Case No: CL-2015-000519

Neutral Citation Number: [2016] EWHC 846 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 20 April 2016

Before :

THE HON SIR BERNARD EDER

- -

Between :

S — **Claimant**

and

(1) A

(2) B

Defendants

- -
- -

David Lewis QC (instructed by **Cooke Young & Keiden LLP**) for the **Claimant**
Paul Henton (instructed by **Andrew Jackson Solicitors**) for the **Defendants**

Hearing dates: 8, 9 March 2016

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Judgment

The Hon Sir Bernard Eder:

Introduction

1. This case concerns an arbitration award dated 27 March 2015 in respect of two separate arbitrations which were heard together (the "Award"). The arbitrations concerned disputes under two coking coal sale contracts (the "Contracts") both dated 11 April 2011 between the same seller (the "seller") and two related Indian companies respectively as buyers whom I shall refer to as "A" and "B" (together the "buyers").

2. In summary, the main focus of these disputes was the buyers' claim for damages on the basis that the seller was in breach of certain express terms of the Contracts with regard to the quality of the coal concerning in particular what is known as "Fluidity" and Mean Maximum Reflectance ("MMR"); and also in breach of implied terms under ss.13 and 14 of the Sale of Goods Act 1979 ("SOGA") that the goods shall correspond with the description and be of satisfactory quality.

3. Following a case management conference on 16 October 2013, the initial oral hearing of the arbitration took place on 18 to 20 November 2013. The hearing was then adjourned because certain witnesses were unable to obtain the necessary visas to attend in London. To accommodate those witnesses, a further hearing then took place on 15 to 17 April 2014. This was followed by two rounds of written closing submissions which were exchanged in May 2014.

4. In the event, by its Award, the tribunal ordered the seller to pay US$1 million to A and US$682,400 to B by way of damages plus interest and certain costs.

5. The seller now applies to challenge the Award on the ground of alleged serious irregularity under s.68(2)(a) and/or (c) of the Arbitration Act 1996 (the "Act"). Alternatively, the seller seeks leave to appeal under s.69 of the Act and (if leave be granted) to appeal the Award. In both cases, the applications were issued late; and the seller requires an extension of time under s.80(5) of the Act. All the seller's applications are being heard at a single "rolled-up" hearing pursuant to the Order of Mr Justice Teare dated 13 October 2015.

6. In support of the applications, the seller relies upon two witness statements of Srivathsan Rajagopalan. In response, the buyers rely upon two witness statements of Dominic Ward. These statements set out in some detail the course of the arbitration proceedings and the events following the publication of the Award.

The Award

7. The Award is a detailed document extending to some 118 pages. For present purposes, the following appears from the relevant parts of the Award.

8. Clause 2 of the Contracts provided in material part:

> "*DESCRIPTION/ INDONESIAN COKING COAL IN BULK.*
> *QUALITY: IN ACCORDANCE WITH ASTM STANDARDS*"

Under the heading *"DESCRIPTION / QUALITY",* a total of nine parameters were identified. Of these parameters, seven were specified by reference to maximum or minimum levels. So far as Fluidity and MMR were concerned, clause 2 specified:

> "*FLUIDITY (TYPICAL) 500 DDPM*
>
> *MMR (TYPICAL) 1.2%.*"

By way of explanation, "DDPM" stands for dial divisions per minute.

9. The Contracts also contained at Clause 5, provision for payment by irrevocable letter of credit against presentation of certain documents, including "*Loadport sampling and analysis certificate in original and 2 copies issued by SGS to be in conformity with contracted specifications*"; and at Clause 7, a provision for loadport sampling by SGS in accordance with ASTM standards to be final, conclusive and binding on both parties for the purpose of Clause 9 (but, it is to be noted, not Clause 2).

10. Clause 9 was headed "*PENALTIES"* and stipulated various price adjustments and rejection levels in respect of certain (but not all) of the parameters specified in Clause 2. In relevant respect, it provided:

> "*FLUIDITY*
>
> *REJECTION BELOW 250*
>
> *MMR*
>
> *REJECTION BELOW 1.05% AND ABOVE 1.3%*"

11. Clause 20 provided, in effect, for the incorporation of INCOTERMS 2010 which stipulated by Article A1:

> "*A1 The seller must provide the goods and the commercial invoice in conformity with the Contract of Sale and any other evidence of conformity that may be required by the Contract*."

