Neutral Citation Number: [2025] EWHC 40 (Comm)

Case No: CL-2023-000868

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

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

Date: 14/01/2025

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

IN AN ARBITRATION CLAIM
BETWEEN:

(1) EMMA LOUISE COLLINS
(2) AMAN LAKHANEY
(3) KHADIJA BILAL SIDDIQUE
(4) COLOME INVESTMENTS LIMITED
(5) ALKBS LLC

Claimants /Applicants

-and-

WIND ENERGY HOLDING COMPANY LTD

Defendant / Respondent

IN THE MATTER OF AN
ARBITRATION BETWEEN:

(1) EMMA LOUISE COLLINS
(2) THUN REANSUWAN
(3) AMAN LAKHANEY
(4) KHADIJA BILAL SIDDIQUE
(5) COLOME INVESTMENTS LIMITED
(6) KELESTON HOLDINGS LIMITED
(7) ALKBS LLC

Claimants / Respondents to Counterclaim

-and-

WIND ENERGY HOLDING COMPANY LTD
Respondent / Counterclaimant

- -
- -

Alastair Tomson (instructed by **Rosenblatt LLP**) for the **Claimants**
Vernon Flynn KC (instructed by **Latham & Watkins (London) LLP**) for the **Defendant**

Hearing date: 9 October 2024
Draft judgment circulated to parties: 20 December 2024

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Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. This is a claim to set aside a Final Award in LCIA Arbitration No. 225475 on the ground of serious procedural irregularity, pursuant to section 68 of the Arbitration Act 1996 ("***the Act***").

2. The essence of the claim is that the arbitrator breached her duties under section 33 of the Act:

    i) by refusing to adjourn an evidential hearing, which commenced on 4 October 2023, in order to allow further time for the Claimants to obtain legal representation and/or prepare for the hearing, and for the First Claimant ("***Ms Collins***") to recover from a breakdown;

    ii) by declining to admit certain evidence at the hearing and to test the evidence tendered by the Defendant; and

    iii) by taking an inappropriate approach to various matters in the Final Award.

3. For the reasons set out below, I have concluded that no serious irregularity occurred and that the claim must therefore be dismissed.

(B) FACTS

4. The Claimants submitted their Request for Arbitration on 20 April 2022. The claim concerned whether a letter of indemnity ("***the LOI***") was valid and binding, and whether the Defendant ("***WEH***") was in breach of the LOI by not meeting the Claimants' ongoing costs of related litigation (the "***Litigation***").

5. The claim in the Litigation was brought by a Thai businessman, Mr Suppipat, and associated companies, and concerned *inter alia* whether he had been deprived of his rights in relation to WEH by the present Claimants and other

persons. It culminated in the decision of Calver J in *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) handed down on 31 July 2023.

6. The Claimants' case in the arbitration was that the other board members of WEH had dismissed them from their positions at WEH and prevented WEH from paying their legal costs of the Litigation, because they wished to prejudice the Claimants' ability to defend themselves in the Litigation. The Claimants called into question the independence, motive and credibility of WEH's main witness of fact, Ms Anichar Asiano, a director of WEH. WEH was the respondent to the arbitration.

7. WEH contended in the arbitration that the LOI was void or unenforceable on various grounds, including lack of consideration, want of authority and illegality. WEH also counterclaimed for (a) approximately £7.6 million paid to Stephenson Harwood and Simmons & Simmons by WEH in relation to the Claimants' legal costs of the Litigation; and (b) a further sum of about SG$ 471,000 paid to another firm of solicitors, Byrne & Partners, in relation to the legal costs of Messrs Narongdej and Phowborom in the Litigation.

8. The LCIA on 5 August 2022 appointed Ms Lucy Greenwood as sole arbitrator, and the Claimants served their Statement of Case on 12 September 2022.

9. On 30 September 2022 the arbitrator issued Procedural Order No. 1 ("***PO1***"). Under PO1, there were to be five written statements of case, with the final written submission (the Sur-Reply) to be filed by the Claimants by 14 July 2023. An evidential and final hearing was to follow on 12-15 September 2023.

10. WEH served its Defence and Counterclaim on 19 December 2022, along with its documentary evidence, witness statement and expert's report.

11. The Claimants served their Reply on 17 February 2023, along with their documentary evidence, witness statements and expert's report.

12. WEH served its Rejoinder on 2 June 2023, together with further documentary evidence, witness statements and experts' reports.

13. The trial in the Litigation took place between October 2022 and March 2023, with the Claimants in this claim participating as defendants, represented by Signature Litigation and counsel. The Claimants instructed Signature Litigation and separate counsel in relation to the arbitration.

14. Under PO1 the Claimants' Sur-Reply was due to be served on 14 July 2023. On 8 July 2023, however, Signature Litigation on behalf of the Claimants applied to the arbitrator for a stay of the arbitration, and to vacate the date for service of the Sur-Reply, on the bases that (a) WEH had brought parallel proceedings in Thailand in relation to the same loss and (b) the forthcoming judgment in the Litigation would impact on their claimed losses.

15. The arbitrator on 18 July 2023 refused the requested stay, but granted the Claimants an extension of time until 28 July 2023 to serve their Sur-Reply. The Claimants did not, however, serve their Sur-Reply on 28 July 2023.

16. The draft judgment in the Litigation was circulated, subject to the usual embargo, on 24 July 2023 and judgment was handed down on 31 July 2023 (the "***Judgment***"). The present Claimants, and some of the other defendants to the Litigation, were found jointly and severally liable to the Litigation claimants in the sum of around £850 million. Calver J refused permission to appeal, but granted an interim stay of enforcement pending an application which the Claimants made to the Court of Appeal for permission to appeal. Ms Collins in her two witness statements for the present application explains her shock at the Judgment and its serious effect on her mental health and on the Claimants' ability to focus on the arbitration.

17. Also on 31 July 2023, Calver J granted a without notice post-judgment freezing order to the Claimants in the Litigation. Among other things, this froze the present Claimants' assets, subject to the usual exception allowing each respondent to spend a reasonable sum on "*legal advice and representation*". Ms Collins states in her witness statements in this claim, and stated in her witness statement dated 28 August 2023 in support of the Claimants' application for an adjournment of the final hearing in the arbitration, that (without waiving privilege) she and the other Claimants understood the freezing order to prevent them from spending any sums on legal representation in the arbitration.

18. The same day, 31 July 2023, Signature Litigation wrote to the arbitrator providing a copy of the Judgment and again seeking a stay of the arbitration, saying:

> "As a practical matter, the Claimants cannot pursue the arbitration in circumstances where they have jointly and severally been found liable for in excess of USD500m, including incurring further costs in the arbitration proceedings. The Former WEH Managers are advised by counsel that they have good grounds for appeal and therefore intend to appeal the judgment. It is not known precisely how long the appeal process will take but the Former WEH Managers are confident that a decision can be achieved within the next 12 months. Only if the appeal is successful will the Claimants be able to proceed with the arbitration.
>
> In the event that permission to appeal is not granted, or in the event that any appeal is ultimately lost, then the Claimants undertake to withdraw the arbitration proceedings at that stage. As such, the Claimants respectfully request the Sole Arbitrator temporarily to stay this arbitration until the outcome of the appeal."

I note that the Claimants did not in this communication suggest that the freezing order prevented them from paying for legal representation in relation to the arbitration. The arbitrator rejected the stay application the same day.

19. The following day, 1 August 2023, Signature Litigation wrote to the arbitrator on behalf of the Claimants:

> "The Claimants hereby withdraw their claim in LCIA Arbitration No: 225475.
>
> The Claimants invite the Respondent to withdraw the counterclaim on the basis that it has already secured a decision in the Thai courts awarding the Respondent the very sum sought by way of counterclaim in the Arbitration. In the event the Respondent agrees to withdraw its counterclaim, the Claimant invites the Sole Arbitrator to issue an award recording the discontinuance of this arbitration, without prejudice, with each party bearing their own legal costs and their respective share of the expenses of the Sole Arbitrator and the LCIA.
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> Should the Respondent be inclined to continue to pursue its counterclaim, the Claimants respectfully request that the Sole Arbitrator dismisses the Respondent's counterclaim, with prejudice:
>
> …".

20. Also on 1 August 2023, Signature Litigation wrote to the arbitrator giving notice that it was no longer instructed in the arbitration with immediate effect, and asking that any correspondence be sent to the personal email addresses of Ms Collins and Mr Lakhaney. Ms Collins states in her witness statement in the present claim that the Claimants were unrepresented in the arbitration from then onwards, save for the instruction of Ruthberg, a Dubai law firm, on a very limited basis to apply to adjourn the evidential hearing pending variation of the freezing order.

