actual Scenario", no buyer could be found to purchase Angophora's shareholding and therefore its loss was the entire value that it had in the "But For" Scenario, and he reiterated this opinion in the Joint Report of Experts of 3 February 2020, this does not detract from the point that the wider scope of Angophora's diminished value claim was clear from Mr MacGregor's statement of his instructions.

43. I do not consider that Procedural Order No 1 assists Mr Ovsyankin's complaint that the Different Case was not covered by Angophora's pleaded case.

44. Nor can I accept that, if the Different Case was covered by Angophora's pleadings, it had been abandoned or somehow fallen away by 14 February 2020. On the contrary, I consider that, even if it was not properly covered by the pleadings, it was available for the Tribunal properly to adopt in its Award because, by the end of the evidential hearing, it was, to adopt the commonly used if somewhat vague expression, "in play", which I understand to mean (for present purposes) that it had been sufficiently covered by the (expert and factual) evidence and otherwise been considered in the proceedings to have given the parties a fair opportunity to deal with it.

45. First, Mr Ovsyankin's pleadings refer to Angophora's claim for diminution in value of its shares with no suggestion that it was understood to be limited to a case that they had no value. Thus, in his response to the Request for Arbitration, he stated that Angophora "has not proven losses, which are framed as an alleged 'diminution in value' of its shareholding in Grooks" (at paragraph 97(vi)). In his Rejoinder (at paragraph 528), it was pleaded, under a heading "The Claimant's primary case", that "The primary measure of damages argued for by Angophora – diminution in value of its shares – demonstrates that the claim lies squarely within the 'no reflective loss principle' …", an argument that it advanced on the basis that Angophora suffered no loss as a result of the matters complained of that was "separate and distinct" from that suffered by Grooks and the Packer Group.

46. I have referred to Mr MacGregor's expert evidence in his first report, and said that his instructions were not directed simply to whether or not the shareholding was valueless. Similarly, Mr Gilbey was instructed on behalf of Mr Ovsyankin "specifically … to respond to Mr MacGregor's Expert Report prepared in connection with [Angophora's] claim that the actions of [Mr Osvyankin and Mr Kirilov] had a detrimental impact on the value of [Angophora's] shares in the Packer Group" and "conduct [his] own, independent expert valuation of the Packer Group as at the Deadlock Date [sc. 26 July 2016] and compare it with a valuation of the Packer Group as at 1 October 2019 … to determine if there has been a diminution in value as a result of the actions of [Mr Ovsyankin and Mr Kirilov]".

47. Thus, Mr Ovsyankin's pleadings show that he understood that the primary case of Angophora that he faced was that, because of the matters of which it complained, its shares could not be sold commercially and they had lost value, and this was the case that Mr Gilbey considered. It was also the case that was upheld in the Award: "while [Mr Ovsyankin] denies a causal link between the breaches of the SHA and any loss in value

of [Angophora's] shareholding, on the basis of Mr Gilbey's reports, the evidence of misconduct in the running of the Group is such that the Tribunal can only conclude that this misconduct resulted in its commercial unsaleability" (at paragraph 446).

48. The Opening Submissions in the reference also reflect this battleline. In its written opening submissions in the reference, Angophora, of course, set out its contention that, as a result of the conduct of which it complained, the shareholding had been deprived of any value, and that its interest was worth nothing. However, Mr Ovsyankin's opening submissions show that he appreciated that he was facing a wider case that, because the shares could not be sold on commercial terms, their value was reduced: he observed (at paragraph 30) that, as I have said, "… [Angophora] has not pleaded a case of 'nil' value in its Reply … saying that 'there is no realistic prospect of [Angophora] being able to sell its shareholding on commercial terms to a third party', …. This accepts that there could be a sale but contends it would not be on commercial terms. [Angophora's] nil value case supported by [Mr MacGregor's report] is inconsistent with what it has pleaded by [Angophora] as being the facts" [sic]. Mr Ovsyankin went on in his opening to observe that the Amended Statement of Claim pleads that Angophora's losses would be a matter for expert evidence and that Mr MacGregor supported in his report the contention that there would be no buyer for the shares and therefore they were worth nothing; and that this contention would give rise to a number of questions, including "Would there be a buyer for the shares were they in fact marketed and a buyer sought by Angophora?" (at paragraph 36(3)) and "Could an offer be obtained from Retemmy/[Mr Ovsyankin]" (at paragraph 36(6)).

49. Issues relating to the Different Case were covered not only in the expert evidence but also by the factual witnesses: Mr Sapozhnikov gave evidence that nothing came of Angophora's enquires made with a view to disposing of the shares, and Mr Kulik gave evidence that Angophora had found it impossible to "execute an exit strategy" because of Retemmy's wrongdoing. He was challenged in cross-examination about whether Angophora made sufficient efforts to sell and more generally about whether a sale had been possible. Specifically, it was put to Mr Komanov, when he was cross-examined, that it would have been possible to sell the shares on the basis that the purchaser could obtain full control of Grooks through the "drag-along" mechanism in the SHA, and he agreed that, with financial information about the Packer Group, it would have been "theoretically" possible to obtain a price, but he struggled to "pin down the value". He continued that, "all of those four, five or six buyers that I believe had approached us, after having reviewed the situation and presumably after having spoken to Mr Ovsyankin, stopped any negotiations in its tracks, both with respect to the 35 per cent and the 100 per cent". He also explained that Angophora decided not to seek buyers of distressed assets because "it would have been inappropriate, it would have been wrong to sell our stake for little money to a third party. It would have been a misconceived exit strategy, whereby, as you have suggested, we could have sold our stake for 1 million or 5 million with a view to enticing Mr Ovsyankin and assisting him in revising his position".

