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Case No: CL-2021-000517
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CL-2021-000613

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

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

Date: 28 June 2022

Before :

THE HONOURABLE MR JUSTICE HENSHAW

Between :

- (1) WILLIAM QUAY HAYS
(2) GROW LAND AND WATER LLC
(3) KINGS COUNTY VENTURES LLC
(4) GREEN RENEWABLE ORGANIC AND
WATER HOLDINGS LLC
(t/a GROW HOLDINGS LLC)

Claimants

- and -

BLOOMFIELD INVESTMENTS LLC

Defendant

**Ricky Diwan QC and Anton Dudnikov (instructed by Wilmer Cutler Pickering Hale and
Dorr LLP) for the Claimants**

**Jasbir Dhillon QC and Fred Hobson (instructed by Freshfields Bruckhaus Deringer LLP)
for the Defendant**

Hearing dates: 3 and 4 March 2022
Draft judgment circulated to the parties: 19 May 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Henshaw:

(A) INTRODUCTION 3

(B) FACTS 5

 (1) The Claimants..... 5

 (2) The dispute with Sandridge..... 5

 (3) The CPA and Amended CPA 5

 (4) Subsequent events..... 7

 (5) The Arbitrations..... 8

 (6) The Awards 10

 (7) Court applications to enforce and to challenge the Awards..... 11

(C) APPLICABLE PRINCIPLES..... 12

 (1) Extensions of time 12

 (a) General 12

 (b) Length of delay 15

 (c) Reasonableness of the applicant’s conduct 16

 (d) Prejudice to the respondent 19

 (e) Strength of the application..... 19

 (2) Challenges to arbitrators’ substantive jurisdiction 21

 (3) Serious procedural irregularities..... 22

 (a) General test 22

 (b) Procedural unfairness 22

 (c) Excess of arbitrators’ powers..... 23

 (d) Awards of interest..... 24

 (e) Substantial injustice 26

(D) THE CLAIMANTS’ APPLICATIONS FOR EXTENSIONS OF TIME 28

 (1) Length of the delay 28

 (2) Whether Claimants acted reasonably in all the circumstances..... 28

 (3) Whether the Defendants or tribunal caused or contributed to the delay 33

 (4) Irremediable prejudice to the Defendants in addition to mere loss of time 33

 (5) Impact on continuing arbitration 35

 (6) Strength of the applications..... 35

 (a) Awards of interest 35

 (b) Jurisdiction over Mr Hays and Grow Holdings..... 39

 (7) Unfairness to Claimants in broadest sense 43

 (8) Overall assessment..... 43

(E) CONCLUSIONS..... 44

(A) INTRODUCTION

1. The Claimants apply for extensions of time of 35 days, pursuant to section 80(5) of the Arbitration Act (“*the Act*”) and/or CPR 62.9, to challenge two LCIA arbitration awards (“*the Awards*”) in favour of the Defendant (“*Bloomfield*”) on the grounds of lack of substantive jurisdiction (section 67(1)/section 72(2)(a) of the Act) and serious procedural irregularity (section 68(1)/section 72(2)(b) of the Act).
2. The Awards remain unsatisfied in their entirety. In September 2021, on Bloomfield’s without notice applications, this court gave leave under section 66 of the Act to enforce the Awards in the same manner as a judgment or order of the court. The Claimants have separately applied to set those orders aside, and those applications remain pending.
3. Briefly, the present applications arise in the following context. In 2014-2016 Bloomfield, an indirect subsidiary of legal finance company Burford Capital, advanced around US\$18 million in total to the Second Claimant (“*Grow Land*”) and the Third Claimant (“*KCV*”). Grow Land and KCV are Californian companies linked, in the way I describe below, to the First Claimant (“*Mr Hays*”), a resident of California. Grow Land has been owned by the Fourth Claimant (“*Grow Holdings*”) since Grow Holdings’ incorporation in 2010.
4. Grow Land and KCV were claimants in litigation in the Californian courts against Sandridge Partners GP (“*Sandridge*”) arising from a land transaction. Bloomfield advanced money to them on a non-recourse basis, on the basis that it could recoup its capital and earn a substantial return contingent on the receipt of proceeds from the litigation. The advances were unsecured, other than by liens granted by KCV and Grow Land over their rights and interests in the litigation. Neither Mr Hays nor Grow Holdings was expressed to be a party to the funding agreements (or to the arbitration agreements they contained).
5. Grow Holdings and KCV obtained a substantial judgment in their favour against Sandridge at first instance, but it was set aside on appeal and the case remitted to the first instance court. Thereafter, the litigation was settled, and the US\$2 million settlement proceeds were remitted to Bloomfield.
6. Bloomfield commenced arbitrations, alleging breach of the funding agreements: in 2018 against KCV, Grow Land and Grow Holdings (“*the 2018 Arbitration*”), and in 2020 against the same companies and Mr Hays himself (“*the 2020 Arbitration*”). Bloomfield claimed that Mr Hays and Grow Holdings were parties to the arbitration agreements by reason of the *alter ego* doctrine of New York law, and liable for various alleged breaches of contract by Grow Land in connection with the settlement of the Californian proceedings, which Bloomfield claimed was concluded at an undervalue.
7. During the course of the 2018 Arbitration, KCV and Grow Land as respondents were ordered by the Tribunal to provide £1.5 million as security for Bloomfield’s costs. Their legal representatives on 1 November 2019 withdrew on grounds of lack of funding, and thereafter KCV and Grow Land no longer participated in the 2018 Arbitration. None of the Claimants participated in the 2020 Arbitration.

8. The Tribunal went on to issue the Awards in summer 2021, holding all of the current Claimants liable. The aspects of the Awards which give rise to the current arbitration claims before this court are as follows.
9. First, the Tribunal found that the breaches of contract relied upon by Bloomfield constituted a ‘fraud or wrong’ enabling the Tribunal to pierce the corporate veil and impose liabilities on Mr Hays and Grow Holdings. Mr Hays and Grow Holdings dispute the Tribunal’s factual and legal determinations in this regard, and seek to challenge the Awards on the basis that they were not parties to the arbitration agreements.
10. Secondly, the Tribunal awarded Bloomfield damages of US\$6 million for the alleged undervalue of the settlement, but it also made an award of “*interest*” at the rate of 65% per annum, compounded quarterly, roughly equivalent to simple interest of 250% per annum. From the date of the breach (7 November 2017) to the date on which the present claims were commenced (18 October 2021) such interest amounted to US\$58.9 million, i.e. almost ten times the damages awarded. The Claimants estimate that in another year’s time the interest will total more than \$100 million. The funding agreements made provision for Bloomfield, in certain circumstances, to be entitled to a rate of return of 65% (compounded quarterly) in the event that the litigation Proceeds (as defined) achieved a certain level and were sufficient to fund such a return. The Claimants say that by using that same rate for an award of interest, the Tribunal both exceeded its powers and committed a serious irregularity, no hint having been given before the issue of the Awards that the Tribunal might contemplate any such approach.
11. The Claimants submit that extensions of time are justifiable in circumstances where (a) the extensions sought, though not insubstantial, are modest; (b) the delay arose from a genuine misapprehension by an overseas litigant about the appropriate forum for the challenge; (c) there would be no prejudice to Bloomfield, particularly bearing in mind that the Claimants are entitled to advance the same substantive arguments in their timely section 66/section 72(1) applications and in the Californian proceedings; and (d) the challenges can be seen, on a provisional review, to have merit.
12. Bloomfield submits that the Claimants’ delay is significant and substantial, being a delay of 35 days following expiry of the 28-day time limit; there are no cogent reasons to justify an extension: on the contrary, the Claimants’ delay has been deliberate and tactical. Bloomfield suggests that on, and before, receipt of the Awards on 16 August 2021, the Claimants pursued a conscious strategy of mounting a pre-emptive challenge to the enforcement of the Awards in California, which is where the Claimants’ assets are located and the likely place of enforcement, rather than in England.
13. For the reasons which follow, I have come to the conclusion that the extensions should be granted in part.

(B) FACTS

(1) The Claimants

14. KCV and Grow Land are Californian companies formed in 2006/2007 by Mr Hays for real estate development purposes. Their objective is said to be to create a sustainable, environmentally responsible, and family-friendly city for more than 150,000 residents in Kings County, California, by combining land with a reliable source of water.
15. KCV had some 20 members at the material time. Mr Hays was a minority member with no managerial, oversight or signatory role. The managing member was Senator Art Torres (retired).
16. Grow Land was formed in 2007. Since the formation of Grow Holdings in 2010, the sole member in Grow Land has been Grow Holdings.
17. Grow Holdings, formed in 2010, is also a Californian company. As of 2014 its sole member was the Hays Family Trust.
18. Mr Hays was at all material times the CEO of Grow Holdings, and one of two trustees of the Hays Family Trust, the other being his wife. Their children are the trust's beneficiaries.

(2) The dispute with Sandridge

19. In 2007-2008, Grow Land and KCV entered into option contracts to purchase additional land, including permanent water rights, from McCarthy Family Farms ("**MFF**"). However, unknown to Grow Land and KCV, Sandridge in 2009 entered into an agreement with MFF to purchase the same parcels of land. In 2009, after Grow Land and KCV had exercised the options, MFF purported to convey the land to Sandridge instead. Grow Land and KCV demanded performance of the options without satisfaction.
20. On 11 December 2009, Grow Land and KCV initiated litigation in the Californian courts against, *inter alia*, MFF and Sandridge for breach of contract and contractual interference.
21. Grow Land and KCV were successful at first instance, and in April 2014 obtained a judgment for US\$128.6 million, comprising US\$73.4 million in compensatory damages and US\$55.2m in punitive damages. By an amended judgment in June 2014, the punitive element was reduced to US\$3 million, thereby reducing the overall judgment to US\$76.4 million.
22. MFF and Sandridge appealed, and by the time the funding agreement referred to below was concluded, the appeal was pending.

(3) The CPA and Amended CPA

23. In 2014 Bloomfield agreed to provide financing in the amount of US\$15 million under the terms of a Capital Provision Agreement dated 28 August 2014 (the "**CPA**"), in return for a contractual entitlement to the proceeds of Grow Land/KCV's claim in the Grow Land/Sandridge Litigation.

24. Bloomfield provided an additional US\$3 million of financing in 2016, pursuant to the terms of an amended and restated Capital Provision Agreement dated 9 March 2016 (the “*Amended CPA*”). This agreement contained various contractual protections to ensure the commercially reasonable prosecution of the Grow Land/Sandridge Litigation, in respect of which the financing provided by Bloomfield was (in effect) secured.
25. I refer to the two agreements together as “*the CPAs*”.
26. The signatories to the CPAs were Bloomfield, Grow Land and KCV. They were expressed to be governed by New York law and contained arbitration agreements providing for LCIA arbitration in London. Neither Grow Holdings nor Mr Hays was expressed to be a party to either of the agreements or their arbitration agreements. Section 14 contained limitations on transfer, successors and assigns, further providing that:

“Neither this Agreement nor any right or obligation in or under this Agreement may be transferred ... by the Counterparty without the prior written consent of the Capital Provider”;

“This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns”; and

“No Person other than the parties hereto (and the Indemnitees and any Capital Provider Transferee) shall have any rights under this Agreement”

There is no suggestion that Mr Hays or Grow Holdings were ‘successors’ or ‘permitted assigns’ of Grow Land or KCV.

