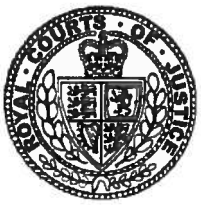

Neutral Citation Number: [2019] EWHC 589 (comm)

Case No: CL-2018-000203

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

Royal Courts of Justice
Rolls Building, 7 Rolls Building
Fetter Lane, London EC4A 1NL

Date: 13 March 2019

Before:

Sir Jeremy Cooke
sitting as a Judge of the High Court

- -

Between:

K and others	**Claimants**
- and -	
P and others	**Defendants**

- -
- -

Tom Smith QC and Toby Brown (instructed by Stephenson Harwood) for the **Claimants**
Stuart Adair (instructed by Fieldfisher) for the **Defendants**

Hearing date: March 6 2019

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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.

.....
SIR JEREMY COOKE

Sir Jeremy Cooke:

Introduction

1. This is an application under s 68 of the Arbitration Act 1996 in which the Claimants ("the Buyers") challenge an arbitration award dated 27 February 2018 ("the Award") on the ground of serious irregularity. The Buyers concluded a Master Share Purchase Agreement ("the MSPA") with the Respondents ("the Sellers") by which the former purchased from the latter the shares in two companies with agricultural interests and property in the Ukraine. The sale price was based on the valuation of the assets as set out in the MSPA and required adjustment following completion at 5 distinct "Check-points", depending on the number of "Qualifying Land Leases" ("QLL"), as defined in the MSPA on each of those dates, and the true state of indebtedness of the companies at 180 days following completion. There were warranties and indemnities given by the Sellers in the MSPA.

2. It is not necessary for me to recite the background to, or details of, the dispute which led to an LCIA arbitration, save to say that there were arguments about the adjustment of the purchase price which depended on the quantity of Qualifying Land Leases on the Check-Point dates, and that there were claims under the MSPA for breach of warranty and for indemnity in respect of various undisclosed matters relating to the assets of the companies and their indebtedness.

3. The parties exchanged detailed statements of case, in some cases subsequently amended, witness statements and written openings before a two week hearing with evidence which was concluded on 26 November 2015 when the record was closed subject to any permission given by the Tribunal to adduce further evidence. Following oral submissions, the hearing concluded the next day, 27 November 2015, with further submissions in writing exchanged some two weeks later, followed by submissions on costs which were completed sometime in February 2016. It will be noted that the Award was not issued until some two years later, on 27 February 2018 which was partly due to a period of illness of one of the arbitrators. Such a period is inordinate and unacceptable, but it was common ground between the parties that, although it might constitute a breach of the general duty of the Tribunal, no substantial injustice could be shown unless some other form of irregularity in the closed list in section 68 was demonstrated. The most that can ordinarily be said about such delay is that it can give rise to a suspicion that the Tribunal may have either forgotten what points were raised and required determination or that it, consciously or subconsciously, sought a shortcut in order to finalise a delayed award.

4. Reliance was placed on three grounds under section 68(2), namely section 69(2)(a) - a failure by the tribunal to comply with section 33 (general duty of tribunal), Section 68 (2)(c) - a failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties and Section 68(2) (d) – a failure by the tribunal to deal with all the issues that were put to it".

5. I need not refer to the many authorities relating to section 68 to which reference was made in the skeleton arguments. There was little or no dispute about the relevant law and the high hurdle which it is necessary for a claimant to overcome in showing a "serious irregularity". The court will only interfere in an extreme case where "the tribunal has gone so wrong in its conduct of the arbitration and where its conduct is so

far removed from what could reasonably be expected from the arbitral process, that justice calls for it to be corrected". Section 68 is designed to deal with procedural unfairness and not with mistakes of either law or fact. The tendency to dress up, in section 68 garb, complaints which are in reality criticisms of the findings or holdings of the arbitrators is to be denigrated. Moreover, a reasonably generous margin of appreciation is granted to arbitrators in the discharge of their functions and the question of substantial injustice is determined by asking whether the tribunal was caused by adopting inappropriate means to reach one conclusion whereas, had they adopted appropriate means, they might well have reached another conclusion favourable to the applicant.