21. On 4 August 2023 WEH stated that it maintained its counterclaim.

22. On 8 August 2023 Mr Lakhaney emailed the arbitrator explaining that the Claimants were in the process of appointing new international arbitration counsel to represent them for the remainder of the proceedings; confirmed that the Claimants would defend WEH's counterclaim in the event it was pursued; and proposed a new timetable leading to a short hearing in December 2023 or January 2024. Mr Lakhaney's message set out a purported objection to the arbitrator's jurisdiction, and also included the following:

> "If, notwithstanding the above, the Sole Arbitrator is minded to permit the counterclaim to continue, the Claimants respectfully request that the procedural timetable is varied so as to allow the Claimants to negotiate terms with international arbitration counsel to secure their representation for the remainder of these proceedings. This amended procedural timetable should also enable the Parties to make one further submission each on the Respondent's altered counterclaim, as well as a significantly curtailed in-person hearing to take account of the fact that the Parties' respective amended cases will likely include significantly less (if any) witness testimony (and therefore no or

> very little interpretation) and will instead be focussed on legal arguments only."

There was, again, no suggestion that the freezing order would prevent international arbitration counsel from being retained.

23. On 9 August 2023 the arbitrator gave further directions in the light of the more limited scope of the arbitration now that only WEH's counterclaim was at issue. The Claimants' request for a new timetable was denied.

24. The Claimants then changed tack again. On 10 August 2023 Mr Lakhaney emailed the arbitrator on behalf of the Claimants as follows, *inter alia* seeking permission to reinstate the Claimants' claims in the arbitration:

> "The Claimants are in the process of finalising their new representation in these proceedings. Regrettably, this is taking longer than expected. The Claimants will inform you immediately once these new arrangements are finalised.
>
> As the Sole Arbitrator will be aware, the Claimants are in the extremely difficult position of having had a significant adverse judgment entered against them by the English High Court, the contents of which they disagree with fundamentally. The Claimants are in the process of appealing this judgment, which will take time and resources.
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> The High Court Judgment was shared with the Claimants on an embargoed basis on 24 July, i.e., five working days before the deadline of submitting the Claimants' Sur-Reply. The Claimants were not able to share the Judgment with anyone before 9:15 AM London time on 31 July but the content and practical significance of the adverse Judgment naturally had to factor into the Claimants' decision-making processes.
>
> In the circumstances the Sur-Reply was not filed in accordance with the Sole Arbitrator's directions and, instead, to attempt to withdraw their claim without prejudice, on the basis that the Respondent would also withdraw its counterclaim. The Respondent has not withdrawn its counterclaim. This leaves the Claimants with no choice but to seek the Sole Arbitrator's permission to reinstate their claim in its entirety with immediate effect.
>
> Reinstating the Claimants' claim is the only way the Claimants will have a reasonable opportunity of putting their case and dealing with the case of the Respondent in accordance with the requirements section 33(1)(a) of the 1996 Arbitration Act. In light of the practical difficulties resulting from the adverse High Court Judgment as well as the time it has taken the Claimants to identify and instruct appropriate alternative international arbitration counsel (and affording such counsel a short time to

> read in), the procedural timetable set by the Sole Arbitrator is no longer suitable to the circumstances of this particular case (section 33(1)(b) of the 1996 Arbitration Act).
>
> In addition, the consequentials hearing in the High Court proceedings (at with leave to appeal will be sought) has just been fixed for the week of 11 September. In light of the potentially devastating consequences should the Claimants lose their appeal, a significant amount of the Claimants' resources will need to be devoted to this appeal. This would leave the Claimants' unable and unavailable to prepare for and attend any hearing in the Arbitration.
>
> As soon as the Claimants have retained their new international arbitration counsel, the Claimants will instruct their counsel to finalise and submit to the Sole Arbitrator and the Respondent the Sur-Reply. In light of the European holiday schedule in August, this may not be achievable before the beginning of September. In light of this impediment, the current procedural timetable is unworkable and incompatible with the Claimants' fundamental right to be heard. To proceed with the evidentiary hearing during the week on 11 September would cause substantial injustice to the Claimants (section 33(1)(a) of the 1996 Arbitration Act).
>
> The Claimants therefore respectfully request a short procedural hearing to take place at the beginning of September (subject of course to the availability of the Sole Arbitrator, counsel for the Respondent and the Claimants' new international arbitration counsel) to allow the Claimants' new international arbitration counsel to introduce themselves and to set a realistic procedural timetable for the outstanding steps in these proceedings. This will balance the need to resolve these proceedings efficiently with the Claimants' fundamental right to put its case in full."

Two points may be noted. First, it was not true that the Claimants had withdrawn their claim *"without prejudice, on the basis that the Respondent would also withdraw its counterclaim".* They had withdrawn it openly and unconditionally by their communication of 1 August 2023. Secondly, even though the Claimants said they were finalising their new legal representation for the arbitration, they once again made no suggestion that the freezing order would prevent such representation being provided.

25. On 11 August 2023 WEH emailed the arbitrator, objecting to the Claimants' request.

26. The freezing order was continued at a return date hearing on 14 August 2023 at which the Claimants were represented. However, there is no evidence that any application was made to vary or clarify the order so as to permit expenditure in relation to the arbitration (even though the Claimants had sought to reinstate their arbitration claims four days previously).

27. Also on 14 August 2023 the Claimants' newly instructed counsel, Ruthberg, wrote to the arbitrator. Their letter began:

> "We have been recently instructed as the Claimants' international arbitration counsel in relation the above case.
>
> We have a large amount of documents to go through within a very short period.
>
> There are also several factual and legal issues, which need time and consideration from our perspective."

28. Ruthberg's letter proceeded to explain why the evidential hearing should be postponed from 11 September 2023 to an unspecified date. The letter was written on the footing that Ruthberg had been retained and needed time to get up to speed to conduct the substantive arbitration. It made no suggestion that Ruthberg's retainer was limited to seeking an adjournment, nor that the freezing order presented any problem.

29. The same day, 14 August 2023, the arbitrator gave a ruling permitting the Claimants to reinstate their claim, but denying the request to vary the procedural timetable, saying:

> "It is not appropriate, however, for the Claimants' choice to withdraw then reinstate their claim to impact the timetable of this arbitration. The timetable was established in September 2022 and all parties have been fully aware at all times of the deadlines set out in Procedural Order No.1. The Sole Arbitrator is mindful of her duty under the LCIA Rules to conduct proceedings expeditiously and without unnecessary delay and finds that the Claimants have not shown good cause to delay the evidentiary hearing scheduled to commence on 11 September 2023.
>
> The Sole Arbitrator's directions of 9 August 2023 are hereby vacated, save that the Respondent should still submit bookmarked pdfs of its Defence and Counterclaim and Rejoinder. The status conference set for 21 August 2023 is hereby vacated. Should the Claimants wish to submit the Sur-Reply, they have leave to do so by 25 August 2023."

30. However, the Claimants did not submit their Sur-Reply on 25 August 2023.

31. WEH wrote to the Tribunal on 26 August 2023 about the Claimants' failure to file their Sur-Reply. The arbitrator responded the same day directing that the Claimants did not have permission to submit any memorial or further evidence in advance of the hearing. The arbitrator also stated:

> "Despite requests to do so, the Claimants have not clarified whether Dr Chinawong remains instructed in this matter and whether Dr Chinawong will attend the hearing. The Respondent's request for Dr Chinawong's report to be excluded

> is denied, I will give the report such weight as I see fit. Absent a showing of exceptional cause, Dr Chinawong will not be permitted to attend the hearing and the Claimants are not entitled to rely on Dr Chinawong's report at the hearing.
>
> By my ruling of 14 August 2023, Claimants were entitled to reinstate and pursue their claims but have not complied with any directions in this regard. Claimants' Counsel indicated on 23 August 2023 that they would be writing to all parties yet I have not received any correspondence in this matter. The hearing is now only two weeks away. The Respondent is entitled to know the case it faces and I am entitled to know the case I am being asked to determine.
>
> Although newly instructed, the Claimants are represented by experienced Counsel. They are hereby directed to confer with Respondent's Counsel as soon as possible to discuss the case that they are putting. Counsel must also work together to minimise the costs which are naturally being incurred in hearing preparations. The parties are reminded that I have a broad discretion in allocating costs of the arbitration and it is incumbent upon the parties to minimise wasted costs."

32. On 28 August 2023, two weeks before the date set for the evidential hearing, Ruthberg emailed the Tribunal referring to *"a variety of fatal obstacles that currently inhibit us from properly representing our client",* and telling the arbitrator for the first time about the freezing order. They attached an 18-page application for the adjournment of the evidential hearing in September, supported by a short witness statement from Ms Collins. The application sought the adjournment of the hearing *"to a date to be fixed at the convenience of the Tribunal and the parties"* or, as it was expressed in the attached draft order, *"to a date to be fixed by the Tribunal after consulting with the parties".* In relation to the freezing order, the application said:

> "The freezing injunction, therefore, prevents the Managers from incurring liabilities or spending money that would be necessary to allow them to prosecute their claim and defend the counterclaim. The permission for expenditure of a *"reasonable sum"* on legal advice and representation extends only to legal advice and representation in the proceedings in which the injunction is granted. That construction follows naturally from the purpose for which the carve-out is required to be included in such injunctions and, as such, it is conventional where a respondent wishes to incur legal expenses in pursuit or defence of separate proceedings for the freezing injunction to include an express carve-out to that effect (indeed, any number of hypotheticals might be conceived that indicate why *"a reasonable sum on legal advice and representation"* is not understood as allowing money to be spent on legal advice and representation beyond those required for the purpose of the proceedings in which the injunction is granted).[FN]" [footnote]

> "Although it is sometimes suggested by practitioners that because the expression *"a reasonable sum on legal advice and representation"* (or a similar expression) is not limited to any particular proceedings, it might permit the injuncted party to spend money on legal advice and representation concerned with other proceedings or matters; but that is not how this carve-out is ordinarily understood and, at the very least, Cs should not have to run the risk of it being suggested that they are in breach of the freezing injunction by spending money on the pursuit and defence of these proceedings."