27. Senator Art Torres signed both agreements on behalf of KCV as its managing member. Mr Hays signed both agreements on behalf of Grow Land, as the CEO and managing member of Grow Holdings, which in turn was the managing member of Grow Land.
28. Pursuant to the CPAs, Bloomfield advanced approximately US\$18 million to Grow Land and KCV on a non-recourse basis (clause 3.1(e)). Bloomfield’s entitlement to any payment from the counterparty, whereby it would recoup the capital and receive the rate of return agreed in Annex II on any amount in excess of the capital, was contingent on the receipt of “*Proceeds*” from the Grow Land / Sandridge Litigation. Hence, the Claimants point out, if the Proceeds were less than US\$18 million, then Bloomfield would not recoup the entirety of its capital and would receive no return on top. As noted in the 2020 Award, the arrangement embodied in the CPAs was in the nature of a ‘monetization’ of the Californian judgment (as opposed to litigation funding as it is commonly understood):

“Andrew Cohen [who gave evidence for Bloomfield] states that, unlike the litigation-cost funding that Bloomfield occasionally offered, where capital provided could only be used for litigation costs and expenses, the funding provided under

the CPA was understood to be a monetization of the judgment on appeal in the Grow Land/Sandridge Litigation, “because US\$15 million far exceeded the costs of litigating the appeal.” Accordingly, he asserts that it was understood that the funding from the CPA could be used for commercial purposes beyond the Grow Land/Sandridge Litigation, including particularly the Quay Valley Development, on which Quay Hays occasionally provided information to Andrew Cohen either by email or telephone.” (2020 Award § 87)

29. In return for the risks Bloomfield was running, it was contractually entitled to a high level of return if sufficient Proceeds were received from the litigation. The arrangements were set out in Annex II to the Amended CPA, which began by defining Bloomfield’s “*Total Investment Amount*” as the sum of US\$18m (the amount Bloomfield advanced) plus a return on capital of 30% per annum, compounded quarterly, accrued from the Original Closing Date (11 September 2014) to the Amendment Closing Date (5 business days after the date of the Amended CPA).
30. Annex II then provided that Bloomfield’s entitlement (“*Counterparty Payment Amounts*”) was a first dollar return of the following:
 - i) the Total Investment Amount; plus
 - ii) a return on capital of 65% per annum, compounded quarterly, on the Total Investment Amount, accruing from the Amendment Closing Date until the earlier of (a) the date the Counterparty Payment Amounts were paid in full or (b) the first anniversary of the Amendment Closing Date; plus
 - iii) if the Counterparty Payment Amounts were not paid in full before the first anniversary of the Amendment Closing Date, a fixed amount equal to 65% of the Total Investment Amount per year until payment in full; plus
 - iv) if the first instance judgment were remanded for further trial court proceedings, 10% of the Proceeds.

(4) Subsequent events

31. On 1 August 2016, the California Court of Appeal reversed the damages awards in favour of Grow Land and KCV and remanded the case to the lower court for a fresh trial on quantum. That meant, as it was put in the 2020 Award, that “*the claim of KCV and Grow Land for compensatory damages was at an end*”, and because “*punitive damages must bear a reasonable relation to the actual damages, the reversal of compensatory damages required that the punitive damages would also have to be re-determined in a new trial*”.
32. In November 2017, the Grow Land/Sandridge Litigation was settled for only US\$2 million, and the proceeds were transferred by Grow Land and KCV to Bloomfield.
33. In the same month, Grow Holdings reached an agreement with Sandridge to settle unrelated proceedings, which had been started by Sandridge and related to a different piece of land originally purchased by Grow Holdings from a third party. The

settlement of that litigation involved a payment of US\$10.5 million by Sandridge to Grow Holdings and the transfer of land to Sandridge.

34. These events led to Bloomfield commencing the Arbitrations.

(5) The Arbitrations

35. Bloomfield alleged in the Arbitrations that the US\$2 million settlement of the Grow Land/Sandridge Litigation was substantially less than the commercially reasonable settlement value of the claim; that value was thereby diverted to Grow Holdings and Mr Hays through the settlement of the Sandridge/Grow Holdings Litigation; that Grow Land and KCV were in breach of their obligations under Section 5.3 of the Amended CPA; and that there was accordingly a ‘fraud or wrong’ for the purposes of the *alter ego* doctrine under New York law (being the law which governed the arbitration agreement), alternatively California law, making Mr Hays and Grow Holdings (by reason of their alleged control) parties to the CPAs and the arbitration agreements they contained.
36. To begin with, the respondents to the 2018 Arbitration were represented by Peter Ashford of Fox Williams. Grow Holdings challenged jurisdiction, and the Tribunal directed that the issue of jurisdiction be determined as part of a final award on the merits (rather than as a preliminary issue, as Grow Holdings had proposed). The Tribunal ordered Grow Land and KCV – who were respondents to the arbitration, and not advancing counterclaims – to provide security in the sum of £1.5 million for Bloomfield’s costs. Fox Williams wrote to the Tribunal on 1 November 2019 saying:

“... ”

2. None of the Respondent companies have the resources to fight this case any further. We have already advised that Grow Land and KCV are unable to post either the security for costs ordered of them, or the counter-indemnity in respect of the security ordered to be provided by Claimant.

3. Respondents continue to fully maintain their defences, and Holdings maintains its denial that it is subject to the jurisdiction of the Tribunal and challenges jurisdiction accordingly.

4. The Tribunal will, no doubt, fairly adjudicate based on the record as it stands and as supplemented by further filings and briefings that are anticipated by the Procedural Orders. Absent legal counsel, Respondents do not consider that there is an equality between the parties as they are not able to assist the Tribunal.

...”

The respondents were thereafter unrepresented and did not participate in the further conduct of the 2018 Arbitration.

37. Bloomfield then applied to add Mr Hays as a party to the 2018 Arbitration. The Tribunal suggested that it would be better to issue new proceedings against Mr Hays instead, and then to seek consolidation.
38. On 14 January 2020, Bloomfield commenced a second arbitration claim (LCIA arbitration no. 204572), the 2020 Arbitration. Mr Hays was joined as a party on substantially the same basis as summarised above in relation to Grow Holdings in the 2018 Arbitration, namely that although he was a non-signatory, he was bound by the arbitration agreement on the basis of the *alter ego* doctrine or direct benefit estoppel doctrine as a matter of New York law, alternatively California law. Grow Land, KCV and Grow Holdings were also joined as respondents, but no monetary relief was sought against them in the 2020 Arbitration.
39. The LCIA Court did not approve the consolidation, and the Tribunal therefore directed that two final hearings take place in the two Arbitrations, one following the other.
40. The respondents to the 2020 Arbitration did not participate, although Mr Hays and Grow Holdings indicated their position that the Tribunal had no jurisdiction over them.
41. On 21-22 July 2020, final hearings were held by video-conference in respect of both Arbitrations. The Tribunal in both sets of proceedings comprised Mr David R. Haigh QC (Chairman), Dr John Fellas and Ms Sophie Nappert.
42. So far as the claim for interest is concerned, the course of events was as follows.
 - i) Bloomfield’s case on interest, as set out in its Amended Statement of Case, was simply for an order that “*each Respondent pay Bloomfield interest on any sums found to be due to it ...*”.
 - ii) No evidence was served about Bloomfield’s cost of borrowing or equivalent, and Bloomfield made no submissions in relation to any possible award of interest before, at, or following the final hearing.
 - iii) Towards the end of the last day of the final hearing, leading counsel for Bloomfield suggested that “*consequential questions such as interest and costs*” could be addressed after the Tribunal’s award on liability and quantum. The Tribunal did not demur, and said “*We will, at this point, as they say, retire and begin our deliberations, and we will get back to you in due course. We haven’t closed the case, we are closing the hearing today. We will get back to you in due course whether we need any further assistance...*”.
 - iv) Subsequently, the Tribunal invited the parties to provide information on costs, but there was no communication about the claim for interest, either from the Tribunal or from Bloomfield.
 - v) At no time did Bloomfield suggest that it was entitled to interest on damages calculated by reference to any of the rates of return specified in Annex II relating to potential recoupment from any Proceeds of the Sandridge litigation.

- vi) The day after the final hearing, on 23 July 2020, Bloomfield said by email to the Tribunal:

“Should the Tribunal grant an award in favour of Bloomfield, we would therefore propose that the Tribunal makes a final award dealing with liability and remedies, following which Bloomfield would make separate representations addressing costs and interest with a view to an additional award being made.”

The Tribunal responded: “*We’ll consider this and provide directions as needed*”. So far as is known, no such directions were made.

- vii) The Tribunal proceeded to prepare the Awards, including its conclusions on interest, without further reference back to the parties.

(6) The Awards

43. The Awards are dated 7 May 2021 but were only issued to the parties on 16 August 2021. It is common ground that the intervening period is to be disregarded for the purpose of calculating the expiry of the 28-day time limit under section 70(3) of the Act.
44. The Tribunal held that the respondents had breached the CPAs by (*inter alia*) not keeping Bloomfield fully and promptly apprised of material developments, failing to consult with Bloomfield in good faith as to the advisability of accepting any settlement offer, and failing to comply with certain reporting requirements. The Tribunal rejected Bloomfield’s further allegation of breach through alleged diversion of substantial value from Grow Land to Grow Holdings. Bloomfield was awarded damages of US\$6 million, reflecting the undervalue at which settlement was entered into, plus interest and costs.
45. The Tribunal found, based on the doctrine of *alter ego* / piercing the corporate veil under New York law, that it had jurisdiction in respect of the claims against Grow Holdings and Mr Hays, and that they were each “*bound by the submission to arbitration and the full duties and obligations under each of the CPA and the Amended CPA as Counterparties*”. The same findings were made against them on liability, and the same monetary relief awarded, as were found and made against Grow Land and KCV.
46. The Tribunal also awarded “*interest*”, on the damages of US\$6 million, at the rate of 65% per annum, compounded quarterly. As I have noted, that was the rate used in the CPAs for Bloomfield’s return, in specified circumstances, if the requisite level of return was obtained as Proceeds of the Grow Land/Sandridge litigation (which in fact it was not and would not have been, even if the whole of the allegedly diverted settlement funds had constituted Proceeds). The Claimants note that the rate awarded:
- i) resulted in a larger interest award than if the Tribunal had applied the contractual “*Default Rate*” of 2.5% a month, compounded daily, which the Tribunal had found (by a majority) was “*unconscionable*”, “*punitive*” and “*disproportionate*”; and

- ii) was much higher than the 5% per annum, simple interest, which the Tribunal awarded on Bloomfield's costs of the arbitration.
47. The Tribunal's approach to interest was first revealed to the parties in the Awards, the Tribunal having provided no opportunity to any party to comment on the approach it was proposing to adopt.
48. The effect of the Tribunal's findings is to render each of the Claimants liable to pay interest which now stands at in excess of US\$60 million, on a damages award of US\$6 million, and which continues to increase since the expiry on 4 March 2022 of an undertaking by Bloomfield not to claim interest. The sum due is expected to reach about US\$120 million by early next year. Had 5% simple interest been awarded instead, as was done in relation to costs, the accumulated interest as of November 2021 would have been approximately US\$1.2 million.