6. The essence of the Buyers' complaints was that, by reason of the approach adopted by the Tribunal, they were denied the opportunity properly to present their case and/or the Tribunal failed to deal with a number of issues which it should have determined. The former was the basis of grounds (a) and (c), as set out in paragraph 4 above, by reference to section 33 of the 1996 Act and Article 14.1 of the LCIA rules which essentially recapitulates section 33, whilst the latter constituted the complaint under section 68 (2)(d) of the Act.

7. There is lengthy discussion in the authorities of the difference between an "issue", a "point", an "argument", a "line of reasoning", a "step in the argument" and a number of other expressions for the purposes of section 68 (2)(d). The distinctions drawn are sometimes very fine. Ultimately the question is one of fairness in the sense of asking whether the Tribunal dealt with the "fundamental issues" put before it for determination, namely those issues where the determination was essential to a decision on the claims or specific defences raised in the reference. Was it necessary for the tribunal to deal with the matter for a fair decision on the claims and defences in question?

8. There are essentially four areas of dispute to which the complaints relate, which can be summarised under the following headings.

   i) Qualifying Land Leases ("QLL")

   ii) Warranty and Indemnity claims

   iii) The Yarmolintsi Silo

   iv) Net Debt.

Qualifying Land Leases (the "QLL")

9. As expressed in the Claim Form,

   i) the Tribunal permitted the Sellers to assert a new claim based on the accounts for the first claimant which was unpleaded, raised for the first time in cross examination and unsupported by necessary accountancy expert evidence, which led to an award to the Sellers of $20,921,582 and the rejection of the Buyers' counterclaim for the $13,068,592.

ii) The Tribunal failed to deal with the issue raised by the Buyers as to the fairness of permitting the Sellers to assert such a new unpleaded claim at a late stage without proper supporting evidence and where the Buyers did not have the opportunity to adduce relevant evidence.

iii) The Tribunal failed to deal with the issue raised by the Buyers as to the conclusions which could properly be drawn from the accounts in the light of the International Financial Reporting Standard 3 ("IFRS 3") and

iv) the Tribunal failed to deal with the issue raised by the Buyers of whether in any case the Sellers had discharged the burden of showing that the number of leases asserted to be QLL pursuant to the new unpleaded claim satisfied all the relevant requirements contained in the MSPA.

10. The Buyers complain that the basis upon which the Tribunal found for the Sellers and against the Buyers was an unpleaded reliance on the management accounts of the Buyers for 31 March 2013 and the annual audited accounts of 30 June 2013, both of which formed the basis of cross examination of one of the Buyers' witnesses, Mr Kovalchuk. The Sellers' pleaded case was that the Buyers had breached clause 7.3 in relation to their duty to assist in the registration of leases and that under clause 7.5 of the MSPA, all the leases were to be deemed QLL. Alternatively, the breach gave rise to damages dependent upon the true quantity of QLL.

11. Because the point was unpleaded and taken only in cross examination, the Buyers contended that they did not get a fair opportunity to put their case by adducing evidence of fact from those who prepared the accounts about their content or from an expert as to the proper interpretation of those accounts and the applicable accounting standard, IFRS 3.

12. Self-evidently, the quantity of QLL was a major issue in the arbitration with each party putting forward a figure which would have resulted in a significant payment to it from the other under the terms of the MSPA. The Buyers put forward a figure based on the evidence of Ms Ustinenko and tables set out in a witness statement from Mr Kovalchuk, which deducted from the registered leases listed there, a figure in respect of those leased from government authorities.

13. At paragraphs 14 – 16 of his second witness statement, Mr Stadnyk, for the Sellers, referred to the published report and management accounts for the three months ending 31 March 2013 and the statement there that "through a series of transactions as of 31 March 2013, the Group received full operational control over a 66,347 ha land bank", which, he maintained, confirmed the figures that he had produced and the falsity of those put forward by the Buyers. He said that it was "obvious that [the Buyers] have always used and accounted in the documents for the land bank transferred to them in the minimum amount of 66,347 ha". He pointed out that subsequent versions of this report on the Buyers' website did not contain this statement.