50. When Mr Ovsyankin was cross-examined, he was challenged about the factual basis for the argument that there could be no commercial sale of the shares: about the fraud and other misconduct that were said to have made a commercial sale impossible, and whether he would co-operate to enable a sale of all the shares.

51. Thus, these questions about the Different Case were explored during the evidential hearing, and they were explored against the background of interventions by Sir Jeremy

Cooke during Mr Swainston's opening submissions and before evidence was called, when he asked about the position if the Tribunal "came to the view that there was not a nil value of the shares, but there was some intermediate value in the shares", explaining that he was looking to "the possibility for the range of factual findings which are potentially open to us".

52. I add that both parties referred before me to a request made by Mr Ovsyankin for disclosure of documents concerning attempts by Angophora to sell its shareholding, which was refused by the Tribunal on grounds of relevance. Angophora suggested that it showed that Mr Ovsyankin considered that the interest shown by potential purchasers was relevant to some issue of fact. Mr Gee, while not raising a distinct complaint of irregularity on the basis of this decision, referred to it as indicating that the Tribunal had preconceived views about how a diminished value of the shares should be assessed. I cannot see that this decision on disclosure has any real significance to the issues that I have to decide. What is of some significance, as I see it, is that in his application for this disclosure Mr Ovsyankin relied on Angophora's allegation that "there is no realistic prospect of being able to sell its shareholding on commercial terms to a third party purchaser", recognising this as an issue in the reference.

Was the enquiry introduced by the Different Case improperly limited?

53. Mr Ovsyankin argued that, when it sought further assistance from the experts about the Different Case, the Tribunal restricted its inquiry to one about a distressed sale, excluding other possibilities, including that Angophora's shares might have been sold on commercial terms, and in particular they might have been sold on commercial terms along with the other shares in Grooks, either through the "drag-along" mechanism in the SHA or through co-operation on the part of Retemmy. It is said that the Arbitrators had, or appeared to have, made up their minds about how they would assess the quantum of the claim before they had heard submissions.

54. I consider that this argument misunderstands the Tribunal's request on 14 February 2020 and in the email of 17 February 2020. It was an invitation (or request, or instruction) to the parties to have their expert witnesses provide further assistance about how damages should be assessed if it was decided to do so on the basis of a (notional) distressed sale of the shares. The Tribunal did not restrict argument about the proper way to assess damages if Angophora succeeded on liability. In the exchanges on 14 February 2020, the Tribunal could not have made it clearer that the request did not restrict what the parties might argue. In the email of 17 February 2020, the Tribunal expressly indicated that it would welcome assistance in submissions about the proper way to ascertain the reduction in the value of Angophora's shareholding, which clearly left open (inter alia) questions whether there might have been a commercial sale and whether the loss should be assessed on the basis of a proportion of the value received on a sale of all the shares.

55. I add two further comments about this point. First, as was reflected in the words used by Dr von Segesser on 14 February 2020 ("as was mentioned before"), the possibility that the shares might have a value that might be realised in a distressed sale, was not one that the Tribunal sprung on the parties out of the blue. Indeed, Mr Gee accepted that Dr von Segesser was referring to his own questions in cross-examination of Angophora's witnesses: for example, when cross-examining Mr Komanov, Mr Gee put it to him that "there are people in the Russian market who make a practice, or make a business, of realising the value of them. Stressed assets". He also challenged Mr MacGregor about

his opinion that the shares had no value on the basis that the shares might be sold on the basis that a price might be obtained from "vulture funds or someone coming in and buying a company that was in distress".

56. Secondly, Mr Gee nevertheless criticised the Tribunal's instruction on the grounds that it was unclear, and he did not know what the Tribunal meant by a "distressed sale". The short answer to that complaint is that Mr Ovsyankin could have requested clarification, and did not do so.

Did Mr Ovsyankin have a proper opportunity to respond to the Different Case?

57. In response to the Tribunal's request, Mr MacGregor and Mr Gilbey prepared Supplemental Reports, both dated 13 March 2020. Both experts said that they had been set a task that they found unrealistic. Mr Gilbey said that the amount of discount to be allowed when valuing Angophora's minority shareholding to reflect "lack of control" of Grooks was "a subjective matter and the level of any discount can only really be known if a buyer was identified". Mr MacGregor wrote that he had been instructed to provide his opinion "of the distressed value of Angophora's minority shareholding in Grooks on the hypothesis (which I continue to believe is unrealistic) that a buyer could be found". Despite their reservations, they gave an opinion about the value of the shareholding in the circumstances contemplated by the Tribunal: Mr MacGregor started from a valuation of Grooks "as is" of US$130.6 million, or US$45.174 million for the minority shareholding of 34.59%, and then, bringing into account a discount for lack of control (the "DLOC") and a discount for lack of marketability (the "DLOM"), and making a further discount to recognise the distressed nature of the hypothetical sale, he put forward a value of between US$6.505 million and US$3.253 million, and a calculation of Angophora's loss of approximately US$61 million to US$64 million. Mr Gilbey adopted a similar methodology, but, allowing smaller discounts, put forward a higher value for the "as is" value of the shareholding, and so a lower calculation of Angophora's loss.