(7) Court applications to enforce and to challenge the Awards

49. On 14 August 2020, about a year before the Awards were issued to the parties, Mr Hays and Grow Holdings sought declaratory relief in the California state court to the effect that (in summary) the Tribunal had no jurisdiction over them and any award would be unenforceable against them.
50. Mr Hays and Grow Holdings served that claim on Bloomfield on 18 August 2021, two days after the Awards were delivered to the parties.
51. On 7 September 2021, Bloomfield applied without notice for permission to enforce the Awards in the same manner as a judgment of the court, and for judgment to be entered in the terms of the Awards, pursuant to section 66 of the Act. Bloomfield's supporting evidence stated that the application was made for the purpose of "*facilitating enforcement of the Award in California*", where Bloomfield understands Mr Hays to have assets, noting that there are no known assets in England and Wales.
52. Cockerill J granted the relief sought ("*the Enforcement Orders*") on 17 September 2021 (in respect of the 2020 Award) and on 24 September 2021 (in respect of the 2018 Award).
53. The Enforcement Orders were served on Grow Holdings, KCV and Grow Land on 1 October 2021 and Mr Hays on 15 October 2021. Both orders permitted the respondents to apply within 21 days of service to set them aside.
54. Within that 21 day period, on 18 October 2021, the Claimants issued:
- i) applications pursuant to section 66 of the Act to set aside the Enforcement Orders (with the result that the Awards cannot be enforced in England and Wales until the final disposal of that application), and
 - ii) applications to set the Awards aside under sections 67, 68 and 72 of the Act, and the application presently before the court (under section 80(5) of the Act) for a 35-day extension of time in respect of the section 67, section 68 and section 72(2) applications.

It is common ground that the applications under section 66 were made in time, and (subject, possibly, to the point mentioned later about section 73(2)) that the application of Mr Hays and Grow Holdings challenging jurisdiction with respect to the 2020 Award under section 72(1) is not out of time given that they did not participate in the 2020 Arbitration.

55. Three days later, on 21 October 2021, the Claimants amended their claim in California to delete their applications for the California court to set aside the Awards, leaving only their challenges to enforcement of the Awards in California and transferring the claim to the federal court in California.
56. On 12 November 2021, in response to Mr Hays/Grow Holdings' California application, Bloomfield filed a motion with the California court to confirm the Awards. Mr Hays and Grow Holdings filed their grounds of opposition to that motion on 10 December 2021. Bloomfield served a reply on 23 December 2021, as well as a petition asking the California court to confirm and enforce the 2018 and 2020 Awards against Grow Land and KCV.
57. Bloomfield sought to have the present extension of time applications determined on paper; the Claimants contended that it should be heard at a 'rolled-up' hearing together with all of the other substantive applications. Following a short hearing on 26 November 2021, Butcher J directed that the time extension application and a CMC for contingent further directions be listed for 3-4 March 2021 with a time estimate of 1½ days.

(C) APPLICABLE PRINCIPLES

(1) Extensions of time

(a) General

58. The Commercial Court Guide at O9.2 refers to the importance of pursuing any challenge without delay and indicates that the court will "*require cogent reasons*" for extending time under section 80(5) of the Act and/or CPR 62.9(1).
59. The principles applicable to the exercise of the court's discretion to extend time were summarised by Colman J in *AOOT Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep 128 § 59 as follows:-

"... although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:

(i) the length of the delay;

(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the Court might now have;

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.”

60. Colman J noted at § 60 that the relative weight to be given to these factors in any given case is likely to be influenced by general considerations relating to international arbitration, which include the avoidance of unnecessary delay (§ 54) and the applicant’s prior experience of international or English arbitration:

“On the other hand it has to be recognized that because of the extremely wide international nature of the market for English arbitration many of the parties may be located in remote jurisdictions and may have little or no previous experience of international or English arbitration. When these relatively unsophisticated parties find themselves involved in such an arbitration, it is only to be expected that they move somewhat more tentatively than would an international trading house well experienced in this field. It would therefore be wrong to fail to make at least some allowance for this factor in evaluating the element of fault in failing to comply with time limits.” (§ 58)

61. In *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, after quoting the above passage, Mance LJ (with whom the other members of the Court of Appeal agreed) said:

“39. Mr Hancock submitted to us that Andrew Smith J [the judge below] had failed to express or undertake any similar exercise. However, it is clear that Andrew Smith J had well in mind as primary factors the length of the delay, its causation and the reasonableness of both parties’ conduct: that is factors (i)-(iii) identified by Colman J. As to factor (iv), he also referred to prejudice, pointing out, correctly in the light of the *Euston* decision [*Secretary of State for the Environment v Euston Centre Investments Ltd* [1995] Ch 200], that prejudice was not an essential pre-condition. I would reject Mr Hancock’s submission that that means that Andrew Smith J may have thought that it was not a relevant consideration at all.

40. As to factor (v) identified by Colman J, the judge in the present case rightly underlined the policy of the Act and of the

courts in relation to applications for permission to appeal, as stated in the *Euston* case. We are told that the present arbitration has not proceeded much further, but it seems to me that that is, on any view, a relatively minor factor. A party cannot, by a late application for permission to appeal which happens to have stopped the process of an arbitration (if indeed that is what has happened) significantly improve his position.

41. As to factor (vi), it is right that Andrew Smith J did not explicitly refer to the strength, or indeed the weakness, of the claim. Perhaps this was not discussed before him. Mr Hancock suggested that the present situation was, in any event, one where courts would not engage in any detailed way with the prospects, except perhaps in a clear case. In my judgment, this was, and is, clearly not a case where the owners' claim can be regarded as so strong that it would obviously be a hardship for them not to be able to pursue it; if anything, rather the contrary. On any view, the prospects here were clearly not such as could have affected what was otherwise the judge's view as to the right exercise of his discretion.

42. Finally, as to factor (vii), general considerations of fairness, the judge must have had well in mind considerations of overall justice and fairness. They must, however, always be viewed in the particular context that Parliament and the courts have repeatedly emphasised the importance of finality and time limits for any court intervention in the arbitration process.”

62. Popplewell J in *Terna Bahrain Holding Company WLL v Al Shamsi* [2012] EWHC 3283 (Comm) underlined the importance of the policy considerations referred to in § 42 above, stating:

“Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.”
(§ 27(i))

63. Popplewell J also stated that factors (i)-(iii) listed in *Kalmneft* were the primary factors, but a different view has been taken in three subsequent cases. In *Allawi v Pakistan* [2018] EWHC 430 (Comm) Carr J stated:

“These principles were drawn from a series of authorities which included *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [2003] 2 CLC 1 which (at [39]) appears to be the source of the further comment in *Terna* (at paragraph 27(iii)) that the first three factors identified above are the

“primary factors”. In *Naviera* at [39] Mance LJ (as then was) had commented that Andrew Smith J had had well in mind in that case as “primary factors” the first three factors. For my part I do not read that judgment as authority for the proposition that the first three factors are necessarily of more significance than any others. What weight each factor is to be attributed will depend on the facts of each case. All factors are relevant for consideration.” (§ 47)

I respectfully agree with Carr J’s interpretation of the reference to “*primary factors*” in *Nagusina* § 39, as well as the general statements made in the last two sentences above. The gist of the appellant’s complaint in *Nagusina*, as appears from the paragraphs quoted above from that case, was that the judge had failed to go through the *Kalmneft* factors as a whole. By pointing out, as the first step of his analysis, that the judge had had regard to the first three “*as primary factors*” Mance LJ was not in my view seeking to set forth a presumption that they should be so regarded. The judgments of Sir Ross Cranston in *Nigeria v Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm) § 160, Andrew Baker J in *Minister of Finance v International Petroleum Investment Company* [2021] EWHC 2949 (Comm) § 125 and Sir Michael Burton in *State A v Party B* [2019] EWHC 799 (Comm) §§ 32-33 and 53(ii) are to similar effect.

(b) *Length of delay*

64. As to the length of delay, the following points emerge from the case law:
- i) The facts of the individual case “must be considered with care. There is no principle of law that any particular length of delay either cannot ever be unjustified, at one extreme, or will always be unjustified at the other extreme”: *Minister of Finance* § 127. On the facts of that case, an extension was granted despite the judge having concluded that there was a material delay of 5½ months (§§ 129-138).
 - ii) The length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore a delay measured even in days is significant, and a delay measured in many weeks or in months is substantial: *Terna* § 28.
 - iii) On that basis, Bryan J in *Daewoo Shipbuilding v. Songa* [2018] EWHC 538 (Comm) treated a delay of 24 days as being significant and substantial (§§ 78 and 93).
 - iv) Conversely, in *Oldham v QBE Insurance (Europe) Ltd* [2017] EWHC 3045 (Comm), Popplewell J granted an extensions of time for section 68 applications brought, respectively, 18 days and six weeks out of time – principally on the basis of the applicant litigant in person’s low culpability and the strength of the challenge as assessed at a ‘rolled-up’ hearing (being that the arbitrator had awarded costs without giving the applicant an opportunity to address the matter: see §§ 37 and 51). As to the length of the delay, Popplewell J stated:

“In relation to the length of the delay, 18 days is a significant period in the context of the 28-day limit and the imperative of

speedy finality which underpins the 1996 Act. The delay of six weeks in the case of the order for payment of costs in the Part I Award is substantial. Neither, however, are to be characterised as very lengthy.” (§ 47)

- v) In *STA v. OFY* [2021] EWHC 1574 (Comm), a delay of 38 days after the 28-day time limit was characterised by Butcher J as being undoubtedly significant and substantial (§ 19). In reaching that conclusion, the judge also referred to the additional fact that Andrew Baker J had granted the applicant an initial extension of time and stipulated a date by which any application for further time should be made; and the applicant had missed that deadline by 27 days.

(c) *Reasonableness of the applicant’s conduct*

65. As explained in *Terna*:

“In seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the Court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant "would have assumed" this or "would have thought" that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.” (§ 29, per Popplewell J)

66. These observations indicate the importance of adducing evidence rather than relying only on submissions. They also indicate that, as one would expect, there is a spectrum of reasons for delay. Whilst a delay occasioned by lack of awareness of the time limit, or by “*laxity, incompetence or honest mistake*” can hardly be described as ‘good’ reasons for delay, they will weigh less against an applicant than “*a deliberate informed choice*”.
67. *Terna* addressed intentional non-compliance further in the next paragraph of the judgment:

“... factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In Rule 3.9(1) of the Civil Procedure Rules, which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure.

This is because in cases of intentional non compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English Court treating the Court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage." (*Terna* § 30)

68. The applicants in *Terna* had not stated in evidence that they were unaware that a challenge should properly be brought before the English court, nor given any explanation as to why proceedings were instead started in Sharjah, nor explained why they then sought to pursue both sets of proceedings in parallel. The judge inferred that they were given advice within the 28-day period that they should challenge the award in London, and made and maintained a deliberate choice to apply in Sharjah due to some perceived advantage. It was thus a case of deliberate and tactical delay, for which the culpability was very high (§§ 70-74).
69. Clearly, a party may act unreasonably even in circumstances where it has not deliberately ignored or failed to meet the time limit, as Butcher J noted in *STA* § 25 (citing *Daewoo* as an example). In some cases, for example, failure to take appropriate English legal advice has been regarded as unreasonable:-
- i) In *Kalmneft* Colman J said that if a foreign respondent is to take advantage of English procedural facilities for testing the arbitrators' jurisdiction, as opposed to merely resisting enforcement proceedings on that basis, then "*it is incumbent upon it to comply to the best of its ability with the requirements of that procedure*" (§ 64). Colman J held that the omission to take advice on English law in that case was "*totally unreasonable*" and not merely an understandable consequence of inexperience in international arbitration (§ 65). The applicant in that case had been advised, by the opponents' solicitors, to take legal advice but ignored that suggestion for over seven months; and ignored the arbitrator's own similar advice (§ 63).
 - ii) In *Broda Agro Trade (Cyprus) Ltd v. Toepfer* [2010] EWCA Civ 1100 an applicant seeking an extension of time to bring a challenge under section 67 had taken advice from Russian lawyers only. The Court of Appeal upheld Teare J's finding that it was unreasonable for the applicant not to incur the cost of obtaining advice from an English lawyer, and that by not instructing an English lawyer in relation to an arbitration in London, the applicant took a risk that the advice it received from Russian lawyers would not be appropriate or correct. The court said:

"51. In order to succeed on this issue, Broda must show that the judge erred in the exercise of his undoubted discretion. It is certainly a strong thing to shut a party out of making an application under section 67, since in a case such as the present the consequence is that that party is bound by an arbitration award under a contract that no court has decided was ever concluded.