14. Mr Kovalchuk said in response in his second witness statement that he did not know how the figure of 66,347 ha appeared in those accounts but it was relevant to note that the land department, which had provided those figures, did not say that this referred to registered land or QLL. He considered that the reference to "operational control" meant that the land in question was simply that which was being cultivated or could

be cultivated. Because, when he saw the phraseology used, he considered that it might mislead investors, he instructed that the statement should be deleted from all subsequent financial statements unless the figure of 66,347 ha of land leases did become registered. It was, at the time, he said, clear to him that the registered land bank was in fact unlikely to ever be as large as that since the Sellers had failed to pay rent, have failed to keep the leasing company solvent and by reason of the distrust of the land owners of the company, as evidenced by their decisions to sign land leases with competitors.

15. In his third witness statement Mr Stadnyk referred to Mr Kovalchuk's evidence of the quantities of QLL and, by reference to his own lawyers' investigations, set out the conclusion that registered land leases since completion totalled some 39,644 ha which, when added to the approximately 24,107 ha registered at completion, gave rise to a total which was stated in the Sellers' opening submissions, as the true QLL figure, to be 63,752.69 hectares.

16. Mr Stadnyk was cross examined on the figures about which he gave evidence, it being the Buyers' case that the true figure was no more than 24,107.26 ha. Mr Kovalchuk was cross examined on his tables of figures for registered leases and QLL.

17. Mr Kovalchuk was, however, also cross-examined and re-examined on the March Management Report and accounts and their successor accounts dated 30 June 2013 which were audited annual accounts. I have read the cross examination of him by Mr Adair, where points were put to him as to what was shown by the March accounts. During the course of this cross-examination, Mr Smith QC, for the Buyers, interrupted, with various exchanges then following between Counsel and the Tribunal. Mr Smith's objection was that the line of questioning derived from IFRS 3 which had not been put to the witness as the basis for the entries in the accounts. The question was, in his submission, what type of assets had to be accounted for but, having "flagged" the matter, in the end, he was content to leave it on the basis that he would explore it further in re-examination and in submissions. He did revert to the latter in re-examination and obtained various answers in relation to the basis of accounting required by IFRS 3. He did make submissions on the point, as appears hereafter.

18. At this stage however, these accounts had been used to challenge the evidence of Mr Kovalchuk as to the number of QLL, suggesting that they showed his figures to be wrong, which he did not accept. He did make various admissions on which the Sellers subsequently relied. The accounts would not have been in evidence as such in a Court setting unless the witness agreed to the propositions advanced by reference to them, but in the context of an arbitration where the March accounts had been introduced by a witness statement, and the rules of evidence are much less restricted, they would be treated as in evidence unless any application was made to exclude them or evidence based upon them. I was not addressed, nor was evidence produced as to any order or ruling made by the Tribunal in relation to the admissibility of evidence under Article 22(vi) of the LCIA Rules.

19. The Buyers did not apply to exclude this evidence or to exclude any case made on the basis of this evidence, nor did they apply to adduce further evidence from those who had prepared the accounts, nor evidence from an expert in accountancy as to the proper interpretation to be given to the entries in the accounts or IFRS 3.

20. When it came to closing submissions however, the Sellers who were the Claimants, placed reliance on the figures in these accounts, as the primary evidence and major plank of their argument as to the true figure for QLL. For the first time, the Sellers put forward a positive case that the accounts showed the true figure for QLL as 66,347 ha, a higher figure than that for which they had previously contended. The accounts showed an intangible asset value of $33.174 million, which tallied, as had been put in cross examination, with the hectare figure when multiplied by the value placed on registered leases of $500 per hectare, whilst unregistered leases were said to have little or no asset value because of their vulnerability.

21. In the Buyers' oral closing submissions, Mr Smith's first point on this topic was that, prior to cross examination, the Sellers had not pleaded or put any case on the basis of the 66,347 ha figure which was derived from the accounts. The only point previously made was the point about the note relating to "operational control" and its removal. He stated that the consequence was that there was no evidence from the persons who had prepared the accounts and although Mr Kovalchuk, as an accountant had been asked about it he was not responsible for their preparation, as he had made clear in evidence. Submissions were then made as to the effect of IFRS 3 on the basis that the intangible asset figure of $33,174, did not equate to registered land leases let alone QLL. Again, at this stage, no point was being taken by the Buyers that the Sellers should not be permitted to advance the unpleaded case. Instead, arguments were advanced as to why it should not be accepted.