58. There was another development after the February hearing. Angophora received two (materially identical) copies of a letter dated 21 February 2020 from Nika-Petrotech LLC ("Nika-Petrotech"), expressing an interest in acquiring a 100% interest in the Packer Group. The letters said that such a purchase would be financed by funds of the Nika-Petrotech Group and a loan from VIB Bank PJSC, a Russian state-owned bank. On 6 March 2020, Enyo, Angophora's solicitors, wrote to the Tribunal that the letter had been received, and said that the copies of the letter "appear to be sham approaches instigated by Mr Ovsyankin in the context of discussions with the Tribunal regarding quantum". On 13 March 2020, Mr Ovsyankin's lawyers wrote to the Tribunal that Retemmy had received a similar letter from Nika-Petrotech: they refuted the allegation of sham, pointing out that Nika-Petrotech "has substantial operations in Russia and is wholly independent of [Mr Ovsyankin] and Retemmy" and stating that Mr Ovsyankin understood that it had provisional financial backing for the proposal. In a witness statement dated 19 March 2020, Mr Alexey Balashov, the Managing Partner of Nika-Petrotech, set out an account of discussions dating back to 2018 with Mr Ovsyankin and Angophora about a potential purchase of shares in Grooks, and said that Nika-Petrotech renewed its expression of interest after representatives of Gazprombank had "said that they were willing to revert to discussion of the terms of the purchase transaction after the completion of the arbitration proceedings". He confirmed Nika-Petrotech's interest in acquiring "at least a majority, but preferably a 100% share" in the Packer Group.

59. There was dispute between the parties about whether the Tribunal should receive Mr Balashov's statement in evidence. By Procedural Order No 7 of 29 April 2020, the Tribunal, while observing that Mr Ovsyankin should have sought leave to submit the statement before sending it to the Tribunal, ordered that it be admitted, and invited Angophora to submit a written reply. It stated that "It considered the factual record to be complete" and that it did not find it necessary for Mr Balashov to appear and give oral evidence. In response to the Tribunal's invitation, Angophora filed a further witness statement of Mr Sapozhnikov.

60. The parties submitted post-hearing briefs on 14 April 2020. In his brief, Mr Ovsyankin argued that Angophora had pleaded and presented its case on the basis that its shareholding could not be sold and was valueless, that it would not be fair to allow the Different Case to be pursued, and that the Tribunal should not permit it: "If a case had been pleaded [Mr Ovsyankin] could have pleaded to it, including that any loss of hypothetical benefit has been self-inflicted, or could reasonably have been avoided. There would have been disclosure. The bundles are bereft of documents which would have been relevant to such a case. These would have included the internal documents of [Angophora] relating to efforts to sell the shares, what options have been available to it and its exit-strategy. In evidence it was admitted that such documents exist. There would have been an opportunity for [Mr Ovsyankin] to prepare a case on it. This would have included considering what witnesses to call and what evidence to adduce. [Mr] Gilbey and Mr Ovsyankin were not cross-examined so that they could have given evidence on a hypothetical sale and an actual sale" (paragraph 24 of Mr Ovsyankin's post hearing brief).

61. There was a (virtual) hearing on 6 May 2020 for oral closing argument. Mr Ovsyankin presented further written submissions for the hearing, and in them he said that, before the Different Case could be entertained, Angophora would need to apply to amend its pleading to make a properly formulated claim and there should be a fair hearing to determine whether it could be pursued. The Tribunal would also need, it was said, in order to be fair and to comply with the rules of the LCIA, to give directions for pleadings, witness statements, expert evidence and a further oral hearing with cross-examination. The written submissions also complained about Angophora's failure to produce documents about possible sales of its shareholding.

62. Angophora did not apply to amend its pleading, either at the hearing on 6 May 2020 or at any time. At the hearing on 6 May 2020, Mr Ovsyankin reiterated his complaints that the Tribunal was proceeding unfairly, including with regard to the pleadings, disclosure, and giving him an opportunity to call evidence and to raise other issues. He did not make any specific application about any of these matters.

63. On 8 May 2020, the Tribunal wrote an email to the parties, that, if the parties wished to cross-examine the experts further, they should notify the Tribunal, and a one-day hearing could be held to allow cross-examination limited to questions about the Supplemental Reports. It stated that no further documents or submissions would be admitted in the proceedings. Neither party notified the Tribunal that it wished so to cross-examine.

64. Mr Ovsyankin's lawyers wrote a letter dated 14 May 2020 to the Tribunal, objecting to the procedure that was being adopted by the Tribunal generally, and specifically objecting to what was said in the email of 8 May 2020, which, it said, did not afford a

fair opportunity to object to the Different Case and to present evidence to support the objection.