12. As matters turned out, the Certificate of Sampling and Analysis dated 16 May 2011 from SGS (the "SGS-CSTC Certificate") did not certify anything about Fluidity or MMR and so did not bar the buyers from making a claim for breach of the Contracts with regard to Fluidity and MMR (Award paras 50, 104, 149, 163).

13. The direct evidence in relation to Fluidity and MMR was threefold (Award para 155):

    i) A Certificate of Sampling and Analysis dated 6 June 2011 issued by Inspectorate (Singapore) Pte Limited (the "Singapore Inspectorate Certificate") showing Fluidity of 322 ddpm and MMR of 1.25% (Award paras 122, 146(ii)(c), 164-165);

    ii) A report of a Dr Chaudhuri dated 4 July 2011 (the "Dr Chaudhuri Report") in relation to certain samples showing Fluidity of 44 ddpm and MMR of 1.24% (Award paras 135, 146(iv), 169, 170-171);

iii) A certificate of stack sampling dated 16 September 2011 provided to the buyers by SGS-India Pte Limited (the "SGS India Certificate"), showing Fluidity of 29 ddpm and MMR of 1.35% (Award paras 144, 146(vi), 173-174).

14. In relation to this evidence, the tribunal held:

i) The derivation of the samples tested for the Dr Chaudhuri Report was unknown (Award paras 135, 169, 184), and there might have been a mix-up of coals (Award paras 188, 208(b)), meaning that the tribunal could not place reliance upon the report (Award para 188);

ii) Reliance could not be placed on the SGS India Certificate's results for Fluidity and MMR because the sampling method could not, and did not, provide representative samples and because the sampling was done some 7 weeks after delivery (Award paras 179-181, 189);

iii) There was no reason to impugn the accuracy of the Singapore Inspectorate Certificate aside from the fact it did not agree with the Dr Chaudhuri Report or the SGS India Certificate (Award para 166). Hence the tribunal accepted the results for Fluidity and MMR as shown by the Singapore Inspectorate Certificate as the best available evidence of the parameters for Fluidity and MMR (Award paras 193-195).

iv) Thus, the tribunal made its important findings with regard to the "correct figures" viz Fluidity 322 ddpm and MMR 1.25% (Award para 195).

15. It is important to note that although the stated Fluidity figure of 322 ddpm fell below the figure of 500 ddpm in clause 2 of the Contracts, it was well above the "rejection" threshold *("REJECTION BELOW 250")* in clause 9; and that although the stated MMR figure of 1.25% was above the figure of 1.2% in clause 2 of the Contracts, it fell within the parameters ("*REJECTION BELOW 1.05% AND ABOVE 1.3%*") for MMR in clause 9. Mr Lewis QC submitted that this was a substantial victory *for* the seller given that the buyers had been relying on the Dr Chaudhuri Report and the SGS India Certificate and the seller had been relying on the Singapore Inspectorate Certificate.

16. However, despite this claimed "victory", the tribunal concluded that the seller was in breach of the Contracts. This alleged disconnect or mis-match is the nub of Mr Lewis QC's complaint on behalf of the seller.

17. The critical findings of breach *against* the seller are contained and explained in a number of different paragraphs in the Award. In particular, the tribunal stated:

> "*Conclusions as to correspondence with the specification:*
>
> *198. [The seller] was in breach of both Contracts* ***by failing to supply coal which corresponded with the specification in Clause 2****. Such a breach was in respect of [the seller's] obligation under Clause 3 [sic] and the Inco term "CFR" and, or alternatively, in respect of an implied term under Section 13*

of the Sale of Goods Act that the coal should correspond with its description"

199. The difference was a shortfall in Fluidity of 172 ddpm (36% shortfall) and an excess in MMR of 0.05%.

208d. <u>The poor quality of the coke produced using an 80/20 blend of the Coal and Australian coal (and other blends):</u>

We consider that the reduced Fluidity recorded by Inspectorate Singapore (36% below the typical quality which the coal should have had with regard to Fluidity) is consistent with the production of a poor quality coke, especially if it were to be used as the sole fuel.