The application also stated, again for the first time, that the freezing order prevented the Claimants from paying for their Thai law expert, Dr Chinawong, to fly to London to give evidence, and prevented payment of travel costs by or for various witnesses of fact.

33. Ms Collins' witness statement included the following paragraphs:

> "9. On 31 July 2023, Signature Litigation (*"Signature"*) withdrew acting for the Claimants in the arbitration and only continued to act on behalf of Cs in the domestic proceedings (the freezing injunction grants permission to allow the Claimants to spend a reasonable sum on legal expenses in support of their defence). The Claimants' inability to be represented properly at the trial in this arbitration is not, therefore, of their own making.
>
> 10. On 8 August 2023, Mr Lakhaney wrote to the Tribunal to inform it that the Claimants were in the process of instructing new solicitors. On 10 August 2023, the Claimants were able, provisionally, to instruct a Dubai-based firm of solicitors, Ruthberg LLC (*"Ruthberg"*), who routinely work in conjunction with a London-based firm of solicitors, Berkeley Rowe International Lawyers (*"Berkeley Rowe"*). However, in light of the freezing injunction, Ruthberg / Berkeley Rowe are only willing to act on behalf of the Claimants in the arbitration if the freezing injunction is varied to allow a reasonable amount to be spent on the prosecution of the Claimants' claim and the defence of the counterclaim in these proceedings (the Claimants have not been able to identify any third-party funding that might allow them to instruct a firm of solicitors without breaching the freezing injunction). However, even if that were to eventuate, Ruthberg / Berkeley Rowe have not been able to commit to representing the Claimants at trial due to the inadequate time to allow them and any counsel instructed to prepare.
>
> …
>
> 12. The earliest that the trial can fairly take place is, in my view, two months after the date on which the freezing injunction is varied to allow the Claimants time to instruct solicitors and counsel to prepare for the trial (including preparation of the Sur-

> Reply) and make all the necessary arrangements for trial (such as booking a venue, arranging visas, and so on)."

34. That last expression of Ms Collins' opinion as to the necessary timescale was not reflected in the application itself, which was unspecific as to timescale both for any application to vary/clarify the freezing order and for subsequent work to prepare for the evidential hearing in the arbitration. Ms Collins added that, although that was the earliest that she considered the hearing could fairly take place, it would be *"reasonable"* for it to be adjourned to a date after the appeal process in the Litigation had concluded, reflecting among other things *"the immense emotional toll and stress that the domestic proceedings [i.e. the Litigation] have caused and are continuing to cause".* Ms Collins did not, however, suggest that she was suffering any mental health problem such as might affect her ability to participate in the arbitration hearing.

35. WEH's counsel made submissions by email on 28 and 29 August 2023, objecting to the adjournment sought by the Claimants.

36. On 29 August 2023, the arbitrator sought clarification of the effect of the freezing order, and the steps taken by the Claimants to be able to spend funds on the arbitration:

> "I am extremely concerned by this latest application on behalf of the Claimants, particularly the emergence at this late stage of the existence of the freezing injunction. I wish the Claimants to clarify a number of points.
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> First, Ms Collins asserts that she has formally sought permission to be able to spend funds on the arbitration and that this has not been granted. When and from whom was this permission sought?
>
> Second, was the arbitration (and the need to spend funds on it) raised at the inter partes hearing on the freezing injunction?
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> Third, has an application been made to vary the freezing injunction? This is raised a number of times in the Claimants' application to adjourn the hearing. If an application has not been made, why not?
>
> …".

The arbitrator added:

> "Please note that I have already determined that the hearing of this arbitration will not be delayed until after any appeal of the decision in the English High Court. This issue should not be raised again. Any adjournment of this hearing will be, if granted, for a matter of weeks only. In the meantime, the Respondent is requested to quantity its costs incurred in relation to the Claimants' application (and the Claimants' previous applications

> on this issue), together with an assessment of the wasted costs should an adjournment be granted."

37. Ruthberg on 31 August 2023 replied to those questions as follows:

> "1. Paragraph 19 of the freezing injunction empowers the parties' solicitors to agree to a variation of the freezing injunction without an application for variation needing to be made. Accordingly, Signature wrote to Wilkie Farr & Gallagher LLP [solicitors for the Litigation claimants] on Thursday 24 August 2023 to invite that firm to agree to expenditure in these (and other) proceedings being treated as within the scope of the legal expenditure carve-out in the injunction (there is, separately, correspondence with Wilkie Farr & Gallagher LLP about funds being used on reasonable legal fees in connection with the domestic proceedings and the source of those funds).
>
> 2. The need for the Claimants to spend money in order to pursue the claim and defend the counterclaim was not raised at the inter partes hearing. Signature remained instructed in the domestic proceedings (having withdrawn only from acting in the arbitration on 31 July 2023), but the Claimants were not aware of the need for the freezing injunction to include a carve-out to allow them to spend money on legal representation for the purpose of other proceedings, which only became apparent after the Claimants sought to instruct new solicitors and counsel. The omission to seek a variation at the time was an oversight that the Claimants are seeking to remedy; however, Ruthberg and counsel are unwilling to accept instructions to act on the Claimants' behalf in the arbitration without a variation to the freezing injunction to permit them to be paid by the Claimants.
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> 3. The Claimants have not made an application to the Court to vary the freezing injunction whilst they are seeking to agree the payment of legal fees relating to the arbitration by consent. If an application is required to be made to the Court, the Claimants anticipate that the variation of the freezing injunction will be addressed at the consequentials hearing listed for 11-13 September 2023."

Ruthberg also asserted that:

> "The application raises a substantive issue of fairness that involves, for present purposes, two questions: (i) does the Tribunal consider that the trial can fairly take place in the circumstances (bearing in mind its duties under the LCIA Rules and statute), and (ii) even if that is so, is there a risk that a Court would take a different view (with the consequences for the enforceability of any award rendered that follow). The answer to those questions is, it is respectfully submitted, clear, and they require the Tribunal to adjourn the trial."

38. On 1 September 2023 the arbitrator circulated her ruling. She summarised the position, including recording submissions from WEH in the following terms:

> "The Respondent addressed the Application in detail on 28 August 2023, objecting to the Application and, understandably (in the Sole Arbitrator's view), pointing out that the Claimants had not raised the issue of the freezing injunction with the Sole Arbitrator or the Respondents for almost a month. It asserted that the Application was *"another guerrilla tactic which lacks any substance"*. It argued that the Respondent would suffer *"substantial prejudice"* were the Application to be granted. It did not specify the form any such alleged prejudice would take." (footnotes omitted)

and ruled:

> "Under the LCIA Rules (in particular Article 14) the Sole Arbitrator has a broad discretion to conduct the arbitration in the manner she sees fit, ensuring the *"fair, efficient and expeditious conduct of the arbitration"*. She must balance the competing interests of the parties in a fair and judicious manner. Here, although it is deeply regrettable that the Claimants did not, for whatever reason, alert the Sole Arbitrator and the Respondent to the existence of the freezing injunction until the eleventh hour, she determines that a short adjournment of the hearing is appropriate in order for the Claimants to address the scope of the freezing injunction.
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> It is not appropriate, however, for the Claimants to reopen previous decisions of the Sole Arbitrator. The adjournment is therefore granted on very limited grounds.
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> The Sole Arbitrator hereby directs:
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> (i) the adjournment has been granted solely to allow the Claimants time to address the scope of the freezing injunction. If it transpires that the freezing injunction does not permit the Claimants to spend monies on Counsel in this arbitration, this is not a ground for a further adjournment in this case;
>
> (ii) the Claimants are not permitted to file or seek to file any new submissions or evidence;
>
> (iii) pre-hearing briefing limited to 30 pages as per Procedural Order No.1 will be due one week prior to the rescheduled evidentiary hearing;
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> (iv) the Claimants are to pay all costs incurred in relation to the adjournment (and also, for the avoidance of doubt, all costs incurred in relation to the Sole Arbitrator's rulings of 18 July 2023 and 14 August 2023);

> (v) the rescheduled evidentiary hearing in this matter will take place in October/November, subject to the availability of Counsel and the Sole Arbitrator. In this regard, the Sole Arbitrator has availability to hear this matter over five days as follows:
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> a. 4-6 and 9-10 October;
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> b. 19-20 and 23-25 October;
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> c. 13-17 November;
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> d. 20-24 November;
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> (vi) Counsel is directed to revert to the Sole Arbitrator by close of business on 4 September 2023 confirming their availability."