65. On 18 May 2020, the Tribunal wrote that, since neither party had asked to cross-examine the expert witnesses on their Supplemental Reports, there would be no further hearing for that purpose. It invited the parties to submit statements of costs, and said, "The Parties are reminded that there shall be no further submissions in these proceedings except upon a specific decision by the Arbitral Tribunal following a reasoned request for leave to submit". Nevertheless, on 19 May 2020, Mr Ovsyankin's lawyers responded, maintaining his objections to the Tribunal's procedure. Their letter said that, if the Tribunal contemplated an award based on the Different Case and to prefer the opinion of one expert with regard to matters covered by the Supplemental Reports, it had to "put any questions it ha[d] with regard to their evidence and give them (and [Mr Ovsyankin]) a fair opportunity to address them …". This was said to be without prejudice to Mr Ovsyankin's primary contention that "the prejudice that would be resulting from proceeding on the basis of the Tribunal's alternative case cannot now be remedied at this late stage by a pro forma offer to cross-examine the experts as an afterthought only after closure of pleadings, disclosure and gathering of fact evidence". Apart from the Tribunal's acknowledgement of the letter of 19 May 2020, there were no further significant exchanges between the parties and the Tribunal before the Tribunal issued its Award.

66. Thus, Mr Ovsyankin had ample opportunity to argue before the Tribunal that the Different Case was not pleaded, and could not fairly be considered by the Tribunal. He was able so to present this argument on 14 February 2020, in his closing submissions and at the hearing on 6 May 2020, and did so. The Tribunal did not accept that submission, and so I must consider whether, in these circumstances, it was fair of the Tribunal to assess quantum on the basis of the Different Case.

67. As Mr Gee submitted, if an arbitral tribunal considers that the parties have missed the real point, it should ensure that they have a proper opportunity to deal with it, and it is not right that they should learn of the adverse points only when the award is delivered. Mr Gee cited numerous authorities in support of this uncontroversial proposition, including the decisions of Bingham J in Zermalt Holding SA v Nu-Life Upholstery Repairs, [1985] 2 EGLR 14 and of the Privy Council in RAV Bahamas v Therapy Beach Club, [2021] UKPC 8. In this case the Tribunal gave the parties a proper opportunity to deal with the Different Case. It did not, as Mr Gee submitted, lock Mr Ovsyankin out from raising consequential issues.

68. On 14 February 2020, the Tribunal had raised a specific and focused question about the value of the shareholding in the event of a distressed sale. The question was not concerned about what sales or potential sales there were or might actually be available, as was clearly explained by Sir Jeremy Cooke ("… what would actually happen on the ground is neither here nor there"). It did not re-open the evidence on any wider question than about the value of the shareholding in assumed circumstances: the Tribunal sought the experts' assistance only on that point. In seeking this assistance, the Tribunal did not restrict the arguments that the parties might make in closing submissions.

69. If Mr Ovsyankin had considered that, if the assistance of the experts was sought on this question, then fairness required that he be entitled to introduce further factual evidence, either by way of witness evidence or documentary evidence, then it was for him to make

an application to the Tribunal. That should have been obvious, but, in any case, it was spelt out by Sir Jeremy Cooke on 14 February 2020. Mr Ovsyankin made no application, and I was not told what evidence he might have wished to present. Nor did he make an application for further disclosure.

70. Having received the Expert Reports, the parties were given the option of cross-examining on them. Neither accepted the invitation. In these circumstances, I cannot accept that Mr Ovsyankin was treated unfairly either because Mr MacGregor was not cross-examined on his Supplemental Report, or because criticisms of Mr Gilbey in his Supplemental Report were not put to him in a cross-examination hearing. Nor can I accept, given the narrow ambit of the further evidence that the Tribunal sought, that it would have been sensible or useful for the Tribunal to direct or invite Mr Ovsyankin to present himself for further cross-examination about the Different Case. I therefore reject Mr Gee's complaint that, in its email of 8 May 2020, the Tribunal unfairly limited the scope of the enquiry into the Different Case. The direction was appropriate in view of the specific and limited assistance that the Tribunal requested on 14 February 2020 and in the absence of any application by the parties to adduce further evidence.

71. In the event, the Tribunal did admit the further evidence of Mr Balashov, which Mr Ovsyankin wanted to present. It did so, as I understand it, not because it considered that it assisted on the Different Case, but because it considered it right, under the principle established in The Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v The Pontypridd Waterworks Company, [1903] AC 426, that the Tribunal should receive that evidence. The Tribunal was entitled to receive it without cross-examination, and its decision to do so certainly caused no unfairness since, in its Award, it did not accept Angophora's contention that the interest expressed by Nika-Petrotech in February 2020 was sham.

Serious irregularity by way of failure to act fairly: section 68(2)(a) of AA

72. Having examined these central complaints of Mr Ovsyankin, I can consider the pleaded complaints of an irregularity quite shortly. I start with the allegations that there was an irregularity of the kind described in section 68(2)(a) of the AA, that the Tribunal did not comply with the duty in section 33 of the AA to "act fairly … as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". Mr Ovsyankin has pleaded many individual complaints in sixteen different sub-paragraphs of breach of this duty: they are interrelated and overlap, but I shall do my best to disentangle them.