209…….We consider that, in all the circumstances, the deficiency of 36% in the Fluidity alone meant that the coal could probably not be used satisfactorily as a single coking coal and could only be used as a blend stock for producing coke of a quality suitable for use in blast furnaces (as it seems, in fact, to have been largely used by [the buyers] during the remainder of 2011.

210. The terms of section 14(2) and 14(2A) of the Sale of Goods Act are well understood. In such a case as this, whether goods are of "a satisfactory quality" depends on (a) (inter-alia) their description and price and (b) all other circumstances. This includes "in appropriate cases whether the goods are fit for "all the pain for which goods of the kind in question are commonly supplied.

211. Undoubtedly, one of the purposes for which coking coal is used is to make coke suitable for use in blast furnaces. The description or specification (and not the place of origin) will determine whether the coal which is to be supplied is suitable for use on its own or only in a blend. In the circumstances of this case, we accept the evidence of Dr Hazra that the description of the coal in clause 2 of the Contracts was such as to make the coal fit to be used individually, and not just as part of a blend, even though [the buyers] had begun by saying that they wanted to use the coal as blend material. The price which they agreed to pay was an open market price which represented the price for coking coal which conformed to the specification in Clause 2 and [the buyers] were, in our judgement, entitled to be supplied with coal of that quality and description. It was not a price which depended on a particular way in which such coking coal was going to be used, but upon the agreed specification.

*212. We conclude that, <u>**because [the seller] supplied coal which was off-specification**</u>, in the circumstances of this case*

> *they were also in breach of the implied terms under Section 14(2) of the Sale of Goods Act by failing to supply goods of a "satisfactory quality".*" [Emphasis added]

18. By way of clarification, it was common ground on this present hearing that the reference in para 198 to clause 3 was a typographical mistake and that the reference should instead be to clause 2; that the stated figure of "172" in para 199 was a basic mathematical error; and that a "shortfall" of Fluidity from 500 ddpm to 322 ddpm results in a figure of 178 ddpm, not 172 ddpm as stated.

19. The tribunal then went on to assess damages, following the normal measure for the supply of defective goods, doing its best to assess (i) the value of the coal as contracted for at the time of delivery, and (ii) the value of it in the deficient state (Award para 216). In carrying out that exercise, the tribunal found that the value of the coal as contracted had by the time of delivery fallen from the contract price of US$296.50 per MT down to US$278.50 (Award paras 219-220). The tribunal was not assisted by evidence of two offers received by the buyers based on a tender advertisement containing a description of coal that did not correspond with what the tribunal had found (Award para 221). The tribunal similarly rejected the "damaged arrived market value" of US$140 to US$150 per MT put forward to reflect the argument that the coal was significantly more defective than the tribunal had found (Award para 225). The tribunal's overall conclusion is set out in the Award para 227:

> "*227. We are satisfied that the Coal as delivered was worth significantly less than the value which it would have had, if the Coal had corresponded with its specification and been of a quality which that involved, but by substantially less than would result from adopting the "damaged arrived market value" for which [the buyers] contend. Doing the best that we can on very limited material and acknowledging that the best we can do is to make an estimate based on such evidence as we do have, we have reached the conclusion that the appropriate reduction in value of the Coal as delivered should be US$ 40.00 per tonne. A higher figure would, we conclude, not be justified by our findings as to the quality and specifications of the Coal delivered, which do not reflect the more serious criticisms of the Coal advanced by [the buyers]. A lower figure, on the other hand, would not recognise that substantial deficiency in quality and specifications which we have found existed in the Coal as delivered.*"

20. On that basis, the tribunal awarded US$1,000,000 to A (US$40 x 25,000) and US$682,400 to B (US$40 x 17,060) (Award para 228).

Subsequent events

21. As stated above, the Award is dated (Friday) 27 March 2015. This was made known to the parties on (Monday) 30 March 2015 when the parties' representatives received a letter from the tribunal informing them that the Award had been completed and that it would only be released when the full 100% of outstanding fees and expenses had

been received by each arbitrator. In fact, most of the fees and expenses had been paid in advance and the amounts outstanding were relatively modest.