39. On 4 September 2023 Ruthberg emailed the arbitrator stating that they expected the freezing order issue to be resolved by the end of the consequentials hearing, but that would leave insufficient time to prepare for a hearing on 4-6 and 9-10 October 2023, and that one of the two associates working on the matter would be away during that period. They said they expected their counsel to be available on 20-24 November but needed to check witness availability. WEH pressed for a hearing on 4-6 and 9-10 October 2023. On 5 September, Ruthberg stated that their counsel would be available for the evidential hearing on either 20 to 24 November, alternatively on 24 to 25 October and 15 to 17 November though it would be preferable not to split the hearing in that way. (I note that the period between the consequentials hearing – listed for 11-13 September – and 24 to 25 October was considerably less than the two-month period referred to in Ms Collins' witness statement.) WEH then on 6 September indicated that 4 to 6 and 9 to 10 October had been made available; and that of the other dates, only 20 to 24 November was possible but would be very difficult due to personal commitments of WEH's two factual witnesses.

40. Later on 6 September, the arbitrator directed that the evidential hearing would take place on 4 to 6 and 9 to 10 October 2023.

41. The consequentials hearing in the Litigation took place on 13 September 2023 before Calver J. Despite instructing leading counsel to appear at the hearing, it appears the Claimants issued no application to vary the freezing order. Instead, the Claimants' counsel at the hearing made oral submissions indicating that permission had been sought from the Claimants in the Litigation for certain UK gilts worth about £1 million, held for Ms Collins by a Mr Barnard, to be liquidated and for the proceeds to be paid to Signature Litigation. The present Claimants sought permission to use up to £500,000 of the proceeds in the arbitration proceedings. Counsel for the claimants in the Litigation objected, saying:

> "If they want to sell the shares, they need either to seek our agreement themselves, that is Signature for Ms Collins … for a variation of the freezing order to allow them to sell it or they

> apply to the court. And let me make it plain; in circumstances where we have the most profound doubt as to what happened to the remainder of the £2.4 million, which Colome has received by way of dividends, we would oppose the sale of gilts. Whilst they remain gilts, we know what they are, we know where they are, they are preserved. As soon as they are liquidated and paid to Signature's account, we will no doubt be told they are being used for legal expenses in X, Y, Z, location, which we then have to consider, come to the court about, etc. There is plenty of money in the account. If they need more money, then they need to justify it.
>
> So insofar as there is a sort of ad hoc … application by Mr Dale [counsel for Ms Collins and the other Signature Litigation defendants] on his feet for a variation of the freezing order to enable it to be sold, I resist it. We require full details of where those gilts, the money came from, before we would consider it. And that is reasonable given the very profound doubts we and the court must have as to the reliability of anything which comes from or on behalf of Ms Collins at this stage."

Colome was the 6th Defendant in the Litigation, jointly represented with Ms Collins and various other defendants by Signature Litigation. Mr Dale KC responded, objecting that the Litigation claimants were seeking to prejudice the present Claimants in their legal representation. Calver J ruled that any application to vary the freezing order would have to be made formally on proper notice to the Litigation claimants. That ruling was reflected in a written order dated 13 September 2023 and sealed on 2 October 2023.

42. It is evident from the transcript quoted above that, at least from the Litigation claimants' standpoint, the present Claimants were not merely seeking permission to spend money on the arbitration: they wanted permission to sell a particular valuable asset in circumstances where there was reason to believe that other funds existed which could be used instead, to the potential prejudice of the Litigation claimants.

43. The arbitrator on 18 September 2023 requested an update from the present Claimants' counsel on the consequentials hearing the previous week. Ruthberg responded simply by providing a copy of an extract from the transcript, including the passages I refer to above.

44. Then on 22 September 2023, Ruthberg wrote to the arbitrator saying:

> "As you are aware, the Claimants cannot spend any sums in relation to this arbitration, as they would be in contempt of Court. The current order applies to everything except very limited personal expenses. It should further be noted that the Claimant cannot even presently pay venue fees without the risk of imprisonment.

> The Claimants can only request an adjournment until the issue of the Freezing Order is resolved.
>
> We have reiterated in the past the importance of this case as well as legal representation needed to ensure it is conducted fairly.
>
> We should be in a clearer position on this matter by the end of November window previously requested, in which the Respondent is available in. Any potential detrimental impact raised by the Respondent is offset by the fact that as demonstrated, the Claimant cannot spend any monies on anything apart from a limited sum on the main case."

45. The arbitrator responded the same day, denying the request for a further adjournment:

> "The Claimants did not inform me of the existence of the freezing order and its impact on the Claimants' ability to disburse funds in this arbitration until 28 August 2023. On 29 August I asked *"has an application been made to vary the freezing injunction?...If an application has not been made, why not?"*. Claimants' Counsel responded on 31 August 2023 that *"if an application is required to be made to Court, the Claimants anticipate that the variation of the freezing injunction will be addressed at the consequentials hearing listed for 11-13 September 2023."* It now appears that no application has been made to vary the freezing injunction, but that, according to Claimants' Counsel on 19 September 2023 *"an application will be made as soon as possible."* Today, there is a further request to delay the hearing, with no indication of whether an application to vary the freezing injunction will ever be made.
>
> The freezing injunction was obtained against the Claimants on 31 July 2023. There has been ample opportunity to make the requisite application. The renewed request is denied. "

46. The Claimants wrote to the arbitrator again on 26 September 2023:

> "We believe that there is a misunderstanding which we hope this email will clarify.
>
> 1. The Freezing Order prohibits any use of assets except as specified with the consent of the other side's lawyer, Wilkie Farr & Gallagher (*"WFG"*). A formal request was made to WFG of funds for the Arbitration. Arguably this was the 'initial application' to release funds.
>
> 2. WFG refused the request to use funds for the Arbitration.
>
> 3. With finance being a serious and legitimate issue, our clients made the same request to the same Judge who imposed the

> freezing order at the Consequential Hearing. This is because, again, the freezing order does have a consent mechanism that didn't need a formal application to vary the order. It would have been a waste of costs as well an aggressive act if our clients had made an application before the hearing. Such request was declined by the Judge – not least because Arbitrations are confidential and he needed further details - who then asked that a formal application be made for a variation of the Freezing Order.
>
> 4. Such application is currently being prepared but is hampered by the fact that the Claimants in the Arbitration are also making an application to stay the Judgement of Calver, J pending determination of application for leave to appeal.
>
> As stated previously, our clients has every reason to continue with the Arbitration, they are however massively hampered by an inability to pay for the same.
>
> In light of the above, we kindly request you revisit the decision made on Friday to allow for a few more weeks until our clients can in fact be represented properly."

47. The arbitrator responded the same day indicating that the hearing dates were maintained.

48. On 28 September 2023 Mr Lakhaney emailed the arbitrator on behalf of the Claimants saying:

> "We write to you directly as we cannot pay our lawyers despite the fact that they are in fact ready and willing to take this matter forward.
>
> We understand the hearing dates for the arbitration will remain fixed as per your last communication. As we have informed you, we are unfortunately unable to incur any costs to book the venue, however as Ms Collins resides in the UK, she shall attend the arbitration in person at any venue that you instruct her to attend. As Mr Lakhaney and Mr Reansuwan are not in country, they will be unable to attend given the same costs issues. Mr Lakhaney can make himself available via Zoom.
>
> The process to vary the worldwide freezing order is taking more time than expected which in addition to procedure is hampered by the fact that we are unable to instruct a firm to make the application as we are unable to pay any new legal fees as per the current orders in the UK proceedings. Given this, we will unfortunately have no legal representation with us, no witnesses with the exception of Ms Collins and Mr Lakhaney (via video link) and no administrative assistance and a such we will not be

> able to submit a pre-hearing brief which we understand is due on 29 September.
>
> We again reiterate that we are in this position precisely because of the Defendant's tactically cutting off funding that it was obliged to provide, and the Defendants are taking advantage of a situation of their making. We will be unable to properly pursue this claim until we have sought and obtained a variation of the Worldwide Freezing Order.
>
> In the above circumstances we believe that it would be against the basic principles of justice for the Arbitration not to be adjourned until the Worldwide Freezing Order has been varied. Notwithstanding, Ms Collins will attend the Arbitration hearings at the appointed dates if Latham & Watkins can provide details of the time and venue."

49. The arbitrator replied on the same day saying:

> "Thank you for your email below, the contents of which are duly noted. Ms Collins (and any other Claimants) are invited to attend any and all parts of the hearing and Ms Collins is welcome to make an opening submission setting out the Claimants' position on the claim and counterclaim.
>
> While the hearing is a firm setting and will not be moved by me, it is always open to the parties to reach agreement on the arbitration procedure and it may be that the Claimants wish to reach out to the Respondent's representatives in this regard.
>
> I also invite the Respondent's representatives to ensure that the Claimants are fully informed regarding hearing logistics, have received copies of the joint hearing bundle and are generally assisted where necessary as a matter of professional courtesy, given the Claimants' lack of legal representation. Please also reach out to the Claimants to discuss and amend the indicative hearing timetable as appropriate."