73. The first group of complaints is directed to the procedure adopted by the Tribunal in May 2020: its invitation on 8 May 2020 to the parties to cross-examine the experts on their Supplemental Reports, and its "disregard" of the letter of 14 May 2020 from Mr Ovsyankin's lawyers. These complaints are based on the contention that the Different Case had not been pleaded and was not properly before the Tribunal in the hearing between 6 and 14 February 2020. I have rejected that contention,

74. There is a specific complaint that the email of 8 May 2020 allowed a further evidential hearing only about the Supplemental Reports of the experts. As I have explained, I see nothing in this complaint. I have also explained that I reject any complaint about how the Tribunal dealt with the material concerning Nika-Petrotech. The only other additional evidence introduced after the February hearing was by way of the Supplemental Reports.

Accordingly, the invitation extended by the Tribunal on 8 May 2020, which the parties did not take up, was appropriately directed and confined to the new material presented after the February hearing.

75. Other pleaded complaints about the fairness of the Tribunal's procedure, though couched in different language, are similarly answered: that the Tribunal adopted "an unparticularised different case from that advanced by Angophora, including in the taking of oral evidence" when it was too late to do so; that at the end of the hearing on 14 February 2020 and thereafter, the Tribunal did not seek to redress the procedural disadvantage to Mr Ovsyankin of entertaining the Different Case, which had not been pursued by Angophora; and that the Tribunal did not give Mr Ovsyankin a fair and reasonable opportunity to advance his own case to meet the Different Case. None of these complaints has any proper basis since the Different Case was always available on the pleadings or fairly in play at the February hearing: that was Mr Ovsyankin's opportunity to respond to it.

76. Mr Ovsyankin also pleads that the Tribunal acted unfairly in that it "took on a role as advocate for Angophora" in advancing the Different Case and "obtaining evidence" to support it. Similarly, there is a complaint that the "Tribunal descended into the arena of the dispute between the parties, and/or acted the role of both tribunal and promoter/conductor of a different case". These complaints too lose much of their force since the Different Case was already pleaded or at least "in play" at the February hearing. In any case, it is permissible for a tribunal to obtain evidence: section 34(2)(g) of AA provides that it is for the tribunal to decide inter alia "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law".

77. Mr Ovsyankin specifically complains that he was not challenged in cross-examination on his evidence that he and Retemmy were willing to join with Angophora to sell 100% of the shares in Grooks. I have already referred to the cross-examination of Mr Ovsyankin. I consider that Angophora adequately put its case to him, particularly given that, as Mr Brown testified, the hearing was being conducted according to a fixed timetable with a rationed length of time for cross-examination. Mr Ovsyankin's evidence that he and Retemmy were willing to join in a sale of shares was largely beside the point. As the Tribunal said in the Award, Angophora could not sell its shares on commercial terms because it could not "put its reputation on the line in marketing the shares" (at para 443), and "[a]ll the problems facing [Angophora] in seeking to sell its minority holding would re-present themselves when selling the whole company, unless Retemmy fully cooperated and management misconduct was laid bare to the purchaser. Since [Mr Ovsyankin] who is the majority owner of Retemmy has continued throughout this arbitration to defend his actions and has not been forthcoming about the true finances of Grooks and its subsidiaries, such a sale was not a realistic possibility" (para 454).

78. Finally, I refer to complaints that the Tribunal disregarded procedural orders. I understand that the focus of this complaint is that Angophora's pleadings did not comply with Procedural Order no 1. I have considered and rejected that complaint.

Irregularity by way of failure to comply with the LCIA rules: section 68(2)(c)

79. Mr Ovsyankin complained that the Tribunal was also guilty of an irregularity under section 68(2)(c) of the AA in that it failed to conduct the proceedings in accordance with the rules of the LCIA, and so not in accordance with the procedure agreed by the parties.

Mr Gee particularly referred to rule 22.2, which provides that the Tribunal "shall have the power upon the application of any party or … upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms … as the Arbitral Tribunal may decide … to allow a party to supplement, modify or amend any claim … submitted by such party". It is said that the Tribunal entertained a case that had not been pleaded by Angophora, that Angophora should have applied to amend its pleadings, and that therefore Mr Ovsyankin should have been given "a reasonable opportunity" to object to it and to present argument about the terms (for example, with regards to allowing further disclosure and permitting further evidence) on which it should be allowed, if at all.