52. The judge ... referred to the guidance given by Colman J in *Kalmneft v Glencore* and addressed each of the considerations listed in paragraph 59 of the judgment in that case. In paragraph 51 of his judgment, Teare J said:

‘51. Broda’s evidence, which has had to be corrected, is that it took advice from Russian lawyers only. Argyrou and Co. were only used to check documents drafted by the Russian lawyers for errors of grammar and syntax, to sign the documents and send them to GAFTA. In taking advice from Russian lawyers only I am unable to accept that Broda acted reasonably. Broda is a grain trader and has been such since 1994. It has concluded contracts with some of the largest and most reputable grain trading companies in the world. Its trading partners are located all over the world in England, France, Switzerland, Israel, Egypt, Morocco, Japan, Turkey and Singapore. On 3 January 2008 the claim in this case was advanced against Broda in London before GAFTA for the sum of \$5,462,668.25. In my judgment it was unreasonable not to incur at that time the cost of obtaining the advice of an English lawyer in connection with such a claim before GAFTA in London. The Interim Award on jurisdiction was issued by the GAFTA tribunal in London on 3 July 2008. That award disagreed with the decision of the Russian court. If an English lawyer had not been instructed to advise before, he should have been instructed then. The Final Award on liability was issued on 19 February 2009. Even then an English lawyer was not instructed. It was not until 21 August 2009 that English lawyers were instructed. The application for an extension of time was then issued on 2 October 2009.’

53. Paragraph 57 of Teare J addressed the issue of unfairness to Broda:

‘57. Whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined: Broda says that it would be unfair because it faces an award of \$6m. in circumstances where it has not had its evidence on the question as to whether there was a contract considered by either the arbitration tribunal or the court. If one assumes that its claim that there was no contract is arguable this is an undoubted hardship. But the question is whether that hardship is unfair. Had Broda acted reasonably and appointed an English lawyer in either January or July 2008 an application under section 67 is likely to have been made within 28 days of the Interim Award on jurisdiction or very shortly thereafter. That is a simple step to have taken and would have avoided any hardship. By not instructing an English lawyer in relation to

an arbitration in London Broda took a risk that the advice it received from Russian lawyers would not be appropriate or correct. Taking a broad view I am unable to say that it would be unfair for Broda to be denied the opportunity of having its application under section 67 determined.’

54. Broda’s submissions on this issue do not come close to showing that the judge made any error of law or principle in the exercise of his discretion. In my judgment, the judge carefully considered the relevant matters and reached a conclusion that was open to him. Indeed, it is difficult to see the practical point of a time limit if an extension as long as that required in the present case should be given to a commercial organisation such as Broda, which, faced with a very substantial claim in London, did not see fit to consult an English lawyer. I assume, in its favour, that Mr Konstantinou did not have access to a copy of the Act, to which reference was made in Broda’s Appeal Submissions to GAFTA. But it must have been obvious that if the Interim Award was to be challenged, that had to be done in London.”

(d) Prejudice to the respondent

70. As indicated in *Kalmneft*, it is relevant to consider whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed.
71. On the other hand, as the Court of Appeal confirmed in *Nagusina* (§ 39 citing *Euston*), an extension of time may be refused even in the absence of such prejudice. As Steyn LJ said in *Euston*, by reference to a predecessor to the Act:

“The objective of the Act of 1979 was to reduce the scope of the supervisory jurisdiction of the English courts. ... it is not only the private interests of the parties that are relevant. There are wider interests at stake, notably the proper functioning of our arbitration system ... One of the aims of the Act of 1979 was to promote speedy finality in the enforcement of arbitration awards: *The Antaios* [1985] AC 191, per Lord Diplock at p 199 and per Lord Roskill at pp 208-209. Since nobody can prevent the losing party in an arbitration from applying for leave to appeal even in the most unmeritorious cases, it is of supreme importance to the proper working of our arbitration system that there must be an effective procedure to ensure that applications for leave are promptly made. That is the policy of the Act of 1979”

(e) Strength of the application

72. Popplewell J noted in *Terna* that:

“ 31. ... the Court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the Court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the Act. However if the Court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the Court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.

32. The position, however, is different where, as has happened in the current case, the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the Court has heard full argument on the merits of the challenge application. In such circumstances the Court is in a position to decide not merely whether the case is "weak" or "strong", but whether it will or will not succeed if an extension of time were granted. The Court is in a position to decide whether the challenge is a good or a bad one. If the challenge is a bad one, this should be determinative of the application to extend time. Whilst it may not matter in practice whether the extension is allowed and the application dismissed, or whether the extension is simply refused, logical purity suggests that it would be wrong to extend time in those circumstances: there can be no justification for departing from the principle of speedy finality in order to enable a party to advance a challenge which will not succeed.

33. Conversely, where the Court can determine that the challenge will succeed, if allowed to proceed by the grant of an extension of time, that may be a powerful factor in favour of the grant of an extension, at least in cases of a challenge pursuant to s.68. In such cases the Court will be satisfied that there has been a serious irregularity giving rise to substantial injustice in relation to the dispute adjudicated upon in the award. Given the high threshold which this involves, the other factors which fall to be weighed in the balance must be seen in the context of the applicant suffering substantial injustice in respect of the underlying dispute by being deprived of the

opportunity to make his challenge if an extension of time is refused. Where the delay is due to incompetence, laxity or mistake and measured in weeks or a few months, rather than years, the fact that the Court has concluded that the s.68 challenge will succeed may well be sufficient to justify an extension of time. The position may be otherwise, however, if the delay is the result of a deliberate decision made because of some perceived advantage.”

73. *Oldham* was another example of a rolled-up hearing. The court there said:

“37. It is convenient to address the merits of the section 68 applications before dealing with the application for an extension of time. This is because the strength of the merits of a section 68 application is one of the factors to be considered in exercising the discretion as to whether to extend time, and in cases such as the present, where the court can reach a concluded view on the merits, is likely to be an important factor. If the section 68 challenge lacks merit, the application for an extension of time becomes irrelevant. If, on the other hand, the court concludes that the challenge is sound and that there has been a serious irregularity, that will often be an important factor in favour of the exercise of the discretion to extend time, as I sought to explain in *Terna* ... at paras 31 to 33 ...”

“51. Of particular importance is the strength of the application. I have decided that in the two respects identified, Mr Oldham has suffered substantial injustice arising out of a serious irregularity. The sums of money for Mr Oldham are very significant. For him to be deprived of an opportunity to advance meritorious challenges, with a realistic prospect of successfully reversing the orders that he pay what are to him very significant sums, would be out of all proportion in fairness and justice to any culpability for the delay involved or its seriousness.”

74. In principle there may be cases where, even without a rolled-up hearing, the court is able to form a clear provisional view as to the strength or weakness of the proposed challenge. It depends on the nature of the challenge.

(2) Challenges to arbitrators’ substantive jurisdiction

75. A jurisdictional challenge proceeds by way of complete re-hearing, not review: *Dallah v Ministry of Religious Affairs of Pakistan* [2011] 1 AC 763 §§ 26, 30, 96, 160; *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm) §§ 65 and 70. The court in *Dallah* made clear that the court is not bound by the arbitrators’ conclusions, however eminent the panel may have been, though it may examine with care and interest, and have regard to, the reasoning and findings of the tribunal if it finds them helpful (§§ 31 and 160).

76. In the present case, the Claimants' challenge would involve a full re-hearing of issues of fact and New York law relevant to the liability of Mr Hays and Grow Holdings under the *alter ego* principle.

(3) Serious procedural irregularities

(a) General test

77. Section 68(2) provides, so far as relevant:

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

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

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

78. The general duty under section 33(1) is that:

“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.”

(b) Procedural unfairness

79. The principles relevant to subsection 68(2)(a) were recently summarised by the Privy Council (Lord Hamblen and Lord Burrows JJSC) in *RAV Bahamas Ltd v Therapy Beach Club Inc* [2021] 1 AC 907 as follows:

“46. Albeit dealing with where an arbitrator had “*misconducted himself or the proceedings*” under section 23 of the old Arbitration Act 1950, there is a classic statement by Bingham J of the need to act fairly, by allowing the parties to put their case in relation to a finding by the arbitrator or in relation to a matter on which the arbitrator’s decision is based. This was in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14. Bingham J said, at p 15:

“the rules of natural justice do require ... that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has

not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him.”

The last point merits emphasis. An arbitrator will not have acted fairly if a party is learning for the first time in the award about findings and matters in the decision of the arbitrator which that party has not had the opportunity to address.

47. Having cited all but the first sentence of the above passage from Bingham J, Langley J in *Cameroon Airlines v Transnet Ltd* [2006] TCLR 1 went on to apply it in relation to a challenge under sections 68 and 33 of the Arbitration Act 1996; and he found that there was a serious irregularity in relation to a decision reached by the arbitrators on a matter of quantification of the value of services under a contract. He said, at para 111: “*the tribunal went its own way to a conclusion which neither [party] had contended for and did so unheralded. That, in my judgment, was fundamentally unfair.*”

80. In the earlier case of *Terna*, Popplewell J said:

“(iv) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

(v) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent’s case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity.” (§ 85)

(c) *Excess of arbitrators’ powers*

81. The key question here is whether the arbitral tribunal has purported to exercise a power which it did not have (excess of power), or has merely erroneously exercised a power that it did have: see, e.g., *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 at §§ 24, 29, 31 and 32 per Lord Steyn.

82. For example, a tribunal has no power substantively to change its award under the guise of the power of correction, since there is no such power: *CHN Global v PGN*

Logistics [2009] EWHC 977 (Comm) § 31. A tribunal cannot make what is in substance an award of compensatory damages or punitive damages under the guise of ‘costs’, as it has no power to award such damages as costs: see *Essar Oilfields Services v Norscot* [2016] EWHC 2361, including the following statement:

“Mr. Hogan also submits that, if in purported exercise of his power to Award costs the arbitrator awarded an amount to compensate the claimant for emotional or inconvenient “cost”, that would have to be characterised as an excess of power, but, if so, why not here as well? Again, the analogy does not follow. In such cases, it is artificial to use the word “costs” at all and, therefore, there is little difficulty in saying that such an award would be wholly outside the arbitrator’s powers to Award costs. The same could hardly be said of the costs of litigation funding, where the line to be drawn is a matter of construction of s.59(1)(c).” (§ 44)

(d) Awards of interest

83. Article 26.4 of the LCIA Rules 2014 and section 49 of the Act confer a discretion upon the tribunal to award simple or compound interest at such rate as it decides appropriate.

84. Christopher Clarke J in *Novoship v Mikhalyuk* [2013] EWHC 89 at [52]-[53] (reversed on other grounds) said:

“52. The primary purpose of an award for interest is to compensate the creditor for having been kept out of his money, not to penalise the paying party, as I decided in relation to interest on costs: see *Fattal and Fattal v Walbrook Trustees (Jersey) Limited and Another* [2009] 4 Costs LR 591.