22. Thereafter, the critical dates are as follows:

    i) The seller paid its share of the Chairman's fees and the fees of its appointed arbitrator (Dr Ong) with value date (Thursday) 16 April 2015;

    ii) The statutory 28 day "deadline" for a challenge under s.68 of the Act or application for permission to appeal under s.69 of the Act expired on (Friday) 24 April 2015: s.70(3) of the Act.

    iii) The buyers paid their share (£7,800) of the Chairman's outstanding fees on 14 May 2015 and the outstanding fees (£400) of their appointed arbitrator (Mr Boyd QC) on about 29 May 2015;

    iv) The Award was then released by the tribunal on 20 June 2015.

    v) The Arbitration Claim Form in these present proceedings was issued on 7 July 2015 i.e. some 102 days after the date of the Award, 74 days beyond the statutory time limit and 17 days after the release of the Award.

The applications

23. There was a threshold dispute between the parties concerning the proper approach of the Court on this kind of "rolled-up" hearing where there is an application to extend time under s.80(5) of the Act. It was, in effect, Mr Lewis QC's submission that the Court should consider fully the merits of both the challenge under s.68 and the application for leave to appeal under s.69 before considering the application for an extension of time under s.80(5). In contrast, Mr Henton submitted that the consequence of a failure to bring the application in time is that the right to do so is lost, subject to the Court's power under s. 80(5); that therefore the s.80(5) application comes logically first; and that the seller's approach is flawed because it seeks to marginalise the importance of s.80(5) by seeking to argue its (out of time) ss. 68/69 applications before first grappling with the need to obtain an appropriate extension.

24. I see much force in Mr Henton's submission. However, the difficulty is that it was common ground that in deciding whether or not to grant an extension of time, the applicable principles are those summarised by Popplewell J in *Terna Bahrain Holding Company WLL v Al Shamsi* [2013] 1 Lloyd's Rep 86 and that one relevant factor is the strength of the application. In particular, in the context of a "rolled-up" hearing, Popplewell J. stated:

> "*31. ... the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. ...*
>
> *32. ... where, as has happened in the current case, the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the court has heard full argument on the merits of the challenge*

application. In such circumstances the court is in a position to decide not merely whether the case is "weak" or "strong", but whether it will or will not succeed if an extension of time were granted. The court is in a position to decide whether the challenge is a good or a bad one.

33. ... where the court can determine that the challenge will succeed, if allowed to proceed by the grant of an extension of time, that may be a powerful factor in favour of the grant of an extension, at least in cases of a challenge pursuant to section 68. In such cases the court will be satisfied that there has been a serious irregularity giving rise to substantial injustice in relation to the dispute adjudicated upon in the award. Given the high threshold which this involves, the other factors which fall to be weighed in the balance must be seen in the context of the applicant suffering substantial injustice in respect of the underlying dispute by being deprived of the opportunity to make his challenge if an extension of time is refused. Where the delay is due to incompetence, laxity or mistake and measured in weeks or a few months, rather than years, the fact that the court has concluded that the section 68 challenge will succeed may well be sufficient to justify an extension of time. The position may be otherwise, however, if the delay is the result of a deliberate decision made because of some perceived advantage."

25. I respectfully agree with those observations. In particular, it is, in my view, inappropriate to lay down any hard and fast rule as to the proper approach of the Court in these circumstances. In the present case, I would adopt what I would describe as an iterative approach.

26. First, as stated above, with regard to an application under s.80(5), it was common ground that the applicable principles are those summarised by Popplewell J in *Terna.* [I should mention that, in my view, it is at least questionable whether such principles continue to apply given the recent decisions of the Court of Appeal in *Mitchell v New Group Newspapers Ltd* [2013] EWCA Civ 1537 and *Denton v TH White Ltd* [2014] EWCA Civ 906. However, I heard no argument on that point; and I proceed on the basis of the common ground.] In particular, Popplewell J summarised the relevant principles as follows:

"*27. The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities ... from which I derive the following principles:*

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

(ii) The relevant factors are: (i) the length of the delay; (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so; (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed; (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the court might now have; (vi) the strength of the application; (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

(iii) Factors (i), (ii), and (iii) are the primary factors."