80. Like many of the complaints made of irregularity under section 68(2)(a), this complaint depends on whether the Tribunal should not have entertained the Different Case without Angophora amending its pleadings. I have rejected that contention, and it follows that I reject this complaint of irregularity

Serious irregularity by way of failure to deal with issues: section 68(2)(d)

81. Under section 68(2)(d) of AA, there is an irregularity in the proceedings if the tribunal fails "to deal with all the issues that were put to it". It is incumbent on an applicant who complains that a tribunal has failed to deal with an issue to identify the issue about which he complains. Mr Ovsyankin did not do so in his claim form. He put his complaint as follows (at paragraph 12(i)): "The Tribunal failed to deal with all the issues put to it, namely the issue raised at the Resumed Hearing and thereafter". This was followed by two further sub-paragraphs, which were said to be "Without prejudice to the generality of the foregoing", and in any case did not identify a specific issue that is the subject of this complaint. In the first sub-paragraph, it was pleaded that the issues "included issues and objections" raised in the letter of 14 May 2020, "including" various procedural objections. In the second sub-paragraph, there was a complaint that the Tribunal "disregarded" the letter of 14 May 2020, except as to whether there should be a hearing to cross-examine on the Supplemental Expert Reports. These sub-paragraphs did not identify specific issues that the Tribunal was said not to have dealt with: it simply said that the Court would find examples of what was "included" in the complaint by trawling through a letter of 18 pages.

82. In an attempt to understand the complaint under section 68(2)(d), I asked Mr Ovsyankin to provide further particulars. I shall only say that the particulars did not, to my mind, clarify the complaint. In the end, in his reply submissions, Mr Gee said that he relied on matters raised in Mr Ovsyankin's post-hearing brief, which is undated but was apparently served on 14 April 2020, as setting out issues that were not dealt with by the Tribunal. I believe that in due course he confined the complaint under section 68(2)(d) to matters mentioned in paragraph 161 of the post-hearing brief, although he then added "Nika-Petrotech", referring to the evidence about the interest expressed by Nika-Petrotech in acquiring shares in the Packer Group. I take this statement of Mr Gee to be Mr Ovsyankin's final position with regard to this complaint.

83. The proper approach to interpreting the sub-section have been authoritatively stated in the judgment of the Privy Council in RAV Bahamas Ltd v Therapy Beach Club Inc, [2021] UKPC 8, in which it is explained:

i) Section 68(2)(d) is directed to "an issue that is essential or crucial to the determination of a claim or defence on which the resolution of the dispute or disputes depends": the RAV Bahamas case at para 41. Thus, it is directed to questions going to the substance of the claim or defence, rather than to procedural questions.

ii) Section 68(2)(d) is concerned with "issues", in contradistinction to arguments, or "lines of reasoning", or submissions on an issue: the RAV Bahamas case at para 41.

iii) The requirement that arbitrators "deal with" all issues does not require them to answer all issues. "A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise": Secretary of State for the Home Dept v Raytheon Systems Ltd, [2014] EWHC 437 (TCC) at para 33(g)(x), cited in the RAV Bahamas case at para 43.

iv) Section 68(2)(d) is not concerned with how a tribunal dealt with an issue. If it was dealt with, it does not matter for the purposes of the subsection how well or badly it was dealt with: Secretary of State for the Home Dept v Raytheon Systems Ltd, [2014] EWHC 437 (TCC) at para 33(g)(vi), cited in the RAV Bahamas case at para 43.

84. I cannot accept that the Tribunal "failed to deal with all of the issues put to it", including those referred to in paragraph 161 of the post-hearing brief and anything concerning with Nika-Petrotech. Paragraph 161 is in a section headed "The Tribunal's proposed alternative case. Distressed sale", which is directed to arguing that the Tribunal should not entertain the Different Case. First, it said that the Tribunal had no "contractual or jurisdictional basis … to devise an unprecedented buy-out remedy" (at para 156). It then set out various arguments about the position "Should the Tribunal nevertheless, on its own motion and contrary to the position of both parties, proceed on the basis of its alternative case on measure of damages, this raises issues of fairness" (at paragraph 159). Paragraph 161 continues, "Without in any way limiting the issues which could have arisen, once a substantive claim was advanced by [Angophora] contending that the shares could have been sold and seeking damages based on this, there would have been further issues which would have arisen on such a claim". It then sets out twelve such questions, such as (to give just two examples) "the terms of the sale" and "the date of the sale". Thus, the paragraph does not purport to identify issues between the parties that had arisen and were put to the Tribunal, but sets out issues that might or would arise. Thus, to refer to the two examples, the parties had not put forward different cases about a date of hypothetical sale or its terms so as to give rise to an issue about them.

85. The argument in paragraph 161 did not go to a question of substance between the parties, but the proper procedure if the Tribunal considered the Different Case. In any case, the Tribunal did deal with, and rejected, the procedural complaint at paragraph 442 of the Award, "[Mr Ovsyankin] gave consideration to the case of the Shares having a value other than nil and his submission that, if [Angophora] had made an express alternative case about a residual value from the outset, he 'would have come with completely different evidence on this case' is untenable. [Mr Ovsyankin] has always argued that [Angophora] could sell its shares and there can therefore be no question that [Mr Ovsyankin] has grappled with the issue of the shares having a value above nil".

86. Moreover, it cannot be said that the Tribunal did not deal with an issue that was crucial or essential to a claim or defence. The issue was what price might have been obtained for Angophora's shares in Grooks, and the Tribunal dealt with that issue: at paragraph 443, it decided that no commercial sale was possible; at paragraph 445, it decided that there was the possibility of a distressed sale; and at paragraph 474, it decided that it could see no reason that a buyer would pay more than about US$ 10.8 million for the shares. Mr Ovsyankin might have preferred more reasoning about various arguments that he raised in relation to it, although the Tribunal's reasoning seems to me wholly sufficient, but that does not amount to the Tribunal failing to deal with an issue.