53. Interest should restore a claimant to the position in which it would have been if it had received the money. Since the claimant may be kept out of his money, the award of interest should cover the cost of borrowing such money. This is the essential basis for pre-judgment interest, and there seems to me no sufficient reason for a different approach in relation to interest post judgment.”

85. Similarly, the Chartered Institute of Arbitrators, *Practice Guideline 13*, §3.4 states:

“Although no guidance is given in the 1996 Act as to how the discretionary right to award interest should be exercised, one very general principle is clear and should be borne in mind by arbitrators. This may be called “the compensatory principle”. It is that an award of interest under Section 49 (in distinction to one under the 1998 Act discussed later) should be designed solely to compensate a successful claimant for having been kept out of the sum of money which the arbitrator has decided

to award him. The award should not be penal in nature or such as to deter others from paying late.”

Similar statements are made in § 4.2 of the Practice Guideline (referring to *Kuwait Airways Corp v Kuwait Insurance Co SAK* [2000] EWHC 191 (Comm)) and in the Institute’s International Arbitration Practice Guidelines “*Drafting Arbitral Awards Part II – Interest*, Article 1(4).

86. The Claimants cited the statement in the DAC Report on the Arbitration Bill that:

“Some of those responding were fearful that arbitrators would abuse this power, and may, for example, award compound interest on a punitive rather than compensatory basis. We do not share those fears. To our minds any competent arbitrator seeking to fulfil the duties laid on him by the Bill will have no more difficulty in making decisions about compound interest than he will in deciding in any other context what fairness and justice require. Anyone who has such difficulties demonstrates, in our view, that he is really not fit to act as an arbitrator. In such a case, the award and the arbitrator will be susceptible of challenge.” (§ 237)

and the following commentary in *Merkin & Flannery on the Arbitration Act 1996* (6th ed.):

“Assuming a claim for interest is made, and the relevant applicable law is silent on the issue of liability or rate, it would seem at first blush that section 49(3) provides the tribunal with the widest possible discretion to order payment of pre-award interest at whatever rate it thinks fit, for whatever period it thinks fit, and (if compound interest is awarded) ‘with such rests’ as it thinks fit, and ditto in respect of post-award interest for the rate and rests. But, as every honourable politician knows, with great power comes great responsibility, and there is therefore a constraint available in the form of a challenge under section 68(2)(a) if the tribunal exceeds its authority by such a margin as to constitute unfairness. To take an extreme example, if the tribunal awards 1,000% interest when the norm is 3% above the Central Bank base rate, there would have to be an extremely good reason (such as a precipitous fall in the currency of claim), without which such a decision could well be attacked under section 68. And of course the tribunal would not have power to order such a high rate unless it had been claimed.” (§49.5)

Merkin cites on this point *Van der Giessen-de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm), where an award of simple interest at 10% was successfully challenged under section 68 because the rate awarded had not been claimed in the pleadings or contended for in submissions, and the tribunal applied it without giving the parties any opportunity to make submissions on its appropriateness.

87. However, the court in *Van der Giessen-de-Noord* based its decision in substance on failure to give the parties an opportunity to make submissions on the rate of interest (§§ 28 and 30), and found it unnecessary to decide whether the choice of rate was wrong as a matter of law (§ 31). Further, even an award of interest that is wrong in law, e.g. because the tribunal has misunderstood the contract, will not necessarily amount to an excess of the tribunal's powers.

(e) *Substantial injustice*

88. For a “*substantial injustice*” to have occurred, it is sufficient to show that an applicant's position was reasonably arguable and that the outcome of the arbitration (but for the irregularity) “*might well have been different*”, not that it would “*necessarily or even probably be different*”: see *RAV Bahamas* § 34 and the authorities cited there. The court in *RAV Bahamas* continued:

“35. Some irregularities may be so serious that substantial justice is “inherently likely” or “likely in the very nature of things” to result. As Toulson J stated in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277, 284F–285A:

“Since the whole process of arbitration is intended as a way of determining points at issue, it is more likely to be a matter of serious irregularity if on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed, than if the complaints go simply to procedural matters ...

“It is inherently likely to be a source of serious injustice if irregularities occurred of the kind to which I have referred. Since the purpose of arbitration is to determine central issues between the parties, if there has been a flaw in that this has not been done, that is likely in the very nature of things to be a matter of serious injustice.”

36. In such cases substantial injustice may be inferred from the nature of the irregularity and that inference may be so strong that “It almost goes without saying”: see *Raytheon* at para 61. In that case the arbitrators had failed to deal with “key issues” which may well have impacted on an award of some £126m.”

89. Popplewell J in *Terna* indicated that the authorities established the following points:

“(1) In order to make out a case for the Court's intervention under s. 68(2)(a), the applicant must show:

(a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to

provide a fair means for the resolution of the matters falling to be determined;

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice

(2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

(3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under s. 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

(4) There will generally be a breach of s.33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s. 33 or a serious irregularity.

(6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.

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

(§ 85)

(D) THE CLAIMANTS' APPLICATIONS FOR EXTENSIONS OF TIME

90. I consider the *Kalmneft* factors in turn, before drawing the strands together in order to reach a conclusion on the Claimants' extension applications.

(1) Length of the delay

91. It is common ground that time started to run from 16 August 2021, the date on which the Awards were transmitted to the parties, so that the 28-day period expired on 13 September 2021. The applications were made 35 days later.
92. Measured against the yardstick of the 28 days provided for in the Act, that is a significant delay; though it would be in my view a slight overstatement to describe it as "*a delay measured in many weeks or in months*" (*Terna* § 28).

(2) Whether Claimants acted reasonably in all the circumstances

93. Evidence of the reason for the delay was provided from the Claimants' solicitor, Mr Caher of Wilmer Cutler Pickering Hale and Dorr LLP ("*WilmerHale*"), whose second witness statement included the following passages setting out information derived from Mr Hays:

"11. Mr Marsden's evidence on this factor overlaps substantially with his evidence, at paragraph 47, in relation to Factor (f). In particular, at paragraph 47, Mr Marsden questions whether my clients' failure to timely file their challenge applications was a deliberate tactical decision rather than due to lack of awareness.

12. Given that assertion, I have specifically gone back to Mr Hays and he has confirmed to me again, on behalf of all of the Defendants, that he was not aware of the 28-day deadline until after I was approached on 29 September 2021 as stated at paragraph 89.2 of Caher 1. However, he informs me that, based on a review of his correspondence after my first statement was served, copies of which I have now been provided with and have reviewed, which I am in a position to therefore also confirm, and without waiving privilege, paragraph 89.2 is not entirely accurate. In particular, prior to my firm being instructed, Mr Hays' Californian lawyer, Mr Serlin, informally approached Baker McKenzie and briefly spoke to a London-based partner on or about 11 September 2021. Mr Serlin did not inform Mr Hays of any 28-day deadline nor that the appropriate place to set aside either of the Awards was before the English Courts. The approach to Baker McKenzie was not thereafter pursued and instead my firm was subsequently retained and instructed. It is therefore not correct to say that the first time an English lawyer was "approached" was on 29 September 2021 and Mr Hays and I apologise to the Court for this error.

13. Whilst, with the benefit of hindsight, Mr Hays accepts that it would have been advisable for him to have obtained advice from an English lawyer in addition to a Californian lawyer, Mr Hays did not do so because he mistakenly believed that the Californian courts are the appropriate venue for non-signatories of an arbitration agreement to seek to set aside an international arbitration award against a Californian respondent. This is evident from the Californian action Mr Serlin filed on Mr Hays' behalf requesting that the California court set aside the arbitration award. When my firm replaced Mr Serlin as counsel to Mr Hays, my colleagues promptly amended the action to remove any such request. As this information demonstrates and as Mr Hays has assured me, he was neither aware nor advised, prior to my firm's involvement, that the appropriate place to set aside a London seated arbitral award is before the English Courts (as set out above) and that there is a 28-day deadline from the date of the award for doing so.

14. Mr Hays is a Californian resident with no experience of English litigation, who has never lived or carried out business in England, and whose first experience of international arbitration was in connection with the CPA and Amended CPA. Mr Serlin had been retained by Mr Hays in connection with the Californian litigation that was the subject of the CPA and Amended CPA and he looked to Mr Serlin for advice. Mr Serlin, who is now in the process of retiring from the practice of law, practises from his own boutique law firm, Serlin & Whiteford, LLP, comprising two lawyers (Mr Serlin and Mr Whiteford), with their stated practice areas being creditors' rights, receivership, bankruptcy, business entity formation / operation, real estate transactions and business transactions. I exhibit a copy of Mr Serlin's CV that is publicly available on Serlin & Whiteford, LLP's website ...

15. Although the Californian proceedings (in their original form) were first in time, Mr Hays does not accept that this amounted to a deliberate decision to focus his resources on California to the exclusion of England. Rather, he mistakenly believed that California was the appropriate venue to attempt to set aside an arbitration award rendered against him and his Californian companies. Had he been aware sooner that England was the appropriate place to seek to set aside the 2018 and 2020 Awards, and that there is a 28-day deadline for doing so, then he would have taken the present course of action sooner and not sanctioned the original Californian Complaint, which has since been amended in deference to the English Courts' power, as the courts of the seat, to adjudicate upon the validity of the Awards. The Defendants accordingly dispute the allegation of any deliberate and/or tactical delay. The only reason for the delay was a lack of knowledge and familiarity

with international arbitration and timely and proper advice from English and Californian lawyers. The Defendants rely, in this context, upon the fact that having retained my firm and myself, and having been made aware of the correct position, my firm worked expeditiously to apply to challenge the 2018 and 2020 Awards in this jurisdiction and at the same time amend the Complaint to raise a New York Convention challenge to the enforcement of the 2018 and 2020 Awards in California, rather than maintain the original Complaint that sought a declaration that any award was null and void for want of jurisdiction (i.e., essentially seeking to set aside the Awards, which was a matter for the English Court as the court of the seat).”

94. The Claimants submit that Mr Hays was accordingly *not* aware of the 28-day deadline until after Mr Caher of WilmerHale was approached on 29 September 2021; and the applications were made less than three weeks later, on 18 October 2021, at some considerable effort on the part of various members of the Claimants’ legal team (as Mr Caher describes in this evidence). There is no basis, they say, to infer any deliberate tactical decision, in circumstances where (unlike in *Terna*) there is positive evidence as to what happened and that it was not deliberate. Mr Hays mistakenly believed that the Californian courts were the appropriate venue for non-signatories of an arbitration agreement to seek to set aside an international arbitral award against a Californian respondent: and that is consistent with the fact that the challenge was initially filed there by Mr Serlin (whose role had been to deal with the property litigation, and whose practice areas do not appear to have included arbitration), but then promptly amended once WilmerHale became involved to remove the unorthodox request to set aside the Awards in California. The Claimants add that Mr Hays is a Californian resident with no experience of English litigation, who has never lived or carried out business in England, and whose first experience of international arbitration was in connection with the CPAs.
95. Bloomfield submits as follows:
- i) The Claimants were represented in the 2018 Arbitration by a London partner in Fox Williams who was a specialist arbitration practitioner (Peter Ashford), until they chose to disinstruct Fox Williams in November 2019. It was obvious to the Claimants that the arbitrations were subject to English procedural law – which no doubt is why they chose to be represented by a London law firm until November 2019 and they had seen fit to appoint a retired English judge as arbitrator (Sir Christopher Clarke).
 - ii) There is no good reason why the Claimants could not have sought advice from Fox Williams upon receipt of the Awards as to the requirements for any challenge to them.
 - iii) The CPAs expressly provided that the seat of the arbitration was in London (clause 24(c)). It is elementary in international arbitration that the arbitral seat determines the applicable law of the arbitration and the relevant supervisory court. It is reasonable to assume that this point will have been readily apparent to the Claimants given the legal representation they had and had previously had.