27. In addition, Mr Henton drew my attention to the following general observations expressed by Popplewell J:

i) Factor 1 - The length of the delay "*must be judged against the yardstick of the 28 days provided for in the Act*". As such, even a delay measured in a period of days is significant. A period of weeks or months is substantial [28].

ii) Factor 2 – When addressing the reasons for the delay, it is normally incumbent on the applicant (here, the seller) to adduce evidence which explains its conduct, unless this is impossible, failing which adverse inferences may be drawn [29].

iii) Factor 2 – One question is whether the applicant acted intentionally in making an informed choice to delay making the application. There is a public interest in litigants treating the Court's rules as rules to be complied with, rather than deliberately ignored [30].

iv) Factor 6 – the Court will not normally conduct a substantial investigation into the merits of the challenge application, as this would defeat the purposes of the Act. However, if the challenge can be readily seen to be intrinsically strong or weak, that is a relevant (though not primary) factor [31].

28. Further, in cases where the delay is said to be explained by reference to delays in collecting/paying for the Award, Mr Henton relied upon the following observations in *The Faith* [1993] 2 Lloyd's Rep 408 at 411 rhc (Hobhouse J):

> "*It is not open to a party to argue, as have the charterers here, that they were waiting for the other party to take up the award; that they did not know that there was any point they wanted to raise on the award. They have to take that decision for themselves. The position is, in a sense, a stark one: a party who wishes to reserve his right to take the matter to the Court either by way of appeal or under s. 22 of the 1950 Act must ensure that the award is taken up in time to enable the application to be made.*"

29. Mr Lewis QC submitted that this observation was made in the context of the old Arbitration Act 1950 and is no longer relevant. However, it was followed and applied in a post-1996 Act context in *The Hilal I* [2010] 1 Lloyd's Rep Plus 102; and, in my view, the observations of Hobhouse J remain relevant today – although, of course, each case will turn on its own particular facts.

30. Second, putting on one side for the time being factor 6 i.e. the strength of the applications, it is my view that the other relevant factors point very strongly against the grant of an extension of time. This is so largely for the reasons set out in Mr Henton's skeleton argument which, borrowing much of his language, I would summarise as follows.

Factor 1 – the length of the delay

31. The date of the Award is 27 March 2015. The 28-day period expired on 24 April 2015. The extension sought is until 7 July 2015 (when the application was issued): i.e. a further 74 days beyond the statutory time limit. In total it took the sellers 102 days to issue these proceedings: almost four times as long as it should have done.

32. This is a substantial period in the context of the statutory period. This delay of itself is a strong factor against granting the extension (length of delay being one of the three primary factors). Delay of even a few days is significant. To allow a party to take 102 days instead of the usual 28 would of itself undermine the policy of the Act with its emphasis on speed and finality.

Factor 2 – whether the seller was acting reasonably in all the circumstances in permitting the time limit to expire

33. The seller agreed to and did arbitrate in London, participating fully in a full hearing of factual and expert evidence spread over six days, at which it was represented by leading Counsel. This demonstrates a willingness and ability to understand and deal with English procedural matters relating to the dispute, with the benefit of legal advice as necessary. It is to be assumed that the seller knew or could have found out about the deliberately tight deadline to preserve the right to challenge the Award; and that the onus was on the party seeking to preserve that right of challenge to ensure the Award was collected on time. Further, as stated above, the outstanding fees were relatively modest; and there is no suggestion here that there was any financial difficulty in making the payments necessary to obtain the release of the Award. It is against that background that the reasonableness of the seller's conduct in the various periods should be considered.

34. Period 1 – Date of Award (27 March 2015) to expiry of the 28-day deadline (24 April 2015):

    i) The seller's evidence seeks to rely on an arrangement whereby payment of the Chairman's fees were (in the first instance) split between the parties, whilst the party-appointed arbitrators were each paid (in the first instance) by their own appointing party: Rajagopalan paras 27-9. As submitted by Mr Henton, that reliance is, in my view, misplaced: see *The Faith* at p.411 rhc (above). If the seller had wanted to reserve the right to take the matter to Court by way of challenge/appeal, it should have "*ensure[d] that the award [was] taken up in*

time to enable the application to be made" – if necessary by shouldering all of the tribunal's fees themselves. In that context, I bear in mind the mandatory provision in s.28(1) of the Act that imposes a joint and several liability of parties to pay the arbitrators' reasonable fees and expenses.