22. In the Sellers' written closing submissions, they advanced both their case based on clause 7.5 and, over the course of 19 pages, their new case based on the accounts. Extensive argument was put as to the details of the accounts and their proper interpretation, relying, in part, on admissions made by Mr Kovalchuk in cross examination and in part on submissions as to what the accounts meant. His evidence in re-examination was also explored including the essential point taken by the Buyers on IFRS 3 that an asset would be recognised in the accounts if "it is probable that any future economic benefit associated with the item will flow to or from the entity and the item has a cost or value that can be measured with reliability". The argument put was that, with a value of $500 per hectare which applied only to registered land leases, the hectare figure and asset value of the intangible assets in the accounts were consistent only with them constituting registered leases, from which a deduction had to be made in respect of government leases to arrive at the QLL.

23. The written closing submissions of the parties were exchanged on the same date whereas, in the oral closings on the last day of the hearing, the Sellers, as claimants had gone first, followed by the Buyers. The Buyers had been able to respond to the Sellers' new argument orally and now had the opportunity to do so in writing. At paragraph 35 of the Buyers' written submissions, the following appeared: "the Sellers' new case is based on K's accounts… However, they have not pleaded any case that the QLL equates to the figure contained in K's financial statements. This alternative case therefore falls at the first hurdle for the reason that it has not been pleaded. (This is not purely a technical objection – there has been prejudiced caused by the absence of pleading, as otherwise the Buyers would have adduced evidence dealing directly with the preparation and basis of the figures in the relevant part of the accounts)". The Buyers went on to set out the history of the development of the argument during the proceedings and made submissions as to the meaning of

"operational control" and the application of IFRS 3 to the figures which appeared in the accounts. The submission was made that there was an obligation to account for leases which had not been registered where there was a contractual right of acquisition and where they could reasonably be expected to be acquired. The intangible assets therefore included contractual rights where it was probable that future economic benefit associated with them would flow and where a cost or value could be measured for that. The point was also made that even registered leases did not equate to QLL.

24. Taken together, the Buyers' oral and closing submissions made the following points: –

i) first, there was no pleaded case that the amount of the QLL was 66,348 ha with the result that no evidence had been adduced from those who had prepared the accounts. Although Mr Kovalchuk was an accountant, he had made clear in his evidence that he was not involved in the preparation of the accounts nor knew how the figure had been compiled.

ii) Second, the notes to the 31 March accounts referred to "operational control" and not to registered leases.

iii) Third, the note had been removed from the year-end accounts because it was potentially misleading. It could be taken to imply ownership, although the expression "full operational control" was entirely consistent with the Buyers' case that it referred to the right to acquire.

iv) Fourth, the accounts were prepared on the basis of IFRS 3 which meant that assets were recognised for accounting purposes on the basis of a probable prospect of future economic benefit which did not correspond to legal ownership of the assets - a legal right to acquire as opposed to actual ownership and registration.

v) Fifth, there could be an element of government leased land that would appear in the assets figure, but which would not qualify as QLL for that reason.

vi) Sixth, in re-examination Mr Kovalchuk had given evidence about what IFRS 3 meant which ought to be accepted.

vii) Seventh, the evidence of Ms Ustimenko as to the correct QLL figure should be accepted in contrast to the figures put forward by Mr Stadnyk.

viii) Eighth, if the Sellers' deeming case under clause 7.5 did not work, then the damage which flowed from the alleged failure to cooperate, even if established, depended upon the actual figure for QLL.

25. When the Tribunal came to determine the matter at paragraphs 126 – 152 of the 205 page Award, it concluded that the only reliable evidence of QLL was to be found in the accounts and that all other evidence was unreliable and self-serving. The Tribunal found that the reference to "Intangible Assets" in those accounts of $33.174m could only reflect the hectare area referred to and could only represent registered leases. This was reinforced by the earlier reference to "full operational control" in the note

which had subsequently been deleted. The Tribunal found that the evidence showed that the Financial Statements and Accounts were recognising land value that corresponded with the value of the hectare areas referred to in the March and June accounts (totalling 66.603 in June) from which 8 ha fell to be deducted as government leased land which did not qualify as QLL.