- iv) The Claimants' account is undermined by the fact that they (a) initially gave incorrect evidence that their first post-Award approach to an English lawyer was on 29 September 2021, when in fact Mr Serlin had approached a London-based partner at Baker McKenzie on or about 11 September 2021, and (b) have chosen to give no evidence as to what was discussed with the Baker McKenzie London partner on 11 September 2021 other than to say that Mr Serlin did not inform Mr Hays of the 28-day deadline or that the appropriate place to set aside the Awards was in England.
 - v) In any event, the fact that Mr Serlin approached a London partner at Baker McKenzie in September 2021 and subsequently the London office of WilmerHale (both major, international law firms), underscores the point that the Claimants would have known that if an award debtor wanted advice about challenging an LCIA award in an arbitration seated in England, it would need to consult English lawyers.
 - vi) The fact (if such it be) that the Claimants chose not to approach English lawyers until 11 September 2021 is irrelevant. The Claimants' choice not to take English law advice is manifestly not a good reason to depart from the requirements of the Act (see, e.g., *Kalmneft* and *Broda*).
 - vii) Mr Serlin was advising the Claimants throughout 2020-2021, so they had the benefit of legal representation throughout the relevant period, including when the Awards were delivered. That is a further reason why their failure to obtain English legal advice was indefensible.
 - viii) The Claimants made a deliberate decision to proceed with their challenge in California, after the Awards were issued, rather than seeking English law advice with a view to making a challenge before the English court. The position is thus similar to that in *Terna*.
 - ix) Mr Serlin was given notice of Bloomfield's applications under section 66 of the Act on 7 September 2021. Presumably that is what prompted Mr Serlin to approach Baker McKenzie on 11 September. The Claimants were therefore well aware in early September that Bloomfield was taking steps in England, before the supervisory court, in aid of the enforcement of the awards. Yet the Claimants continued to sit on their hands before approaching WilmerHale on 29 September.
 - x) There is an unexplained period of delay between the time that WilmerHale were approached (on 29 September) and the subsequent date of the applications (on 18 October). The time for making the application had already expired around a fortnight before WilmerHale were approached.
96. In my view, the Claimants cannot be described as having acted "*reasonably*" in allowing the time limit to expire. I conclude on the evidence that Mr Hays did not obtain advice from an English lawyer, until he approached Mr Caher of WilmerHale on 29 September 2021, because he mistakenly believed the Californian courts were the appropriate venue for a Californian respondent non-signatory of an arbitration agreement to seek to set aside an international arbitration award against him/it; and that he did not know (and was not advised) prior to WilmerHale's involvement that

the appropriate place to do so was before the English court or that there was a 28 day deadline for doing so.

97. There are good reasons why Mr Hays should have sought English advice sooner, because:
- i) his companies had been involved in the 2018 arbitration until November 2019 and had, until then, instructed English lawyers (Fox Williams) and appointed an English retired judge as an arbitrator;
 - ii) he was not a stranger to litigation: on the contrary, the contracts that were the subject of the current dispute related to the funding of hard-fought commercial litigation in California by Mr Hays' companies against Sandridge;
 - iii) on 7 September 2021 Mr Hays' Californian lawyer, Mr Serlin, was sent a courtesy copy of Bloomfield's section 66 application (which was presumably passed on to Mr Hays), so he knew action was being taken in the English court based on the Awards;
 - iv) on 11 September 2021 Mr Serlin informally approached Baker Mackenzie and spoke briefly to a London-based partner: no details of this conversation are provided, save that it did not lead to Mr Serlin telling Mr Hays that the appropriate place to set aside either of the Awards was the English courts or that there was a 28 day period for doing so (which by then was due to expire in 2 days' time); and
 - v) on 23 September 2021 Bloomfield served its motion in the Californian court, seeking to dismiss the Claimants' Californian application on the basis that the Californian court was not the correct forum to apply to set aside the Awards.

It is only after (v) above that WilmerHale were approached, six days later on 29 September 2021.

98. The Claimants' evidence is unsatisfactory in that it does not include evidence directly from either Mr Hays or Mr Serlin themselves, and the Serlin conversation with the Baker & Mackenzie partner on 11 September 2021 is inadequately explained. Despite those shortcomings, I am unable to infer on the evidence before me that Mr Hays in fact made a deliberate tactical decision to refrain from proceeding in England. That would imply that he knew or at least suspected that he should be proceeding in England, but I do not consider the evidence allows me confidently to draw any such inference. Clearly he did decide to proceed in California, as early as August 2020 i.e. a year before the Awards, but that is different from making a deliberate tactical decision not to proceed in the appropriate forum of the English court.
99. Further, the subsequent events once WilmerHale were instructed do not positively support there having been a tactical decision: unlike in, say, *Terna* where the claimant deliberately chose to maintain a challenge abroad as well as in England. Following WilmerHale's involvement the Claimants accepted that their application in California to set aside the Awards had been wrong, and that they should make those applications only in England. The fact that the Claimants here have provided evidence that they were initially unaware of the need to apply in England or of the time limit for doing

so is, despite its shortcomings as identified above, an important point of difference from *Terna*.

100. Finally on this point, I do not regard the period between when WilmerHale were approached and when the applications were filed as involving culpable delay. The applications, the Awards and their background were and are complex; it was bound to take time to understand them and prepare coherent applications; and I do not accept Bloomfield's suggestion that the Claimants ought to have submitted (very soon after WilmerHale were approached) applications to extend time: a bare extension application, which at that stage could hardly be supported with any cogent reasoning, would have achieved very little. It is true that it might (if made on notice) have put Bloomfield on notice of a challenge, but Bloomfield already knew the Claimants were seeking to challenge the Awards albeit, at that stage, only in California.

(3) Whether the Defendants or tribunal caused or contributed to the delay

101. Since it is accepted that the period leading up to the date of transmission of the Awards to the parties (on 16 August 2021) is to be disregarded, there has been no relevant delay on the part of the Tribunal. There is no suggestion that Bloomfield contributed to the delay in the Claimants' applications.

(4) Irremediable prejudice to the Defendants in addition to mere loss of time

102. As noted earlier, prejudice need not be shown for an extension application to be refused: it is merely one potential factor to be considered.
103. Bloomfield makes the points that:
- i) if extensions are granted, Bloomfield may be unable to enforce the Awards, as any court in which enforcement is sought may stay enforcement under Article VI of the New York Convention;
 - ii) absent extensions of time, the Claimants' applications under sections 66 and 72(1) could be disposed of far more quickly, so the likely consequence of extensions would be to prolong significantly the time needed to deal with the Claimants' challenges, in turn delaying Bloomfield's ability to enforce the Awards; and
 - iii) (alternatively to (ii) above) if the extensions are refused, Bloomfield could choose to discontinue its current section 66 application and simply proceed in California.
104. The Claimants make the following points:
- i) Even if the Californian or other court asked to enforce the Awards did adjourn the proceedings pursuant to Article VI, that would amount only to "*the mere loss of time if the application were permitted to proceed*" (*Kalmneft* § 59).
 - ii) It is unclear whether the court in California (the only place where any assets are known to exist) would grant an adjournment. Mr Hays' claim for declaratory relief remains pending there. In addition, Bloomfield has applied to enforce the Awards in California under the New York Convention, and the Claimants have

filed an opposition resisting enforcement under Article V on grounds that substantially overlap with the grounds of challenge advanced before this court. The court in California may choose to proceed to determine those matters. Even if it were to adjourn them, a decision from this court on the Claimants' challenges could in the end expedite matters.

iii) It would be open to the Claimants to seek to adjourn the decision on enforcement in California under Article VI of the New York Convention anyway, based on their pending challenge under section 72(1) which is not time barred:

a) Article VI applies where an "*application for the setting aside ... of the award*" has been made to the competent authority, i.e. this court.

b) Section 72(1) empowers the court to grant "*a declaration or injunction or other appropriate relief*", and the relief sought by Mr Hays and Grow Holdings under section 72(1) includes an order setting aside the 2020 Award. Such an order would follow logically from a declaration that the Award had been made without jurisdiction, and would constitute 'other appropriate relief' (*see Sino Channel Asia Ltd v Dana Shipping* [2016] EWHC 1118 (Comm) § 66 per Eder J, reversed on other grounds [2017] EWCA Civ 1703).

c) To the extent that it matters for present purposes, the Claimants submit that the better view is that section 72(1) is available in the post-award situation, and is not (as Bloomfield suggests) confined to challenges brought during the pendency of an arbitration: see *London Steam Ship Owners Mutual Association v Spain (The "Prestige")* [2013] EWHC 2840 (Comm) §§ 59-78, 82-84 per Walker J; *Sino Channel Asia Ltd* §§ 4-5 per Eder J).

iv) There is no basis on which to expect that, absent the extensions sought, the section 66 proceedings could be disposed of more quickly. The Claimants would be entitled as part of those proceedings to a full rehearing of the jurisdiction issues anyway (see *Sovarex v Romero Alvarez* [2011] EWHC 1661 (Comm) § 44).

v) Further, for Bloomfield now to discontinue its section 66 proceedings would be a tactical *volte face*, the possibility of which should be disregarded, and would in any event not affect the points made above about the challenges which the Claimants are bringing in California.

vi) The extravagant rate of interest awarded by the Tribunal would amply compensate Bloomfield for any delay.

105. I agree with the Claimants that, for reasons (i) and (ii) above, it cannot be shown that the grant of the extensions sought would result in irremediable prejudice in the sense considered in *Kalmneft*. It is therefore unnecessary to consider the impact, if any, of factors (iii) to (vi). For completeness, I would observe that:

i) factor (iii) depends on a question about the scope of section 72(1) which the parties agreed I cannot and need not resolve on the present application;

- ii) I would agree with factor (iv) taken alone, but it is linked to factor (v) and I consider that the court could take into account the possibility of Bloomfield discontinuing the section 66 proceedings. Accordingly I do not consider it correct to assume that the Claimants' challenges will necessarily continue to be live in the section 66 proceedings; and
 - iii) factor (vi) should in my view be disregarded, since it begs the question of whether the interest award will ultimately be upheld.
106. Bloomfield raised during the hearing a further possible argument, to the effect that Mr Hays and Grow Land might have lost their rights to object to the Tribunal's jurisdiction, pursuant to section 73(2) of the Act, because the Tribunal ruled on its jurisdiction and Mr Hays/Grow Land did not make a timely challenge. However, it was common ground in *Sovarex* that section 73(2), like section 73(1), applies only to a person who has taken part in the arbitration (§ 16); and, as noted in *Russell on Arbitration* § 8-077, that was stated to be the position in *London Steam Ship Owners Mutual Association v Spain (The "Prestige")* §§ 49 (citing the DAC Report) and 82). The parties did not invite me to seek to decide the point, and it is unnecessary to do so. I do not consider that it would affect the conclusion I reach in § 105 above.