50. On 29 September 2023 Mr Lakhaney replied to the arbitrator, on behalf of the Claimants, saying:

> "… Latham & Watkins have reached out as to the hearing logistics and have asked us some questions in relation to the hearing, to which we are not clear about, but Ms Collins will reach out directly to Latham & Watkins to discuss. We had one other matter that we would please request you to consider:
>
> 1. Prior to Signature Litigation coming off the record, they had put together various documents to be submitted to the Respondent's last submission. I have attached the main documents for reference - including a draft Sur Reply, signed

> witness statements (incl. an expert witness statement), final unsigned witness statements (that can be signed), and relevant exhibits (exhibits not attached given size constraints). We understand that it is late but as we will not be in a position to conduct cross examinations of witnesses nor argue legal points we wanted to know if we can submit these documents so as to address the Respondent's last submission and at least be able to provide some final submissions in writing for you to consider as you make your decision.
>
> 2. Subsequently, we have also found one additional email in Ms Collins' possession which is from Watson Farley & Williams (WEH's corporate lawyer) addressed to the WEH Board of Directors specifically in relation to the Letter of Indemnity and their views on its validity. We think this is a material document and would request that it is entered into evidence.…"

The attachments to Mr Lakhaney's email were a Sur-Reply (albeit marked as a draft), two signed witness statements, three unsigned witness statements, a signed expert's report and one email.

51. Also on 29 September, WEH filed its Pre-Hearing Brief.

52. Later the same day, in reply to Mr Lakhaney's email, the arbitrator wrote to the parties:

> "Please note that I have removed representatives from Ruthberg LLC from this correspondence, given that I understand that the Claimants are no longer represented in these proceedings.
>
> I am disappointed by the Claimants' extremely late filing of a lengthy submission and evidence (in the form of a further expert report, witness statements and one additional exhibit). There was no reason why this could not have been filed sooner, rather than waiting until two working days before the evidentiary hearing.
>
> I have determined that, in light of the fact that the Claimants are no longer legally represented and have indicated that they will not be filing a Pre-Hearing Brief, that the draft Sur-Reply will stand in lieu of a Pre-Hearing Brief. I will consider it alongside the Respondent's Pre-Hearing Brief, which I received a few minutes ago.
>
> In relation to the late evidence, should the Respondent choose to make a formal application to exclude this evidence, I will hear that application during the evidentiary hearing. Should the Respondent not make an application, or should I determine, following any such application, that the evidence should be admitted to the record, I will, of course, accord that evidence the weight I consider it deserves.

> Finally, I wish to pick up on a point in Mr Lakhaney's email of this afternoon. He says *"we will not be in a position to conduct cross examinations of witnesses nor argue legal points"* during the evidentiary hearing. As I made clear in my email of yesterday, as litigants in person the Claimants are invited to attend all parts of the evidentiary hearing and will be permitted to put their positions on the claim and counterclaim and participate fully in the hearing, including cross examination of witnesses and making an opening submission, should they so wish."

53. Also on 29 September 2023, WEH replied, again complaining about the late filing by the Claimants, and the fact that the Sur-Reply referred to new evidence, and stated that WEH would face prejudice were new documents and evidence admitted. It asked the arbitrator to confirm that only those parts of the draft Sur-Reply which referred to material on the record as of 1 September 2023 be taken into account, and the balance disregarded. WEH also suggested that, in light of the fact that only Ms Collins and Mr Lakhaney would be attending, revisions should be made to the timetable for the evidential hearing.

54. On 30 September 2023 the arbitrator replied to WEH. She clarified that the evidence filed by the Claimants the previous day would not form part of the record until after WEH had made any application to exclude, and to the extent no such application was made, or was unsuccessful, the arbitrator would give the evidence such weight as it deserved.

55. On 1 October 2023 Mr Lakhaney sent a further email to the arbitrator, contending that Calver J had denied the Claimants permission to fund lawyers for the arbitration, which had led to Ruthberg not finalising the Claimants' arbitration submissions and then coming off the record. The email also included this:

> "5. Instructing new solicitors with an inability to spend our own funds has been challenging but we are speaking to firms on the matter so as to seek a variation of the WFO, it is just taking time.
>
> 6. In the meanwhile, as these hearing dates have been fixed and we are representing ourselves, we think that even in draft form, the replies, witness statements, and exhibits (all prepared but not served by Signature Litigation) are better than anything we would be able to prepare ourselves (as laypeople with no legal or arbitral background). These submissions would also do a better job presenting our case as they directly address the points made by the Respondent's. We did not send the exhibits and attachments to the documents sent earlier given size issues – please do let us know if these would be helpful / should be sent to you as you make your decision on whether to include them.
>
> We also do not agree with the characterization of *"guerilla tactics"*. There is no reason that we would risk not having made these submissions earlier at the risk of them being disregarded.

> We believed we had solicitors engaged and that they would have finalized these documents for submission but as explained above due to a restriction of payments, this ended up not being the case.
>
> We also believe that the additional email that was recently located and not disclosed that sent from Watson Farley & Williams and addressed to the Respondent's board of directors goes to the heart of the matter and is material to these proceedings.
>
> We appreciate your confirmation that we are free to engage in the proceedings to the extent we wish, and we will attempt to do so to the best of our abilities given the circumstances. We also confirm that the Respondent's lawyers did email us at 11:27pm UK time Thursday and asked for a response by 12pm the following day. We informed them that we would reach out on Monday. While their questions are second nature to them as professional litigators, we do need a little bit more time to consider what is being asked and the subsequent implications.
>
> We do ask that you please take the above into account as you make your decision. We do apologize again as we appreciate that this is unorthodox but are sincerely attempting to do our best given where we are."

56. On 2 October 2023 at 6.09pm Mr Lakhaney wrote to the arbitrator again saying:

> "We have been under a huge amount of pressure and stress since losing the UK civil case, legal funding and solicitors together with a judgment that has prevented us from using funds we have on account.
>
> In addition:
>
> 1. As we have stated previously, in the UK civil proceedings, we had been diligently preparing appeal, interim stay, and stay documentation for submission to the Court of Appeal. The Permission to Appeal Skeleton, Grounds of Appeal, Stay Skeleton and ancillary documentation The preparation of these documents had as you can appreciate consumed all of our time, especially as they had to be submitted within 21 days of the consequential hearing for the UK civil proceedings. Today these documents were submitted.
>
> 2. We strongly dispute the current ruling in the UK civil case, and we understand the Respondents have used parts of that ruling in their most recent skeleton. We believe that any views taken in relation to that judgement should also take into account our grounds for appeal (which we can share with you if requested).

> 3. We again appreciate your invitation to participate in these proceedings. However, we believe that we have had an inability to present the claim / defend the counterclaim properly due to the lack of legal representation due to the freezing order and the fact that our solicitors were forced to stand down. We have tried to follow the process for obtaining agreement on accessing the funds we have available, and this is ongoing. We have had no interaction with lawyers or our experts and witnesses and have had to submit incomplete documents which is obviously not satisfactory.
>
> 4. The Respondent's will have one of the world's leading law firms, administrative staff and a KC and neither Ms Collins or Mr Lakhaney have no legal or arbitral background. We are worried that with no representation we would have no protection / be at risk of incriminating ourselves in other civil and criminal proceedings brought by the Respondents (in these proceedings) and the Claimants (in the UK civil proceedings).
>
> 5. As Claimants, we have repeatedly asked for a stay to these proceedings to allow us time to obtain access to our funds – we feel that this situation is very prejudicial to us as we are proceeding with attempting to amend the freezing order, but it will not be done in time to affect this hearing.
>
> 6. Given the above, Ms Collins is not in any emotional state to attend the hearing alone or submit herself to cross examination without counsel and the risk of further incriminating herself in other proceedings brought by the respondent.
>
> 7. Mr Lakhaney shares the same concerns as above but will make himself available via video link for cross examination. Mr Lakhaney will reach out to Latham & Watkins on arranging a logistics." (emphasis in original)

57. Ms Collins in her witness statement in the present proceedings says she had, by this stage, suffered a breakdown and collapsed at home. If so, Mr Lakhaney's email did not convey that to the arbitrator, referring only to Ms Collins being *"not in any emotional state to attend the hearing alone or submit herself to cross examination without counsel"*. Nor did Mr Lakhaney's email seek an adjournment on the grounds of Ms Collins' ill health.

58. The arbitrator replied the following morning, 3 October 2023, noting among other things that *"The decision of the Claimants not to participate in the hearing, save for the willingness of Mr Lakhaney to make himself available for cross-examination (which is appreciated), will impact the indicative timetable suggested for the evidentiary hearing."* The arbitrator also referred to travel disruption the following day and asked the parties to consider deferring the start of the hearing to 5 October.

59. Ms Collins replied shortly afterwards, saying:

> "My doctor, whom I saw yesterday and today, has instructed me to convey to you that I am not fit to attend the hearing as I am suffering from anxiety and depressive order. I attach my written evidence."

She attached a *"Statement of Fitness for Work For social security or Statutory Sick Pay"* dated 3 October 2023, in which the doctor said *"Mrs Collins is taking venlafaxine antidepressant medication and has been referred to the mental health services and psychiatrist".* The Statement advised that Ms Collins would not be fit for work for four weeks.