26. It is said by the Buyers that the Tribunal failed to determine their objection to the case being advanced at all, as set out in paragraph 35 of their written closing submissions. It is self-evident that the Tribunal, whilst not expressly dealing with the point, decided that the Sellers should be allowed to advance the case because they went on to accept it. It is true that at paragraph 74 of the Award, the Tribunal set out the Sellers' alternative cases, including the "new case" at paragraphs 83 - 86 and then set out the Buyers' position on this alternative claim at paragraph 100 – 103, without making any reference to the objection taken to the case being advanced at all. Whether or not they overlooked paragraph 35 of the written closing is unknown, but, given the history of the matter and the manner in which the Buyers argued their position in respect of the new case, the decision to allow it is altogether unsurprising and cannot be said to constitute a serious irregularity within the meaning of section 68. The Buyers chose to deal with this new case and only in their final written submissions made any suggestion that it was not open to the Sellers to advance it because it had not been pleaded. Even then, there was no application to exclude the case or reliance upon it, and the wording used- "*This alternative case therefore falls at the first hurdle for the reason that it has not been pleaded*", appears to represent an argument as to why the case should not be accepted, particularly because of the absence of any direct evidence from the Buyers in the shape of witnesses who produced the accounts or expert accountancy evidence. The argument could be taken as going to weight rather than exclusion. Up to that point, the Tribunal had proceeded on the basis that the Buyers were prepared to deal with the points raised and the wording of paragraph 35 of the written closing, even if it had the meaning for which the Buyers contend, could hardly be read, on its face as an application for that alternative case to be dismissed out of hand. I venture to suggest that the Buyers themselves would have been very surprised if the Tribunal had ruled that case out as opposed to treating the points made as going to the weight of the arguments advanced.

27. There is no doubt that the quantity of QLL was an issue which the Tribunal had to decide and that the Buyers had a full opportunity to address the points made in this alternative case and the evidence adduced by the Sellers in the course of cross-examination of Mr Kovalchuk. At no stage did the Buyers apply to exclude either the evidence of the accounts or the evidence of Mr Kovalchuk on the point (which would have been a nonstarter in the circumstances) nor require an amended pleading from the Sellers, nor seek permission to adduce factual evidence from those who prepared the accounts, nor expert accountancy on IFRS 3. There was no procedural unfairness in what took place in the circumstances, regardless of the absence of any reference in the Award to the express terms of paragraph 35 of the Buyers' written closing, because the Buyers had been given every opportunity to grapple with the points raised, however late they first appeared as a positive case for the Sellers, as opposed to a basis for challenge of the evidence of the Buyers. The latter knew that their accounts were to be the subject of debate from the moment that reference was made to them in Mr Stadnyk's witness statements and were therefore alive, or should have been alive, to the range of arguments which were ultimately run.

28. It cannot be said that the Buyers did not have an opportunity to deal with this case because they did so in re-examination of Mr Kovalchuk and in submissions, exactly as they had indicated to the Tribunal that they would when the point first arose in cross-examination of that witness. It was open to them at any stage to apply to adduce further evidence but they did not do so.

29. At paragraph 101 of the Award, the Tribunal referred to the Buyers' argument that "recognition of an asset in the financial statements of an entity does not equate to the legal ownership of that asset. K was simply accounting on the basis that it had a legal right under the MSPA to acquire the 66,347 ha of land". Whilst there is no direct reference to IFRS 3 in the Award, when the Tribunal reached its conclusions on this matter at paragraphs 134 – 140, it decided that the value of the Intangible Assets set out in the Financial Statements and the Annual Report did reflect the area of QLL, because the figure for hectares and the asset value tallied at the rate of $500 per hectare for registered land. In the Tribunal's view, there was no other explanation for the figures which appeared for Intangible Assets and provided a deduction was made for government leases, the registered leases constituted QLL. The IFRS 3 point was plainly in mind, even though no further reference was made to it, as such. So also was the fact that registered land leases did not per se equate to QLL, as the deduction shows.