ii) The seller knew by 31 March 2015 (4 days post-Award) that just £400 was owing to the buyers' arbitrator. It took until 16 April 2015 (19 days) to pay its own share of the tribunal's fees. This left it only 9 days to mount any challenge in any event. The evidence suggests this would not have been enough in any case since it took the seller 17 days from release of the Award (20 June 2015) until issue of proceedings (7 July 2015) in any event.

iii) The seller took no steps to even enquire whether the buyers had paid their share of the tribunal's fees until 21 April 2015. By this time, there were only 3 days left in which to mount any challenge to the Award.

iv) The response received on 21 April 2015 from Mr Ward of Andrew Jackson (the buyers' English solicitors) was simply that it was his "understanding" that the buyers were about to make payment, but that he would request an update as the buyers' Indian Counsel was dealing with the matter.

v) The seller could not reasonably have relied on Mr Ward's message as a warranty or undertaking that the buyers' payment would be made by any particular date - still less that payment would be made in time for the seller to challenge the Award in time.

vi) It was not until 24 April 2015 that Mr Ward conveyed his instructions that payment was "in hand". Even then no timeframe was given upon which the seller could reasonably have placed reliance. Self-evidently, the seller had by now left it too late to mount its challenge in time: it being after close of business on the date the deadline expired.

35. Period 2 - From expiry of the deadline (24 April 2015) to release of the Award (24 June 2015):

i) As submitted by Mr Henton, this period is largely characterised by complete inactivity on the part of the seller.

ii) By 29 April 2015 the seller was told in no uncertain terms, by the clerk to the Chairman of the tribunal, that fees remained outstanding. Despite that knowledge, it took no steps to enquire what the outstanding balance was, to whom it was owed, or whether the buyers were still intending/attempting to pay it; and it made no arrangements to pay that balance itself in order to collect the Award.

iii) In fact, the seller simply went silent for almost an entire month; not contacting anyone again about the matter until 27 May 2015. That is a further 28-day period (29 April – 27 May), after the expiry of the initial 28-day period, attributable to complete inactivity on the part of the seller.

iv) The evidence does not reveal anything about the reasons why the seller simply left matters to rest for a further 28 days – save that Mr Rajagopalan accepts he could have been more proactive.

v) When the seller finally did make enquiries on 27 May 2015, it learned by 28 May that the total balance outstanding was just £400 – just as it had been when they were copied into Mr Boyd's invoice two months earlier.

vi) Even then, the seller took no steps to settle even this trivial amount themselves. Nor did the seller even ask the buyers whether/when they were going to settle the £400. It simply went quiet for another 22 days until the Award was released.

vii) Mr Rajagopalan tries to blame this further period of delay on the tribunal and/or the buyers on the basis that in fact the buyers' share of the fees had been paid on 29 May 2015. I agree that the fact that it took the tribunal some 22 days after payment of the outstanding fees by the buyers to release the Award is, on its face, very surprising. However, the reason for this delay is unexplained. I also agree that the buyers could have been more active themselves in demanding the release of the Award more promptly after payment of the fees. However, the fact remains that the seller made no further enquiries during this period as to the payment position (as they should or at least might have done).

36. Period 3 – From release of the Award (20 June 2015) to commencement of proceedings (7 July 2015):

i) The seller took a further 17 days from the release of the Award on 20 June 2015 until the issue of these proceedings on 7 July 2015. Whilst this timeframe of itself may not seem unreasonable, I agree that it has to be considered alongside the other periods of delay as set out above.

ii) As submitted by Mr Henton, even leaving aside the inexplicable periods of silence set out above (one of 28 days, another of 22 days), it remains the case that the seller originally took a total of 36 days simply to pay their own arbitrator (19 days) and to mount their challenge to the Award once it was available (17 days). This period was solely attributable to the seller.