60. Ms Collins' email did not state that she or the Claimants were requesting an adjournment, and it does not appear to have been understood as doing so by the arbitrator, who simply responded *"Thank you for this information. I wish you a prompt recovery."* In the Award, after quoting Mr Lakhaney's email of the evening of 2 October (quoted above), the arbitrator said:

> "It was therefore only on the eve of the evidentiary hearing that it became apparent that the Claimants had elected not to attend and not to exercise their rights to address the Sole Arbitrator and cross-examine the Respondent's fact and expert witnesses, on the stated grounds of concerns about possible incrimination in relation to other proceedings and, additionally in relation to Ms Collins, medical grounds.[FN]" (Footnote) "Ms Collins provided medical evidence of her inability to attend the evidentiary hearing by email on 3 October 2023."

61. Again on 3 October, WEH replied to the arbitrator's first email of that morning, saying:

> "The Respondent's team has already made arrangements (including booking hotels, etc.) to attend the IDRC tomorrow and wishes for the hearing to proceed as planned, in particular because of the urgent need for the Tribunal to resolve the issue of whether the Claimants should be allowed to introduce a significant quantity of new evidence on the eve of the hearing. No good reason has been advanced by the Claimants as to why they should be given permission for this (which flies in the face of your previous orders) but we understand that you still wish the Respondent to address you on the matter at the hearing. That is the first order of business and the Respondent needs your decision so that it can plan the rest of the hearing accordingly. It is not feasible to wait until Thursday before addressing this as the new evidence impacts all aspects of the hearing (opening submissions, witness and expert evidence). The Respondent therefore wishes to address you on this in person at the IDRC tomorrow morning, so that it knows where it stands and the hearing can proceed accordingly."

The arbitrator responded indicating that the hearing would proceed as planned on 4 October.

62. Mr Lakhaney replied to the arbitrator later the same day to WEH's point about new evidence, saying that "*when your previous order was made there was the prevailing view / assumption that we would have legal representation who would make submissions and represent us. This is a material fact that has changed and we request that this be taken into consideration as the Respondent's make their request and you make your decision*."

63. The evidential hearing commenced on the morning of 4 October 2023. The Claimants were not present or represented. WEH applied to exclude the draft Sur-Reply and draft evidence. After hearing submissions, the arbitrator made a decision, which was confirmed in a written ruling later that day saying:

> "1. The draft witness statements of Emma Louise Collins, Aman Lakhaney and Thun Reansuwan are not admitted to the record;
>
> 2. The witness statements of Wichai Thongtang and Nuttawut Phowborom, and the second expert report of Dr Nattaphol Chinawong, are admitted to the record, with the Tribunal to give those such weight as it considers appropriate taking account those witnesses have not been made available for cross examination;
>
> 3. The email from Watson Farley & Williams to Emma Louise Collins dated 9 November 2020 is admitted to the record.
>
> 4. The Claimants' draft Sur-Reply dated 28 July 2023 will be admitted to the record and stand as the Claimants' pre-hearing brief, save that any references in that document to new material are excluded. The Tribunal has approved a redacted version of the draft Sur-Reply proposed by the Respondent (see 'A-007').
>
> …
>
> Further, please note that the hearing was adjourned today to give the Respondent time to address the new evidence that has been admitted to the record and will resume on Friday 6 October at 10.00am. We have separately notified Mr Lakhaney that we anticipate he will be required for cross examination from 1:00 pm (London) / 8.00 am (New York) on Friday 6 October and will be in touch with him tomorrow to confirm."

64. The following day, 5 October 2023, Mr Lakhaney emailed the arbitrator saying:

> "In relation to the below notice, we are not clear / do not agree with the Claimant's witness statements not being admitted on the record as there seems to be a distinction between signed and unsigned statements – a technicality as our statements could easily have been signed before being emailed. We had asked about how to share the documents referred to therein (given size constraints) but received no response. I do reiterate that this does not seem fair as we remain litigants in person and these

> statements and documents were quite important as they showed the WEH board of directors, shareholders, and other key stakeholders were fully aware of the litigation and approved the payment of legal expenses.
>
> I confirm that I have been notified by Latham & Watkins that I will be required for cross examination at 1:00 pm (London) / 8.00 am (New York) on Friday 6 October at their New York City offices and will be there at the appointed time unless otherwise notified."

65. The evidential hearing reconvened on 6 October 2023. Again, the Claimants were not present or represented at the hearing, save that Mr Lakhaney was cross-examined remotely. WEH made its opening submissions, during which process the arbitrator intervened on numerous occasions to seek clarification of matters. WEH called its experts, which affirmed their reports and answered brief supplementary questions from counsel (including expressing disagreement with the Claimants' new expert report i.e. the 2nd report of Dr Chinawong). This was followed by cross-examination of Mr Lakhaney, who had submitted two witness statements. The arbitrator intervened on several occasions to query the basis for a question or to ask counsel to move on, and several further times to ask the witness a question. WEH's witnesses of fact then affirmed their written evidence, and stated in examination in chief that they did not agree with the Claimants' new evidence of fact. The arbitrator did not put any questions to WEH's experts or witnesses of fact. The evidentiary hearing was then closed.

66. Ms Collins exhibited to her evidence in the present proceedings a report from a consultant psychiatrist dated 11 October 2023 and a letter from a GP dated 13 October 2023. These indicated that Ms Collins had presented with acute stress and anxiety about two weeks previously; was at moderate risk of suicide at first presentation and distraught; had reported suicidal thoughts since August-September; had been diagnosed as suffering from adjustment disorder with mixed anxiety and depressed mood; and had improved somewhat since then.

67. Submissions in relation to costs were made on behalf of the parties on 20 October and 3 November 2023.

68. On 17 November 2023 the arbitrator circulated her Award. In summary, she rejected the Claimants' claim, and allowed WEH's counterclaim. In the disposition of the Award, the arbitrator:

    i) declared that the LOI was unenforceable and rejected the Claimants' claim that WEH was in breach of it;

    ii) directed that the Claimants, on a joint and several basis, should repay to WEH the £7,654,186 odd which had been paid to Stephenson Harwood and Simmons & Simmons in relation to the Claimants' legal costs, and awarded pre- and post-award interest on that sum;

    iii) directed that the First to Third Claimants should repay to WEH the sums disbursed to Byrne & Partners in relation to the legal costs of Messrs

Narongdej and Phowborom, plus pre- and post-award interest on those sums; and

iv) directed the Claimants to pay WEH's legal costs of the arbitration in the sum of USD 3,067,291, plus the arbitration costs of £47,700.

(C) PRINCIPLES

69. Section 33 of the Act provides:

> "33. — **General duty of the tribunal**.
>
> (1) The tribunal shall—
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

70. Section 68 provides:

> "68. — **Challenging the award: serious irregularity**
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,
>
> (b) set the award aside in whole or in part, or
>
> (c) declare the award to be of no effect, in whole or in part.
>
> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.
>
> (4) The leave of the court is required for any appeal from a decision of the court under this section."

71. It has been stated that section 68 is designed as a longstop remedy, available only where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in section 68(2) that justice calls out for it to be corrected: *Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm) at [14]. A challenge under section 68 involves a "*high hurdle*" and there will be a serious irregularity only if what has occurred is far removed from what could reasonably be expected from the arbitral process: *Islamic Republic of Pakistan v Broadsheet LLC* [2019] Bus LR 2753 at [17].

72. Article 14 of the LCIA Rules (effective 1 October 2020) includes these provisions:

> "Article 14 Conduct of Proceedings

> 14.1 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:
>
> (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and
>
> (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.
>
> 14.2 The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to the mandatory provisions of any applicable law or any rules of law the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.
>
> …
>
> 14.5 Without prejudice to the generality of the Arbitral Tribunal's discretion, after giving the parties a reasonable opportunity to state their views, the Arbitral Tribunal may, subject to the LCIA Rules, make any procedural order it considers appropriate with regard to the fair, efficient and expeditious conduct of the arbitration."

73. In some situations it has been held that a party needs legal representation in order to have a fair hearing. In *Airey v Ireland* (1979-80) 2 EHRR 305, the European Court of Human Rights held the unavailability of legal aid to an applicant seeking to petition for judicial separation from her husband to be in breach of Article 6 of the Convention. She could not effectively conduct her own case in circumstances where:

> "In Ireland, a decree of judicial separation is not obtainable in a District Court, where the procedure is relatively simple, but only in the High Court. A specialist in Irish family law, Mr. Alan J. Shatter, regards the High Court as the least accessible court not only because "fees payable for representation before it are very high" but also by reason of the fact that "the procedure for instituting proceedings . . . is complex particularly in the case of those proceedings which must be commenced by a petition", such as those for separation.
>
> Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses

> may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.
>
> For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position (see para. 8 above) can effectively present his or her own case. This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer (see para. 11 above)." (§ 24)

The court made clear that that did not mean effective access to a court required legal representation in all civil cases: there may be cases where representing oneself secures adequate access even to the High Court, and *"much must depend on the particular circumstances"* (§ 26).