(5) Impact on continuing arbitration

107. There is no such impact here.

(6) Strength of the applications

(a) Awards of interest

108. The Claimants submit that it is readily apparent, without having to conduct a substantial investigation, that they have a very strong (if not unanswerable) case under section 68.
109. First, there was a serious failure by the Tribunal to comply with section 33 of the Act. The approach that the Tribunal adopted emerged for the first time in the Awards, so the parties were learning for the first time in the Award about findings and matters which the parties had not had the opportunity to address. Bloomfield had not even contended for the extraordinary rate of interest applied by the Tribunal.
110. Secondly, the Tribunal applied an astronomical interest rate which was punitive, irrational, and in excess of its powers within the meaning of section 68(2)(b). Rather than awarding interest on damages to reflect the time-value of the principal sum, the Tribunal in substance awarded punitive and inapplicable remuneration pursuant to the terms of the Amended CPA under the guise of interest, which it had no power to do.
111. The rate applied by the Tribunal produces a much larger figure than the 2.5% per month, compounded daily, which the Tribunal in the same Award found to be so "unconscionable", "punitive" and "disproportionate" as to amount to a penalty, hence rejecting Bloomfield's claim for the Restitution Amount (2020 Award §§268-269). Similarly, when it came to interest on costs, the Tribunal awarded Bloomfield simple interest at 5% pa (2020 Award, §281(f)(iii)). There was no basis to distinguish

between damages and costs: the time value of money in both contexts, concerning the same party, would have been the same.

112. The Claimants submit that the Tribunal's stated basis for applying a rate of 65% pa, compounded quarterly, namely paragraph 2 of Part 3 of Annex II to the Amended CPA, was fundamentally misconceived.
- i) No claim was brought by Bloomfield under Annex II.
 - ii) Paragraph 2 of Part 3 could only conceivably apply if the Proceeds from the Sandridge litigation exceeded the Total Investment Amount (US\$18m plus the specified rate of return), which they plainly did not on the Tribunal's own findings and Award.
 - iii) Even if paragraph 2 applied, it would have been subject to a strict time limit, namely the earlier of the date of payment in full or the first anniversary of the Amendment Closing Date.
 - iv) Though the Awards are not entirely clear on this point, on one reading the Tribunal appears to have thought that the parties had 'agreed otherwise' for the purposes of Article 26.4 of the LCIA Rules, by stipulating a rate of 65% pa, compounded quarterly, in Annex II. If so, that was plainly an excess of power because that was not an agreed interest rate, but a return on capital, for a limited time only, as part of a formula for calculating the Counterparty Payment Amounts for which no claim was brought by Bloomfield, and which had no application to the facts.
113. The Claimants submit that these irregularities are so serious that substantial injustice is "*inherently likely*" or "*likely in the very nature of things*" to result (*RAV Bahamas*). At the very least, the decision on interest might well have been different (which is the relevant test). Further, the decision would have had to be different, because the Tribunal had no power to award a punitive rate. In short, this is "*one of those extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls for it to be corrected*": DAC Report, §280.
114. Beginning with the argument based on excess of power (section 68(2)(b)), Bloomfield submits that the rate at which interest is awarded was a matter for the Tribunal's discretion. Article 26.4 of the LCIA Arbitration Rules (2014) provided that, unless the parties agreed otherwise, the Tribunal was entitled to award interest "*at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) [...]*". The critical question, Bloomfield submits, is whether there was a rational basis for the exercise of the Tribunal's discretion, in other words whether there was a possible justification for its exercise of discretion. The Tribunal's decision was fully reasoned. It explained why it considered it appropriate for interest to be awarded by reference to the rate specified in Annex II. The Tribunal was using the rate specified in Annex II as a reference point for its determination of what amounted to an appropriate rate in the exercise of its discretion. As the Tribunal correctly noted, the rate reflected the return attributable to the risk inherent in the lending transaction. While the Tribunal was not required to apply the rate set out in Annex II, it was entirely rational for it to proceed as it did. Nor can there be any suggestion that the rate was punitive. As the Tribunal

reasoned at § 309 of the 2018 Award: “*That rate of interest is high, in our view, but it is expressly stated as a return on investment that is directly attributable to the risk inherent in this lending transaction. In these circumstances, we determine that it is an appropriate rate to apply to the damages awarded to Bloomfield.*”

115. In my view, the Tribunal’s approach was a surprising, and very probably incorrect, way of seeking to arrive at a compensatory interest rate. Moreover, it produced an extreme result for which the parties could not on any view be said to have contracted. The contract was a non-recourse one, with the result that the potentially high levels of return which Bloomfield could potentially earn would arise if, but only if, the litigation Proceeds were high enough to pay them. The parties had agreed that if the Proceeds reached a certain level, then Bloomfield would be entitled to a return calculated by applying a rate of 65% to those Proceeds. It could not follow that if the Proceeds were instead only, say, \$6 million, then the Claimants could nonetheless be potentially liable to pay from their own funds interest at the rate of 65% on top of that sum.
116. It is open to debate whether the result arrived at by the Tribunal constituted an excess of power, or merely an erroneous exercise of the power the Tribunal had. The Tribunal did not indicate that it chose the interest rate for punitive reasons, but on the basis that the parties had agreed on it as a rate of return in the contract. The Claimants may well be right that the Tribunal took into account an irrelevant consideration, but that would still arguably amount to no more than an error of law. On the other hand, the Claimants are probably correct to say the result was at least punitive in effect, and that may be sufficient to result in it being an excess of power. It is also arguable that choosing, purportedly as a rate of interest, a contractual rate designed not to compensate for the time value of money but rather to confer a rate of return on specified Proceeds in specified circumstances, amounted to an excess of power. My provisional assessment, based on the argument made on the present application, is simply that it is arguable that the Tribunal exceeded its powers.
117. As to procedural unfairness and section 68(2)(a), the Tribunal’s approach to interest was not one which any party had asked for, nor one of which any warning was given to the parties. Bloomfield suggests that, in its own submissions, it left it to the Tribunal to rule on interest; and given that the Claimants made no submissions, there can be no complaint that the Tribunal simply did what it thought fit. I find that contention unrealistic. One might reasonably anticipate that a Tribunal would award interest at a normal commercial rate, or based on some evidence of funding costs if adduced (there was none here), or a rate contractually agreed as the rate of interest payable on any late payments. The rate used here was none of those things. Instead, the Tribunal in effect converted a rate of return which the parties had agreed as being applicable in certain very specific circumstances – involving a high level of Proceeds from the litigation, and payable only to the extent those Proceeds were received – into a rate of interest payable by the Claimants from their own funds, in any event of any late payment, without limit in time, regardless of the level of Proceeds from the litigation. That is an outcome which it would have been impossible to anticipate, and which resulted in an extortionate rate of interest.
118. Bloomfield suggests that the Claimants have advanced no sufficient plea of substantial injustice, citing the statement in *Kalmneft* § 91 that an applicant complaining of lack of opportunity to make further submissions must go on to say

what further evidence and/or submissions he would have advanced. However, as indicated in *RAV Bahamas* §§ 35-36 and 69-72, some irregularities may be so serious that substantial injustice is inherently likely or likely in the very nature of things to result, and in such cases substantial injustice may be inferred, or may even go without saying. The present case is probably such a case, and in any event the section of the Claim Form dealing with section 68, read as a whole, in my view makes sufficiently clear the gist of the submissions which it is alleged would have been made:

“The Tribunal exceeded its powers within the meaning of s. 68(2)(b) of the Act, in that, inter alia, (i) it made an extraordinary award of interest on the erroneous basis that the parties had “expressly agreed” an interest rate of 65% per annum, compounded quarterly; and/or (ii) if and to the extent that the Tribunal purported to exercise any discretion as to the award of interest, then it exceeded its discretion and acted on an impermissible basis outside of its power to grant interest since (inter alia) (a) the Tribunal took into account an irrelevant consideration, namely the rate of return stipulated in Paragraph 2 of Part 3 of Annex II to the Amended CPA; (b) the Tribunal used its power to award interest for an improper purpose being to award punitive damages and not for compensatory purposes, to compensate for the time value of money; and/or (c) otherwise made a decision that no reasonable and/or rational Tribunal could make.

b. Further or alternatively, there has been a failure by the Tribunal to comply with s. 33 of the Act (and therefore s. 68(2)(a) is engaged), in that the Tribunal inter alia (i) failed to give the parties a reasonable opportunity of dealing with the approach adopted in the Awards in respect of interest on damages; and/or (ii) failed to adopt procedures suitable to the circumstances of this particular case. The Tribunal neither gave an opportunity to the parties to address the misconceived basis on which it intended to award interest and nor was any evidence submitted to justify such an approach. Further, so far as the Defendants are aware, the Claimant did not even advance a case for interest on the basis awarded.”

119. Bloomfield makes the further point that the Claimants were not participating in the arbitration, and have not said in terms that they would have reacted at all had the Tribunal given an indication of the approach it was minded to take to interest. However, non-participating parties can still have rights under section 68 (see section 72(2)(b)). More specifically, I consider it well arguable that an inference can readily be drawn that, had the Tribunal told the parties that it was contemplating an interest rate at this level (which would lead to an interest award already approaching \$60 million as at the date of the Award), then at least one of the Claimants would have reacted. As the Claimants point out, that could have been done in the form of a submission, or even a letter, from KCV or Grow Land, without any need for Mr Hays or Grow Holdings to intervene and thus run the risk of being participants in the arbitration (undermining their case as to jurisdiction).

120. I also see some force in the point that Bloomfield's representatives themselves might have been professionally bound to point out to the Tribunal the limited and specific purposes for which the 65% rate of return had been agreed in the CPAs, and that it had only ever been agreed as a form of division of actual litigation Proceeds. I am not convinced that Bloomfield could simply have gratefully accepted an extraordinary windfall in circumstances where the respondents to the arbitrations had indicated that they had ceased participating due to lack of funds.
121. Either way, there appears in my view to be a high likelihood that a reaction from at least one party would have been provoked, and that the Tribunal would have had to reconsider. There is then a strong argument that the outcome may well have been different.
122. For these reasons, I am of the clear provisional view that the Claimants' section 68 challenge has good prospects of success.

(b) Jurisdiction over Mr Hays and Grow Holdings

123. The Claimants submit that the weight of the arguments favours them on the jurisdiction issue. They make the following broad points, which also reflect the evidence advanced in support of their application in the first witness statement of Mr Caher.
- i) The starting point is that neither Grow Holdings nor Mr Hays is expressed to be a party to the CPAs. None of the contractual provisions under which third parties may be bound by, or acquire rights under, those agreements is arguably engaged. Nor is it alleged that Grow Land or KCV were acting as agents for Grow Holdings or Mr Hays. Bloomfield will have the evidential burden of establishing its case that Grow Holdings and Mr Hays were nevertheless parties to the arbitration agreements in the CPAs: *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 § 82.
 - ii) Bloomfield does not allege that there was any fraud or other wrongdoing at the time of the *formation* of (i) the CPAs, or (ii) the arbitration agreements they contained. Bloomfield's case under New York law is that a *breach* of the CPAs can lead to the conclusion that Mr Hays or Grow Holdings are parties to the CPAs and the arbitration agreements in circumstances where Bloomfield never intended to contract with either of them.
 - iii) The first requirement to piercing the corporate veil is not satisfied, namely that the owner of the corporate entity exercises complete domination of it with respect to the transaction at issue. The Tribunal pierced the corporate veil of Grow Holdings, through to Mr Hays, applying the legal principle that where an 'owner' exercises complete domination, the veil can be pierced to the owner: 2020 Award §122(c), 158, 164 (referring in the latter paragraph to a case where the veil was pierced to the owner and controlling shareholder). However, Mr Hays was not the 'owner' of Grow Holdings, as the Tribunal itself determined, with the shares held by the Hays Family Trust for the benefit of Mr and Mrs Hays' children. On its face, therefore, the Award was wrong in piercing the corporate veil to Mr Hays.