Factor 3 – Whether the Tribunal or Respondent contributed to the delay

37. The only factor relied upon against the buyers is that they delayed in payment of their share of the tribunal's fees. However, in my view, this carries little, if any, weight. At the risk of repetition, I would refer again to the observations of Hobhouse J in *The Faith.*

38. The point taken by the seller against the tribunal seems to be that it did not immediately release the Award upon receipt of the buyers' payment on 29 May 2015. That would seem correct; and the reasons for this delay are unexplained. It is also fair to say that the seller was not apparently aware that the buyers had made the payment on 29 May. However, the fact remains that the seller made no payment itself and

made no further enquiries during this period as to the payment position (as they should or at least might have done).

Factor 4 – Whether the Buyers would suffer irremediable prejudice in addition to loss of time if the extension were granted

39. If the extension were to be granted, Mr Henton submitted that the buyers would suffer prejudice beyond mere loss of time, in the form of (i) having to deal with the High Court proceedings, (ii) inevitable irrecoverable costs of those proceedings (no party ever recovers 100% of its costs on assessment), and (iii) difficulties in enforcement of a substantial Award in its favour in the meantime. As to (i) and (ii), the authorities establish that there is always at least some irremediable prejudice when a commercial party is being kept out of its money (see *Nestor Maritime v Sea Anchor Shipping* [2012] 2 Lloyd's Rep 144 at [41]). As to (iii), it cannot be said there is no evidence of difficulties in enforcement in this case. Indeed, as Mr Henton emphasised, the seller has categorically stated in correspondence that it has no intention of paying the Award (as it is obliged to do) because it considers its challenge to be a strong one.

Factor 5 – whether the arbitration has continued

40. This factor is not applicable.

Factor 6 – the strength of the challenge

41. As stated above, I put this on one side for the time being – although, as submitted by Mr Henton, I would note that, as appears from previous authorities including *Terna,* this is not one of the three "primary" factors.

Factor 7 – Whether in the broadest sense it would be unfair to the seller to be denied the opportunity of having their application determined

42. The answer to this question depends in part on the strength of the applications and since I have put that factor on one side for the moment, I propose to leave this too on one side for the time being.

Preliminary conclusion with regard to s.80(5).

43. For all these reasons and putting on one side factor 6 i.e. the strength of the applications and factor 7, it is my clear preliminary conclusion that the application for an extension of time under s.80(5) of the Act in respect of both applications should be refused.

S.68 Serious irregularity

44. So, I turn to consider the seller's first application under s.68 of the Act. Since, I heard full argument on the point, I will express my conclusion on the merits.

45. The seller's challenge was founded on s.68(2)(a) and/or s.68(2)(c) of the Act which provide as follows:

"*(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 the tribunal)…

…..

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.."

S.33 provides as follows:

"*(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."

46. As to the law, it was common ground that the relevant principles were as summarised by Popplewell J in *Terna* at para 85:

"*(i) In order to make out a case for the court's intervention under section 68(2)(a), the applicant must show: (a) a breach of section 33 of the Act; ie that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined; (b) amounting to a serious irregularity; (c) giving rise to substantial injustice.*

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

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

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

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

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

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

47. Further, Mr Lewis QC emphasised the following additional points which were not disputed by Mr Henton:

i) Where a tribunal wishes to adopt a course not advocated by either party (e.g. a "halfway house"), it is generally incumbent upon the tribunal to give the parties an opportunity to address it on that possible course before it is finally adopted; failure to do so may amount to a substantial irregularity: see *The MV Ocean Glory* [2014] EWHC 3521 (Comm.) [2015] 1 Lloyd's Rep. 67 at para 27;

ii) The tribunal will be guilty of a serious irregularity where it reaches a conclusion contrary to the common position on matters which have ceased to be in issue between the parties, and without giving any warning that it is

considering doing so: see *Omnibridge Consulting Limited v Clearsprings (Management) Limited* [2004] EWHC 2276 (Comm) at paras 43-44.

iii) Given the delay in issuing the Award (ten months against the LMAA Terms guideline of six weeks), the Court should be more astute to subject the Award's reasoning to close analysis to check how the tribunal dealt with the issues before it: see *The Celtic Explorer* [2015] EWHC 1810 (Comm), [2015] 2 Lloyd's Rep. 351 at para 24.