74. The Court of Appeal in *Terluk v Berezovsky* [2010] EWCA Civ 1345, in a rolled up hearing, held there to be an arguable case that the trial judge was wrong to refuse an adjournment to allow the defendant to a libel case time to seek and obtain legal representation; but dismissed the appeal on the facts in circumstances where there was no clarity as to where the funding for legal representation was going to come from.

75. Fairness may require an adjournment due to a party's inability to attend for health reasons. In *Teinaz v Wandsworth LBC* [2002] EWCA Civ 1040 the Court of Appeal said:

> "21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.
>
> 22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor

> giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved.
>
> …
>
> 25. ... If a party chooses deliberately not to attend, then that is clearly most material to the exercise of discretion. But to my mind it is no less clear that if a doctor has advised his patient not to attend the hearing and the patient obeys that advice, it is unfair to describe the patient as choosing not to attend and to treat that as a factor against exercising the discretion to adjourn."

The appellant in *Teinaz* had provided a standard form sick certificate, which had then been supported by a more detailed letter from the doctor explaining his condition and the doctor's advice, including advice that (a) if the appellant did not take at least two weeks off work he would be in serious danger with a great risk to his health, and (b) he must equally avoid any stress-inducing task including attending any court.

76. In *Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101 the Court of Appeal held that a judge should have granted an adjournment to a litigant who sought a 6-8 week adjournment to recover from stress-related illness, supported by a *"comprehensive"* (§ 19) letter from his GP setting out the appellant's condition and treatment over a period of almost a year.

77. *Solanki* was followed in *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221, where two important witnesses had been unable to attend the trial of a complex fraud case for *bona fide* medical reasons but there was every reason to believe they could have attended given an adjournment. The Court of Appeal stated the principle at § 30:

> "… the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an

> adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for."

(D) APPLICATION

Ground 1: evidential hearing in October 2024

78. The Claimants submit that the arbitrator was in breach of her section 33 duty by granting an unrealistically short adjournment of the evidential hearing from 11 September 2023 to 4 October 2023 in response to the Claimants' application of 28 August 2023; and then in pressing ahead with the evidential hearing on 4 October 2023 in the face of requests from the Claimants to reconsider her decision given the obvious continuing difficulties the Claimants faced with the lack of legal representation, and Ms Collins' mental health issues. The Claimants draw particular attention to a number of points, which may be summarised as follows:

i) The Claimants did not have any legal representation in relation to the arbitration, save in respect of the adjournment application, after Signature Litigation ceased to represent them on 1 August 2023.

ii) As the arbitrator was told, Ruthberg and Berkeley Rowe were willing to act only if the freezing order were varied; and the Claimants had not been able to find any third-party funding by that stage.

iii) Even after funding was obtained, the Claimants' lawyers would need enough time to prepare for the hearing. Ms Collins explained in the witness statement provided to the arbitrator that the earliest the evidential hearing could take place was two months after the date of variation of the freezing order to allow the Claimants' counsel to prepare.

iv) The arbitrator failed to grapple with the point that Ruthberg and Berkeley Rowe were not at that stage prepared to commit to preparing for, or representing the Claimants at, the evidential hearing until the funding issue was resolved; and seems to have proceeded on the incorrect basis that Ruthberg had been preparing and assisting the Claimants substantively in relation to the evidential hearing since mid-August 2023.

v) The lack of legal representation was not a choice made by the Claimants but a direct consequence of the freezing order having been made, and then of the Litigation claimants (who are linked to WEH) not agreeing to a variation of the freezing order to allow expenditure on legal fees for the arbitration. That was plainly tactical on the part of those ultimately behind WEH in order to prejudice the Claimants' ability to bring their claim and to defend WEH's counterclaim in the arbitration.

vi) The Claimants were led to believe by their lawyers, Signature Litigation, that submissions would be made at the return date of 14 August 2023 for variation of the freezing order, and that a formal application would be made prior to the consequentials hearing on 11 to 13 September 2023. The lawyers failed in both those respects and the Claimants are considering a potential claim against them.

vii) Even if a variation to the freezing order had been obtained after 13 September 2023, it would have still left insufficient time for any legal representatives to prepare for the evidential hearing prior to 4 October 2023, as had been made clear to the arbitrator by both Ms Collins and Ruthberg.

viii) Ms Collins' evidence is that she suffered a breakdown on 2 October 2023, requiring emergency medical treatment. Whilst the arbitrator was informed about Ms Collins' medical diagnosis only shortly before the hearing, indications had been provided at an earlier stage which put the arbitrator on notice of the issues she was facing. In particular, in her evidence in support of the adjournment application made on 28 August 2023, Ms Collins had explained *"the immense emotional toll and stress that the domestic proceedings have caused and are continuing to cause."*

ix) It is unrealistic to suggest (as WEH does) that Mr Lakhaney, Ms Siddique or Mr Reansuwan could have attended the hearing, made submissions, and asked questions of WEH's witnesses. None of them is legally trained. Ms Siddique had no or very limited involvement in the relevant matters (as recorded by the arbitrator in the Final Award). Further, as with Ms Collins, Mr Lakhaney and Mr Reansuwan had been busy dealing with developments in the Litigation. Given the volume of evidence, expert evidence and submissions made in the arbitration it was unrealistic to consider they could have prepared adequately for the evidential hearing. By contrast, WEH had an experienced specialist legal team which had no doubt been focusing on preparation for many weeks.

79. I am unable to accept the Claimants' submissions that the arbitrator breached her section 33 duties or that a serious irregularity occurred.

80. On the materials made available to the arbitrator, the Claimants' lack of legal representation was a result of their failure, over a period of time, to take proper and prompt steps to obtain a variation of the freezing order (assuming such a variation to have been necessary).

81. As set out earlier, the Claimants' solicitors wrote to the arbitrator on 31 July 2023, in the immediate aftermath of the Judgment and the freezing order, about the future of the arbitration, making no suggestion that there was any problem about legal representation in the arbitration. Mr Lakhaney's messages of 8 August and 10 August likewise gave no hint of any such problem, even though they specifically contemplated the engagement of international legal counsel for the arbitration.

82. There was an obvious opportunity to address any need to vary the freezing order at the return date on 14 August, but it was not taken up: even though the Claimants had four days' previously sought permission (in Mr Lakhaney's 10 August message) to reinstate their arbitration claims. Even Ruthberg's letter of 14 August, the day of the return date hearing, made no suggestion of any difficulty about funding of legal representation in the arbitration.

83. The Claimants thus did not raise the problem about the freezing order until 28 August, almost a month after it had been made and only two weeks before the then date for the evidential hearing.

84. Even then, their (long and detailed) application for an adjournment was unspecific both about how long it would take to make an application to vary/clarify the freezing order, and about how much time might be required for subsequent preparation work. (I have already made the point that Ms Collins' two-month estimate was not reflected or justified in Ruthberg's 18-page adjournment application, and was inconsistent with Ruthberg's apparent willingness to have a hearing six weeks after the date of the consequentials hearing in the Litigation.)

85. In these circumstances it is unsurprising that the arbitrator was reluctant – taking into account the aspect of her section 33 duties concerning the avoidance of unnecessary delay – to grant a lengthy or open-ended adjournment.

86. In any event, having obtained an adjournment from the arbitrator, the Claimants inexplicably failed again to take the obviously necessary steps required in order to seek variation/clarification of the freezing order at the consequentials hearing in September, despite having continuing legal representation in the Litigation. No application notice was issued or served. Instead, counsel for the Claimants made an oral application which, predictably, the Litigation claimants and the judge were unwilling to entertain without proper notice having been given. Even then, the transcript indicates that the Claimants sought to cherry pick an asset to sell in order to fund legal representation, in circumstances where there were evidently grounds on which the Litigation claimants and the court would seriously question why other funds could not be used instead. Thus, even as made orally, the attempted application was calculated (whether deliberately or not) to fail or at least to give rise to further enquiry and likely delay. Whilst the Claimants now seek to blame their legal representatives, no information was given to the arbitrator to suggest that the representatives had done anything other than act on the Claimants' instructions. In these circumstances, any debate about whether the period between the consequentials hearing and the evidential hearing was adequate becomes somewhat hypothetical; but, in any event, given the lack of any reasoned basis for seeking a longer period (see § 84 above) I would not have concluded that the arbitrator acted unfairly in listing the start of the evidential hearing for 4 October 2023.

87. Following the consequentials hearing, the Claimants in their communications to the arbitrator of 22, 26 and 28 September and 1 October 2023 continued to give no estimated date by which any application to vary the freezing order would be made.

88. I do not accept the Claimants' suggestion that the arbitrator was under the misapprehension that Ruthberg had been helping the Claimants prepare for the evidential hearing (as opposed to merely the application to adjourn): there is no evidence of any such misapprehension, and in § 26 of the Award the arbitrator quoted the Claimants' message of 31 August indicating that Ruthberg were unwilling to accept instructions to act in the arbitration without a variation of the freezing order. The arbitrator's ruling of 1 September was explicitly premised on the effect of the freezing order, and it specifically contemplated in § (i) that, absent a variation, the Claimants might have to proceed without representation in the arbitration.