30. In my judgement, it cannot be said that the Tribunal failed to deal with an issue however that expression is defined. The essential question which they had to resolve was the number of QLL's which they did. Various arguments were put forward on the basis of different pieces of evidence, including the accounts in question and although it may be said that the Tribunal did not specifically determine each and every argument put forward, it cannot, in my judgement, be said that it failed to deal with an issue in the sense of an essential matter which had to be determined in order for the Tribunal properly to reach its conclusion.

31. The reality is that the Tribunal reached a conclusion on the issue of QLL which was adverse to the Buyers, specifically rejecting all other evidence of the figures for QLL other than what appeared in the Buyers' own accounts, in circumstances where the Buyers were initially content to rely upon the re-examination of Mr Kovalchuk, to argue about their own accounts and their meaning and not to seek to put in any additional evidence to counter the points being made against them. It cannot be said that just because the higher figures for QLL were unpleaded, there was unfairness when the Buyers knew the case being made and addressed the arguments without seeking to exclude the evidence as such or adduce any extra evidence themselves. The fact that the Tribunal, in its Award, did not expressly deal with every one of the points raised by the Buyers in closing, is neither here nor there. They were but arguments in the context of the essential issue of the number of QLL. The Tribunal came to its conclusion and set out its reasons for doing so which was never the subject of any application for further reasons under section 70.

32. In such circumstances there was no serious irregularity and no substantial injustice, within the meaning of the authorities, so the section 68 challenge in respect of QLL must fail.

Warranties and Indemnities

33. There is really only one point taken now which is that the Tribunal failed to deal with an issue relating to the contractual requirement that, in respect of Claims for breach of warranty or indemnity, where they found that there was a need for a loss to be "actually incurred and paid out", under the terms of Clauses 8 and 9, Clause 1.1 and paragraph 1.4(a) of Schedule 7. The issue was whether the requirement for such payment out could be satisfied by payment of the purchase price under the MSPA itself.

34. There is a subsidiary issue as to a finding made by the Tribunal that it was common ground that there had been no payment out of any losses, when it was said to be the Buyers' case that 3 particular claims out of the 40 plus which were pursued for breach of warranty and indemnity, had been the subject of payment. This point is not a section 68 point, since, even if true, it amounts to an error of fact - a mistake made by the Tribunal and does not fall within the closed list of "serious irregularities". No application was made for correction under section 57, and even if that section is not wide enough to allow for errors of the kind made here, it cannot fall within the ambit of section 68. Insofar as the finding of common ground of no payment out also encompasses the point raised in paragraph 33 above, it adds nothing to it.

35. There were some $27 million of such claims not otherwise determined by the Tribunal under other heads. After setting out the Buyers' contentions in relation to the point of construction as to the absence of need for the losses to be actually incurred and paid out in order to be recoverable for breach of warranty or by way of indemnity, the Tribunal at paragraph 393 of its Award referred to the Buyers' argument that, even if there was such a requirement, this would be satisfied by the payment of the purchase price under the MSPA.

36. The Tribunal decided the point of construction against the Buyers in relation to Claims for breach of warranty as well as for indemnity and concluded at paragraph 397 that there could be no recovery for breach of warranty under the MSPA in circumstances where the Buyers had not made any payment in relation to Claims. At paragraph 398 the Tribunal referred to the normal basis of damages for breach of warranty as the difference between the value of the item as warranted and its actual value (or the price if that represents the value) and held that the parties had made express provision in the MSPA that there would only be liability for damages or losses in the circumstances set out in paragraph 1.4(a) of Schedule 7 where they had been actually incurred and paid out. The Tribunal held at paragraph 400 that it was necessary for the Buyers to have made payment in respect of any claim in order to make recovery.

37. Nowhere, however did the Arbitrators expressly deal with the point that payment under the MSPA of the purchase price might be enough to constitute actual payment for the purpose of the definition of Losses. The Sellers argued that the point was implicitly determined by the holding in paragraph 397. I cannot read that into the decision in that paragraph and conclude that the Tribunal did fail to deal with this argument.