- iv) The second requirement – that the complete domination be used to commit a fraud or wrong – was also not satisfied. The Tribunal accepted the expert evidence of a Californian lawyer that, under New York law, the requirement of a ‘fraud or wrong’ for the purposes of corporate veil piercing can be established by any breach of contract: 2020 Award §161. The Tribunal proceeded to make findings of breach of contract, but nothing else, and did not accept Bloomfield’s case that there had been a diversion of value from one settlement to the other: 2020 Award §251. Grow Holdings and Mr Hays contend that a distinct ‘fraud or wrong’ is required, and cite New York legal authorities to the effect that a mere breach of contract is not enough because it would render the requirement of a ‘fraud or wrong’ meaningless. In other words, the wrong must consist of more than merely the breach of contract that is the basis of the party’s lawsuit.

124. As to those points, Bloomfield responds that:

- i) The Tribunal held that: (a) the arbitration agreement was governed by New York law (being the law which governed the CPA and Amended CPA); (b) the issue whether Mr Hays and Grow Holdings were bound by the arbitration agreement was therefore a question of New York law; and (c) as a matter of New York law, it was appropriate on the facts to pierce the corporate veil between Grow Land and Grow Holdings/Mr Hays such that Grow Holdings and Mr Hays were bound by the arbitration agreement.
- ii) The Claimants’ formation/breach distinction is irrelevant to the *alter ego* test under New York law.
- iii) The ‘domination’ requirement of the *alter ego* test under New York law does not require ownership: it connotes a broader range of factors relating to control. The facts establishing domination were the subject of detailed consideration by the Tribunal (2020 Award §188).
- iv) The 2020 Award specifically addressed the ‘fraud or wrong’ requirement, and did not base the decision on mere breach of contract. The Tribunal found that the requirement, that the domination of Grow Land be used to commit a wrong, extended to any unjust act or breach of legal duty in contravention of Bloomfield’s rights; and that Mr Hays and Grow Holdings not only used their control and domination of Grow Land to breach the Amended CPA but also “*to place its assets beyond the reach of Bloomfield, rendering Grow Land and KCV judgment-proof. As shown in Mr. Dasteel’s opinion, this is a “wrong” and an abuse of the corporate form that justifies piercing the corporate veil*” (2020 Award § 190).
- v) The fact that Mr Dasteel, Bloomfield’s expert, was a Californian lawyer rather than a New York lawyer is not relevant in circumstances where the Tribunal comprised three experienced international arbitrators, including a distinguished New York lawyer (Dr John Fellas), and reviewed carefully the underlying New York case law. Bloomfield’s own leading counsel was also himself a New York-qualified lawyer.

125. Since the Claimant's jurisdiction challenge, were it to proceed, would involve a complete rehearing of the relevant facts and the New York law issues, the court can at best make a very provisional assessment of the merits.
126. As a starting point, I am inclined to agree with Bloomfield that the Tribunal was qualified to assess these matters under New York law, particularly given that the panel itself included an experienced New York lawyer. It is also the case that the panel set out detailed reasoning, by reference to the New York case law: and that it did so having first expressly recognised that business people are entitled to organise their affairs through corporate entities and, in general, to expect that their separateness will be recognised and respected (Award § 187). I acknowledge that these considerations would be of only limited relevance to a court making its own assessment of the jurisdiction question (see § 75 above).
127. The Tribunal's summary of the relevant New York authorities, and the Claimants' evidence in support of this application, do not appear to contain any indication that there needs to be any form of fraud or wrong at the time of the formation of the contract or arbitration agreement in question, as opposed to subsequently.
128. At least some of the New York cases cited in the Award, and in the expert opinions of Mr Dasteel (filed on behalf of Bloomfield in the arbitrations) and Professor Wong (filed on behalf of the respondents) which were before the Tribunal (in the 2018 Arbitration only, in the case of Professor Wong's report), appear to be expressed in terms of domination of a corporate entity by its "owner". Grow Land was owned by Grow Holdings; however, Grow Holdings was owned not by Mr Hays but by the Hays Family Trust, of which Mr Hays was not a beneficiary.
129. The non-exhaustive list of factors which the Tribunal set out, based on the case law, for determining whether complete domination exist, do not themselves necessarily depend on ultimate ownership. They are:
- “(1) a disregard for corporate formalities and paraphernalia such as issuance of stock, election of directors and keeping of corporate records; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of business discretion shown by the dominated corporation; (7) whether the dealings between the related parties are at arms' length; (8) whether the corporations are treated as independent profit centres; (9) payment or guarantee of the dominated entity's debts by the dominating entity; and (10) intermingling of property between the entities, i.e., whether the corporation in question had property that was used by the other of the corporations as if it were its own.” (Award § 159)

That list is substantially the same as that set out in the expert report of Professor Wong on behalf of the respondents.

130. Given the apparent aim of the *alter ego* doctrine, it might seem surprising if its application could be avoided by the use of a family trust of which the allegedly

dominating person was settlor and trustee but whose beneficiaries were his children (particularly if the Tribunal was right to conclude that “*monies flowed to [Mr Hays] from Grow Holdings or from the Hays Family Trust*” in the period following the settlements: Award § 188(e)); though the court would of course have to consider this issue carefully for itself on any challenge to the Tribunal’s jurisdiction.

131. The Claimants may have an arguable point that § 189 of the Award went too far in accepting Bloomfield’s submission (based on *Freeman v Complex Computing Co Inc.*, 119 F. 3d 1044 at § 37 (2d Cir., 1997)) that the use of domination to bring about any breach of legal duty is sufficient. However, the Claimants are in my view incorrect to suggest that the Tribunal went on to make findings of breach of contract but nothing else.

132. It is true that the Tribunal rejected Bloomfield’s allegation that substantial value was diverted from Grow Land to Grow Holdings by means of the two settlements proceeding in sync with one another (Award § 251). On the other hand, as to the law, the Tribunal also quoted a statement of the Supreme Court of New York that “*To use domination and control to cause another entity to breach a contractual wrong for personal gain is certainly misuse of the corporate form to commit a wrong*” (*Cobalt Partners v GSC Capital Corp.*, 944 N.Y.S. 2d 30, at 34 (App. Div. 1st Dep., 2012)). As to the facts, the Tribunal found there to be more than the mere breach of contract by Grow Holdings. The Tribunal found that:

- i) Mr Hays and Grow Holdings used their control to render KCV and Grow Land judgment-proof shortly after the settlements in November 2017 (Award § 190), and
- ii) the settlement of the Sandridge/Grow Holdings litigation at an undervalue (which was brought about by Mr Hays’ and Grow Holdings’ domination of Grow Land: Award §§ 191-192):

“facilitated the settlement of the Sandridge/Grow Holdings Litigation. Our consideration of the evidence before us leads us to conclude that it is more likely than not that [Mr] Hays and Grow Holdings arranged these settlements for their own purposes, thereby causing Grow Land to breach its obligations to fund and vigorously prosecute the litigation until it achieved a commercially reasonable settlement. We therefore find that the third requirements under New York law for piercing the corporate veil, namely a showing of injury or loss to Bloomfield, has been satisfied.” (Award § 193)

Although that finding seems to have been made in the context of the third requirement (loss to Bloomfield), the Tribunal evidently considered that the breach of contract by Grow Land had been brought about by Mr Hays and Grow Holdings for their own benefit.

133. The Claimants counter that the Tribunal’s findings about rendering KCV and Grow Land judgment proof were wrong on the evidence, as neither company had any assets from the outset. However, the Tribunal clearly appreciated that Grow Land lacked its own funds (Award § 172(b)), and in Award § 174 referred to the assets placed beyond

reach of creditors as “*representing the undervalued settlement amount*”. In any event, the Claimants’ objection does not answer the findings referred to in § 132.ii) above about Mr Hays and Grow Holdings having engineered Grow Holdings’ breach of contract for their own benefit.

134. In all the circumstances, whilst I do not find it possible to form a clear provisional view at this stage as to the merits of the proposed jurisdiction argument, it is fair to say that the Claimants have not succeeded in positively persuading me that they are likely to have a strong case.

(7) Unfairness to Claimants in broadest sense

135. The Claimants submit that it would be unfair to them to be denied the opportunity of having their applications determined. An unusual feature of this case is that both grounds of challenge are already in play in any event, as part of the challenges under sections 66 and 72(1), which are not time-barred. Unless an extension of time is granted, there is a real risk of inconsistent findings.
136. Bloomfield responds that general considerations of fairness should be viewed in the context of Parliament and the courts having repeatedly emphasised the importance of finality and time limits for any court intervention in the arbitration process. The finality intended by the 28-day time limit in the Act engages the public interest. In the present case, the Claimants have only themselves to blame for their failure to make a timely application. Their failure to do so has, moreover, been a deliberate one. Refusing the applications would preclude the Claimants from bringing them, and generate no risk of inconsistent findings.

(8) Overall assessment

137. Viewing the matter in the round, I consider that the Claimants’ applications fall close to the borderline. The delay of 35 days is significant by reference to the 28-day time limit prescribed by the Act, even though (as I have indicated) not quite in the ‘many weeks or months’ category. The Claimants cannot be said to have acted ‘reasonably’ in this regard, and their evidence has a number of shortcomings, albeit I have not concluded that they took a deliberate tactical decision not to apply in the appropriate forum (viz this court). Granting the applications would not interfere with any ongoing arbitral process, nor cause Bloomfield irremediable prejudice over and above possible delay. (There is a possibility of multiplicity of proceedings, but that would depend on the course of events in the section 66 and Californian proceedings.) I have reached the clear provisional view that the Claimants’ section 68 challenge has good prospects of success, but have not reached such a view in respect of the jurisdiction challenge.
138. I have to consider both applications in the context of the broader considerations mentioned earlier regarding “*speedy finality*” in the enforcement of arbitration awards, and decide whether the interests of justice require a departure from the timetable laid down by the Act.
139. I have concluded that the interests of justice do require this in the case of the section 68 application. The apparent strength of that application, in combination with the severe prejudice to the Claimants if the awards of interest are indeed wrong but are allowed to stand, in my judgment tip the balance in favour of the grant of the

extension. It falls in the category of cases where, at least potentially, justice calls out for correction. I would also observe (though the point is not determinative) that as a reasonably discrete point unlikely to require much, if any, additional evidence, the section 68 application creates a fairly limited tension with the broader considerations referred to in the preceding paragraph.

140. I consider that the jurisdiction application falls, on balance, on the other side of the line. Here, the factors adverse to the Claimants' application (a significant delay, which cannot positively be said to be 'reasonable' and the evidence about which has some deficiencies), are not counterbalanced by a provisional showing of a positively strong case (unlike the position on the section 68 application): and the overall mix of factors, viewed in the context of the general considerations mentioned in § 138 above, does not in my view call for the grant of an extension. In other words, so far as the jurisdiction challenge is concerned, I have not been persuaded that the interests of justice require the court to depart from the timetable laid down by the Act.

(E) CONCLUSIONS

141. For these reasons I grant the extensions of time sought for the section 68/section 72(2)(b) challenges to the awards of interest, but not those sought for the section 67/section 72(2)(a) jurisdiction challenges.