89. In all these circumstances, the arbitrator's decision to proceed with the hearing on 4 October 2023 was fair and consistent with her duties under section 33 of the Act and LCIA Article 14. The Claimants had had ample opportunity to resolve any problem about the freezing order and obtain legal representation, but had made no realistic efforts to do so. They remained entitled to represent themselves, for example through Ms Collins or Mr Lakhaney. As recorded in Calver J's judgment, Ms Collins had been co-CEO and then CEO of WEH for six years, and Mr Lakhaney had been its Head of Corporate Finance and a director. It appears that Mr Lakhaney had been actively engaged in procedural steps in the Litigation following the Judgment; and, as quoted above, he engaged in detailed correspondence with the arbitrator about the arbitration. As recorded in §§ 49 and 52 above, the arbitrator took steps to ensure that the Claimants were fairly treated as unrepresented parties and to ensure they understood they were entitled to participate fully in the evidential hearing; and, given the Claimants' lack of representation, the arbitrator decided to allow their draft Sur-Reply to stand in lieu of a Pre-Hearing Brief.

90. Ms Collins' mental health problems were communicated to the arbitrator only at the last minute, and Mr Lakhaney's message on the evening of 2 October made no reference to Ms Collins having suffered a breakdown (as she now says she had). The medical evidence submitted to the arbitrator on the morning of 3 October, the day before the hearing, was a standard form statutory sickness note. In all the circumstances (and given the history), had Ms Collins' problems been put forward as a ground for an adjournment, the arbitrator might reasonably have been sceptical about them and sought further and better evidence. However, they were not so put forward: the arbitrator was not asked to adjourn on this ground, either by Ms Collins in her message of 3 October or by Mr Lakhaney: whether in his message of 2 October or when he appeared remotely at the hearing to give evidence.

91. In all the circumstances, I do not consider that the arbitrator acted unfairly by not (effectively of her own volition) adjourning the hearing in response to Ms Collins' message and its attachment.

92. Nor, in any event, would I have been persuaded that any substantial injustice was caused by Ms Collins' absence. It would have been open to Mr Lakhaney to make submissions on the Claimants' behalf, and there is no indication that Ms Collins' oral testimony would have been critical to the outcome Although reference is made in the Award to part of her witness statement and to her absence (§§ 72 and 73), the issues in the arbitration turned to a large degree on

questions of law and construction and/or documentary evidence. The arbitrator also had the benefit of Ms Collins' written evidence, the Claimants' other signed witness statements and expert evidence, and the submissions in their Reply and draft Sur-Reply.

Ground 2: approach to Sur-Reply and evidence

93. The Claimants submit that although the draft Sur-Reply and additional evidence were late (and no formal application was made to admit them), fairness required the arbitrator to admit them in full in circumstances where the Claimants were unrepresented and Ms Collins was unable to attend for medical reasons. It is said that WEH could if necessary have been given additional time to review and address them.

94. However, the new material comprised an 80-page draft Sur-Reply, five witness statements (three of them unsigned), an expert's report and one document. It was sent to WEH only two business days before the hearing. As WEH points out, the documents appear to have been in final or near final form since at least 28 July. The arbitrator decided to allow the draft Sur-Reply to stand in place of a Pre-Hearing Brief and to admit in evidence the two signed witness statements, the expert's report and the document. She had already received evidence from the Claimants with their Reply on 17 February 2023. Award § 12 indicates that the arbitrator had before her witness statements from six witnesses of fact including Ms Collins and Mr Lakhaney. In all the circumstances, it was not unfair for her to refuse also to admit, at the very last minute, three unsigned witness statements.

95. The Claimants also submit that at the evidential hearing, the arbitrator failed to act fairly and impartially by not testing the credibility of WEH's main witness of fact, Ms Asiano, nor the cogency of WEH's case in general. I do not accept that submission. The Claimants had been given a fair opportunity to participate in the hearing, whether legally represented or not, and in person or remotely. It was for the arbitrator to determine to what extent she found it necessary to probe WEH's evidence and submissions (which, as noted earlier, she did) in order to decide the issues before her. Having reviewed the transcript and the Award, I am satisfied that she acted fairly.

Ground 3: approach to issues

96. The Claimants say the arbitrator took an inappropriate approach in the Final Award in that, at least:

    i) she failed to identify the weight she had given to the Claimants' evidence;

    ii) contrary to the rule in *Hollington v Hewthorn* [1943] KB 587, she relied on findings made about the Claimants' credibility as witnesses in the Judgment and in the Thai proceedings, rather than carrying out her own evaluation; and

iii) she failed, adequately or at all, to address all the disputes of fact and law on the parties' respective evidence in explaining how she had come to her conclusions.

97. As an example of (i)/(iii) above, the Claimants say their evidence was that the other members of WEH's board, and its legal representatives, were made aware of the LOI and the fact that payments had been made pursuant to it to the Claimants' lawyers in relation to the Litigation. They complain that the arbitrator appears to have ignored this evidence, and to have accepted Ms Asiano's evidence unquestioningly, despite the serious concerns raised about her by the Claimants.

98. However, as Teare J said in *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm), [2018] Bus LR 650 (after reviewing the case law):

> "28. … A contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within section 68(2)(a) or (d), for several reasons. First, the tribunal's duty is to decide the essential issues put to it for decision and to give its reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all the relevant evidence. Second, the assessment and evaluation of such evidence is a matter exclusively for the tribunal. The court has no role in that regard. Third, where a tribunal in its reasons has not referred to a piece of evidence which one party says is crucial the tribunal may have (i) considered it, but regarded it as not determinative, (ii) considered it, but assessed it as coming from an unreliable source, (iii) considered it, but misunderstood it or (iv) overlooked it. There may be other possibilities. Were the court to seek to determine why the tribunal had not referred to certain evidence it would have to consider the entirety of the evidence which was before the tribunal and which was relevant to the decision under challenge. Such evidence would include not only documentary evidence but also the transcripts of factual and expert evidence. Such an enquiry (in addition to being lengthy, as it certainly would be in the present case) would be an impermissible exercise for the court to undertake because it is the tribunal, not the court, that assesses the evidence adduced by the parties. Further, for the court to decide that the tribunal had overlooked certain evidence the court would have to conclude that the only inference to be drawn from the tribunal's failure to mention such evidence was that the tribunal had overlooked it. But the tribunal may have had a different view of the importance, relevance or reliability of the evidence from that of the court and so the required inference cannot be drawn. Fourth, section 68 is concerned with due process. Section 68 is not concerned with whether the tribunal has made the "right" finding of fact, any

> more than it is concerned with whether the tribunal has made the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact."

And similarly, as regards the expression of an arbitrator's reasons for their award:

> "134. … the duty to act fairly imposed by section 33 does not require the tribunal to refer in its award to all of the evidence regarded by the losing party as key or to deal with all of the submissions made in relation to the evidence but simply, in the language of section 52(4) , to set out "the reasons for the award". All that can be said is that such an approach to writing the reasons for an award is different from the current practice of the courts when writing judgments. It is true that where the evidence alleged to be key by the losing party is not referred to by the tribunal that party may sometimes be left in doubt as to what the tribunal thought of that evidence, but in circumstances where the parties have agreed that their chosen tribunal is the sole judge of fact they cannot expect the court to review the evidence in order to form a view as to whether, as is likely to be the case, the tribunal has regarded the evidence as unhelpful (for one or more reasons) or, as is unlikely to be the case, the tribunal has ignored or overlooked the evidence. As was noted by the DAC in its report (paragraph 280) "the test is not what would have happened had had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate." Were the court able to scrutinise the content or quality of a tribunal's reasons the court would have something akin to a general supervisory jurisdiction over arbitrations which it does not have. Such scrutiny would frustrate one of the principal purposes of the Arbitration Act 1996 which was, as explained in *Lesotho*, to limit the court's intervention in arbitration. As Tomlinson J. said in *ABB AG v Hochtief Airport*, at paragraph 80, a tribunal's reasons may be "unsatisfactory" but that is not a serious irregularity within section 68. "It is not for this court to tell an international commercial tribunal how to set out its award or the reasons therefor.""

See also *Islamic Republic of Pakistan v Broadsheet LLC* [2019] EWHC 1832 (Comm), [2019] Bus LR 2753 at [40].

99. The arbitrator in the present case set out the reasons for her Award in clear, detailed and sufficient terms.

100. Whilst the arbitrator cited among other things the findings made about the Claimants' credibility by Calver J and in the Thai proceedings, she expressly recognised that she was not bound by them (Award § 93), and made her own

findings about them and about the issues before her. Section D of the Award, comprising paragraphs 82 to 122, sets out in detail the arbitrator's reasoning and conclusions about the LOI. Moreover (as to the *Hollington v Hewthorn* point), section 34 of the Act provides that an arbitrator is entitled to determine procedural and evidential matters including "*whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material*".

(E) CONCLUSION

101. For all these reasons, I find no merit in the Claimants' claim. The challenge to the Award must be dismissed.