38. The question then arises as to whether this amounts to failure to deal with "an issue" within the meaning of section 68(2)(d). As I have already said, the question of characterisation is by no means straightforward when the terms of the section are borne in mind. The Tribunal held that "payment out" was required, having referred to

the ordinary measure of damages for breach of warranty but did not consider whether the payment of money under the MSPA itself would suffice. As Mr Smith QC pointed out, Schedule 6 contained a series of different types of warranty, many of a kind which are commonly found in share sale and purchase transactions such as warranties as to the capacity and authority of the parties to conclude the contract, the accounting records, the indebtedness of the company sold, the absence of litigation and the like. In relation to a number of warranties, there is no difficulty in looking for an independent payment out but in other cases such as warranties of title to assets, there may be no basis for any payment out, but merely a diminution in value in what is obtained or warranted.

39. It appears that most of the claims which the Tribunal did not need to determine, because of its conclusions on construction and the absence of any determination as to whether payment under the MSPA could constitute payment out, may well have related to undisclosed trade debts where separate payment out is a practical possibility but the question that was not answered is one of potentially general application to all branches of the warranties and not solely to those where individual payment in respect of the breach and loss is not a practical outcome.

40. It seems to me that it would be both over simplistic to characterise the only issue in this context as breach of warranty. If the Tribunal had failed to decide whether payment out was required, that would undoubtedly have constituted a failure to deal with an issue since that was a key point of dispute between the parties upon which much turned. Equally, it appears to me that, having determined that payment out was required, the arbitrators should, in all fairness, have decided whether or not the requirement could be met by reference to the MSPA purchase price itself, as the Buyers maintained.

41. I therefore conclude that the Tribunal did fail to deal with this issue which was put to it and that this did constitute a serious irregularity which has caused substantial injustice in as much as the Tribunal might have come to a different conclusion, if it had determined the issue.

42. The Award should be remitted to the Tribunal for determination of this issue.

The Yarmolintsi Silo

43. In the MSPA a value was ascribed to this Silo of $19.5 million and considerable expert evidence was adduced by the parties as to its condition, as compared with its warranted state and the costs of the reinstatement/reconstruction/repair. The case was always put by the Buyers on the basis of breach of warranty and entitlement to such cost, which represented the diminution in value of the Silo, which, $ for $, was reflected in the purchase price for the shares in the company which owned it.

44. Until the Sellers' written closing, two weeks after the close of the hearing, it was common ground between the parties that the cost of reconstruction represented the loss flowing from any breach of warranty in relation to the Silo. In consequence of a discussion between Mr Smith QC and one of the arbitrators, in the former's closing speech, as to the ordinary measure of damages for breach of warranty being the difference between the value of the shares of the company if the warranty was true and their value if untrue, the Sellers contended, opportunistically, in their written

submissions, to which there was no opportunity to reply, that, absent evidence of valuation of the shares, no loss could be established by reference to the dilapidated condition of the Silo and the cost of putting it right.

45. The Sellers sought to justify this stance by arguing that the Buyers had changed their case because they had understood that the claim for loss by reference to the cost of reconstruction of the Silo meant that the Buyers intended to carry out that reconstruction. Since by this time the company which owned the Silo was in liquidation and the liquidator was managing it rather than the directors appointed by the Buyers, this seems unlikely, but whether or not that is the case, the claim was never framed on the basis that the buyers would carry out such work and there was therefore no change in case.

46. It had been common ground that the value of the shares depended on the assets on a $ for $ basis because the MSPA purchase price was specifically constituted by the agreed asset values set out therein, including the value of the Silo at $19.5 million.

47. In the circumstances the Buyers had no opportunity to counter the new argument raised in the Sellers' written closing submissions or to adduce expert evidence on share valuation in the context of the MSPA and the asset valuation of the shares and the Tribunal in accepting this argument without any reference to the Buyers, acted unfairly and deprived them of the opportunity of meeting that case and of putting its own case.

48. The Tribunal found against the Buyers on two bases:

    i) First, on the ground no money had actually been expended in relation to the Silo, so that on the proper construction of the warranties and indemnities, no recovery was possible, since there was no actual payment out - see the discussion above.

    ii) Secondly, on the basis that the claim in respect of the Silo was a claim for derivative loss in the value of the shares in the Silo owning company and no evidence had been adduced as to the loss in value of those shares as a result of the defective condition of the Silo. The Tribunal did not accept that there was a $ for $ equivalence in the share value and purchase price vis-à-vis the Silo repair cost which would have been incurred by the owning company, rather than the Buyers.