87. As for the interest said to have been expressed by Nika-Petrotech, I again cannot accept that this in itself raised an issue within the meaning of section 68(2)(d): it was relevant to a step in one of Mr Ovsyankin's arguments about the value of the shareholding. In any case, the Tribunal dealt with the question at paragraph 445: having rejected Angophora's argument that the interest was not genuine, the Tribunal said that, "The reality is ... that such a sale was never a realistic possibility, whether of 100% of the shares in Grooks or the minority shareholding".

88. I reject the complaint under section 68(2)(d) of AA.

The allegation of apparent bias: introduction

89. It is not alleged that the Tribunal, or any member of it, was actually biased, but it is said that the Arbitrators exhibited apparent bias. This is the basis of Mr Ovsyankin's remaining challenge under section 68 of the AA and also of his applications under section 24.

90. Under article 10 of the LCIA Rules, the LCIA Court may revoke any arbitrator's appointment if (inter alia) "circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence". Article 10.2 provides that the LCIA Court "may determine that an arbitrator is unfit to act … if that arbitrator (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry".

91. After the Award in the Guarantee Arbitration had been published, on 5 January 2020, Retemmy wrote to the LCIA about the SHA Arbitration, setting out what it said were "justifiable doubts as to whether the Arbitral Tribunal is able to remain impartial in the arbitration". It invited the Arbitrators to withdraw from the arbitration, and, if they did not do so, invited the LCIA Court to revoke their appointment.

92. The basis for the application was that, in the Award, the Arbitrators had expressed final views on matters that went directly to "the ultimate issues" in the SHA Arbitration. On the same date, 5 January 2020, Mr Ovsyankin's lawyers wrote in similar terms about the Non-Compete Arbitration. The LCIA Court appointed Mr Christopher Lau SC to consider the two challenges.

93. On 29 January 2021, Mr Ovsyankin's lawyers wrote to each of the Arbitrators in similar terms, asking them whether they admitted any irregularity in the Guarantee Arbitration. No reply was received.

94. On 16 April 2021, the Arbitrators wrote to Mr Lau that they considered that "they have acted impartially and fairly in [the Guarantee Arbitration] and see no reason to recuse themselves from [the SHA Arbitration and the Non-Compete Arbitration] on the basis of the findings that they made on the evidence adduced by the Parties".

95. On 2 June 2021, Mr Lau dismissed the challenges. He said that Mr Ovsyankin and Retemmy were aware, when agreeing that one arbitration should be heard and decided first, that the Tribunal, if it decided the merits of the claims, would in its award in that arbitration make decisions and findings and reach conclusions on "overlapping issues", matters in dispute in two or all of the arbitrations which had been stayed. He also said that it was "not for the LCIA Court to determine the matters raised in [these proceedings]". He ordered that Mr Ovsyankin pay the arbitration costs of the challenge and Angophora's costs.

Serious irregularity by way of failure to act impartially: section 68(2)(a)

96. With this introduction, I return to section 68(2)(a) to consider the allegation that the Tribunal failed to act impartially, contrary to section 33 of the AA.

97. First, it is said that the Tribunal appeared to have decided issues about the proper measure of Angophora's loss pre-maturely and before hearing full argument. Mr Gee cited authority that this is a form of bias, and this is not disputed. As was said by the Privy Council in Stubbs v The Queen, [2019] AC 868 at para 15, "The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for removal. The appearance of bias includes a clear indication of a prematurely closed mind …. The matter was expressed by Longmore LJ in Okritie International Investment Management Ltd v Urumov, [2014] EWCA Civ 1315 (para 1) in the following terms: 'The concept of bias … extends further to the real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case'".

98. The allegation being one of apparent bias, the question is whether a "fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": see Porter v Magill, [2001] UKHL 97 at para 103 per Lord Hope. In his opening submissions, Mr Gee contended that a reasonable observer, would take account of "all relevant matters … indicative of a closed mind or indeed 'anything other than an objective view'". I would prefer to say that the hypothetical observer would take into account all relevant considerations, both indicative and counter-indicative of a closed mind.

99. Mr Gee's submissions went on to list twenty considerations (which were said not to be an exhaustive list, but no others were identified and I can conceive of none other) that he contended would lead the hypothetical observer to conclude that there was a real possibility of bias. They include many of the complaints that were raised in support of the allegation that the Tribunal failed to act fairly or in respect of the complaint under section 68(2)(d). I have already considered and rejected them, and I do not repeat my reasons for doing so. I shall, however, mention three points.

100. First, Mr Gee said that the observer would take into account that, in the Award, the Tribunal upheld the Different Case, "knowing of issues which Mr Ovsyankin would have wished to raise in relation to it and ignoring them". It is perhaps not surprising that the Tribunal upheld the Different Case in the Award. Presumably, the Tribunal requested

further help about it from the experts on 14 February 2020 because it thought that it might provide the proper measure of damages, but, as a reasonably and fair-minded observer would recognise, that is quite different from having a closed mind. As for the complaint that the Award did not explore all the points that Mr Ovsyankin sought to argue, or sought the opportunity to raise, they simply did not bear on the approach to quantum adopted by the Tribunal.