49. In such circumstances the Tribunal did not need to investigate the extensive evidence as to the cost of repair or reconstruction of the Silo and, in this context, the Buyers relied on the inordinate delay as giving rise to an objective suspicion of a tribunal seeking, consciously or unconsciously to effect a shortcut.

50. In my judgement, there is no answer to the complaint that the Tribunal failed to act fairly in giving the Buyers an opportunity to meet this new case, made for the first time in the Sellers' closing submissions when there had previously been common ground between the parties that the cost of re-construction was the relevant measure of loss for the breach of warranty. The Buyers had no opportunity either to counter the argument or to adduce expert valuation evidence in relation to it.

51. Furthermore, insofar as arguments could arise in the future as to the proper measure of loss, the question of "payment out" by reference to payment of the MSPA purchase price would also require to be determined.

52. On this basis, there was a serious irregularity which has caused substantial injustice because of the possibility of the Tribunal coming to a different conclusion in the absence of such unfairness and failure to deal with the issue of payment out via the MSPA. In the result, the Award must be remitted to the Tribunal on this point too.

The Net Debt

53. Once again, the Buyers' complaint is that the Tribunal decided an issue without giving them the opportunity to deal with the argument. At no time at all, not even in closing submissions, did the Sellers ever take the point which the Tribunal decided as a further "threshold issue". At paragraphs 402 – 411 of the Award, the Tribunal decided that claims for breach of warranty in relation to undisclosed debts could only be pursued through the Net Debt Adjustment mechanism set out in the MSPA. This had never been part of the Sellers' case, where it had been expressly accepted by their Counsel that trade debts could not fall within the Net Debt Adjustment mechanism because that only covered "borrowing or indebtedness in the nature of borrowing" or "other transactions having the commercial effect of a borrowing, including trade and other liabilities of current and non-current nature…" in accordance with the definition of "Indebtedness" in clause 1.1 of the MSPA.

54. The Tribunal's conclusion at paragraph 403 was therefore arrived at contrary to the agreed position between the parties and was reached without giving any notice to the parties so that the Buyers had no opportunity of meeting it. The Buyers maintain that only one counterclaim was in the nature of borrowing, whilst the rest were "trade debts".

55. As with the previous two items, both relating to breaches of warranty and/or indemnity, there has been a serious irregularity with substantial injustice as a result in accordance with the test set out in *Vee Networks Lt v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192, since the Tribunal might have reached a different conclusion had it acted fairly in the circumstances.

56. This issue too must be remitted to the Tribunal for reconsideration.

Waiver.

57. Insofar as it was argued that the Buyers by taking up the Award or continuing to participate in the arbitration, waived their right to object, by reason of the terms of section 73 of the 1996 Act in relation to the three points on which I have found in their favour, I need say very little. The Buyers could not know until they collected the Award that the Tribunal had not determined the issue relating to satisfaction of the payment out requirement by payment of the MSPA price. Nor could they know that the Tribunal would adopt the course it did in accepting the Silo argument despite previous common ground between the parties as to the measure of loss for breach of that warranty. Nor could they foresee that the Tribunal would come to a conclusion never put forward by the Sellers in relation to Net Debt. No waiver can therefore arise on these points.

Conclusion

58. Given the failings of the Tribunal in the present case I considered whether any loss of confidence in the Arbitrators might require that the Award be remitted to a different Tribunal, but that would require much more duplication of work than would be involved in remission to the existing Tribunal where reasons relating to the illness of one member may account at least in part for the delay and perhaps an overhurried approach in publishing a delayed Award. At all events, remission to the existing Tribunal appears to me to be the right course and I so order.

59. If the parties can agree on the form of the order I should make, that would be helpful. So far as concerns costs, it seems to me that there has been some success on each side so that costs would not fall wholly to be paid by the Sellers who resisted the application root and branch and lost on three of the four points, whilst winning on the major area of controversy which took most of the time. If the parties cannot agree on costs, then I will make a ruling as required but my provisional view is that the Sellers should, allowing for the time taken on the different issues, pay 60% of the Buyers' costs of the application, to be the subject of detailed assessment if not agreed.