101. Mr Gee also listed as a matter that the observer would take into account that the Arbitrators each told Mr Lau that they "consider[ed] that they ha[d] acted impartially" and saw no reason to recuse themselves "on the basis of the findings which they made on the evidence adduced by the Parties". Mr Gee submitted that this statement, considered in the context of the submission made to Mr Lau, "misrepresented the position and created a misleading picture of what the [Tribunal] had done. Its foreseeable consequence was that Mr Lau would rely upon it as he did … and make adverse costs orders against Mr Ovsyankin". I see nothing misleading in the Arbitrators' communication with Mr Lau.

102. Mr Gee also listed as a matter that the observer would take into account that the Arbitrators did not respond to the letter of 29 January 2021. As I understand it, his point is that, if an Arbitrator accepts that he has made an error in unwittingly giving an impression of being partisan, this can, depending on the circumstances, be counter-indicative that he is actually biased. No doubt that might be so, but in this case, the Arbitrators had no reason to make any admissions or accept that they had erred.

103. Mr Gee had another argument: that it constitutes a form of bias if a judge or arbitrator is guilty of what he described as "serial breach of the Rules of the LCIA and the Arbitration Act". In some circumstances, I suppose, such conduct could be such as to give a fair-minded and informed observer reason to think that there is a real possibility that an arbitrator is biased, although to my mind this is not itself a species of bias as such. In any case, as I have explained, I do not accept that the Tribunal in this case broke either the rules of the LCIA or the AA.

Conclusion on application under section 68

104. I conclude that there was no irregularity affecting the Tribunal, the proceedings or the Award. I also received submissions about whether, if there were any irregularity, it would be serious in the sense that it has caused or will cause serious injustice to Mr Ovsyankin, but I do not need to consider that question.

The Applications under section 24 of AA

105. Under section 24 of AA, a party to arbitral proceedings may apply to the Court to remove an arbitrator on the ground (inter alia) that circumstances exist that give rise to justifiable doubts about his impartiality (section 24(1)(a)), or if an arbitrator has failed or refused properly to conduct the proceedings (section 24(1)(d)(i)). Mr Ovsvankin and Retemmy apply for the removal of all the Arbitrators in each of the three arbitrations.

106. I refuse the applications. I accept that in the Guarantee Arbitration the Tribunal made decisions on questions that also arise in the SHA Arbitration or the Non-Compete Arbitration. That in itself provides no basis for concluding that any of the Arbitrators is, or appears to be, biased. First, I agree with Mr Lau that the parties clearly agreed to having the same Arbitrators in each reference when they knew that this situation might,

indeed was highly likely to, arise. Secondly, it is well established that the English Courts do not consider that a judge should recuse himself from a case on the grounds that he has made adverse findings against a party, in other proceedings or at a different stage of the same proceedings. In Okritie International Investment Management Ltd v Urumov, (loc cit), Longmore LJ said (at para 13): "The general rule is that [the judge] should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so". I consider that, as far as is relevant for present purposes, the same general rule applies to arbitrators.

107. Many of the arguments in support of the applications under section 24 are Mr Ovsyankin's various complaints that the Tribunal conducted the Guarantee Arbitration unfairly, and I have rejected them. I have also rejected the complaint that the Tribunal gave an appearance that it was not impartial in conducting the Guarantee Arbitration and in its Award. However, as Mr Gee submitted, the question whether there is an appearance of bias is judged as at the time of the hearing to remove the arbitrator, and Mr Ovsyankin is entitled to rely in support of the section 24 applications upon what has happened since the Award was issued.

108. Accordingly, Mr Gee argued in support of the section 24 application:

i) That Mr Ovsyankin is claiming relief against each of the arbitrators by way of repayment of the fees paid to him by Mr Ovsyankin, interest and costs.

ii) That the Arbitrators made representations to Mr Lau, which led to adverse consequences to Mr Ovsyankin.

Mr Gee submitted that the reasonable observer would take account of the "confrontational dispute" between Mr Ovsyankin and the Arbitrators, and their conduct in relation to the challenge to their appointment under article 10 of the LCIA rules, when considering whether the Arbitrators lack impartiality and have a properly open mind as to what they will have to decide.

109. It would be strange if, because Mr Ovsyankin has launched an unsuccessful challenge under the LCIA Rules and he and Retemmy had made otherwise unmeritorious applications in these proceedings, it should thereby come about that the applications under section 24 were granted. I do not accept that these considerations would lead a reasonable observer to have doubts about the Arbitrators' impartiality or to conclude that there is a reasonable possibility that they will not conduct the arbitrations impartially. Arbitrators are aware that the contentious nature of references means that their conduct and decisions might be challenged, and challenged vigorously, in the Courts and elsewhere. They do not generally allow it to influence their dispassionate assessment of disputes that come before them. I see no reason to think that the Arbitrators in this case will be influenced by the matters on which Mr Gee relied.

Conclusion

110. I refuse all the applications.