48. For his part, Mr Henton also emphasised the following points which I accept:

i) The focus of the enquiry under s.68 is on due process, not the correctness of the tribunal's decision. The thresholds of serious irregularity and substantial injustice are high thresholds designed to eliminate technical and unmeritorious challenges or disguised attacks on the factual decision: see in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] 2 Lloyd's Rep 310 H.L. at [28].

ii) The jurisdiction is a "long-stop" available only where what has happened is so far removed from what could reasonably be expected of the arbitral process that the Court must take action. See the well-known guidance at paragraph 280 of the Departmental Advisory Committee Report (cited in part in *Lesotho* at [27]):

> "*The test of 'substantial injustice' is intended to be applied by way of support of the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened 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. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*."

iii) Recent Court of Appeal guidance re-affirms this principle of non-intervention and the importance of not allowing s.68 to become a "side door" for a disguised attack on the factual findings: see *The Magdalena Oldendorff* [2008] 1 Lloyd's Rep 7 at [38], [47]. The case also re-iterates that it is for Counsel at the hearing (especially experienced leading Counsel) to take such points as they wish [42].

iv) As regards reading/construing the Award in order to determine whether the various thresholds are met:

a) The Award itself should be construed in accordance with the principles as summarised by Teare J in *The Pace* [2010] 1 Lloyd's Rep 183:

> "*[15] In examining the tribunal's reasons it is necessary to bear in mind the observations of Donaldson LJ in Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) [1981] 2 Lloyd's Rep 130 that: "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award"'*
>
> *[16] ... However, when reviewing the reasons of an arbitral tribunal the court should read the award "as a whole in a fair and reasonable way ... [and] should not engage in minute textual analysis" (see* Kershaw Mechanical Services Ltd v Kendrick Construction *[2006] 4 All ER 79 at para 57). The courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration" (see* Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd *[1985] 2 EGLR 14).*"

b) The general approach should be to strive to uphold arbitration awards. The Award should be read in a reasonable and commercial way expecting, as is usually the case, there will be no substantial fault that can be found with it: per *Zermalt*, as cited and followed in, for example, the post-Act case of *The Ojars Vacietis* [2012] 2 Lloyd's Rep 181 at [34].

49. As to the present case, Mr Lewis QC submitted that the high threshold for serious irregularity had been met. In essence, he submitted that it had been common ground between the parties that coal with a Fluidity of 322 ddpm and MMR 1.25% was not off-specification; that the tribunal had, in effect, ignored such common ground between the parties; that if the tribunal had proceeded in accordance with such common ground, the tribunal would have substantially dismissed the claims (i.e. awarded at most nominal damages) instead of awarding the buyers US$1,682,400; and that the failure to proceed in accordance with such common ground constituted a serious irregularity involving substantial injustice to the seller.

50. In essence, Mr Henton disputed that there had been any "common ground" as alleged by Mr Lewis QC; that, in any event, the conduct of the tribunal did not constitute serious irregularity; and that, even if it did, there was no substantial injustice because (as set out in the buyers' Respondents' Notice) the tribunal's Award was justified in any event.

The alleged "common ground"

51. In considering the alleged "common ground", it is necessary to follow the various steps in the arbitration leading up to the Award which were in relevant respect as follows.

52. The starting point is the buyers' Claim Submissions dated 6 January 2012. This was a rambling prolix document which advanced various allegations of fraud, forgery, dishonesty and the like but did not specifically plead claims of breach of any implied terms of the SOGA. However, that document was amended in August 2013 and there is no doubt that this new pleading (referred to as the buyers' Amended Claim Submissions ("ACS")) advanced specific claims for breach of the express terms of the Contracts as well as the statutory terms implied by ss. 13 and 14 of the SOGA. In particular:

i) Paragraph 3 of the ACS made specific reference to Article A1 of Incoterms and then pleaded:

> "*3.2 [The seller] was therefore obliged to provide goods that conformed to the description/quality set out in clause 2 and in particular goods with Fluidity 500 DDPM and MMR 1.2%.*
>
> *3.3 [The seller] was under an obligation not only to provide goods which complied with the above criteria, but was also under an obligation to provide documentary evidence that the goods conformed to these criteria*."

Paragraph 3.4 of the AOCS then set out verbatim the material part of ss.13 and 14 of the SOGA.

ii) Paragraph 17 of the ACS set out the alleged particulars of the seller's breach of contract including specific allegations that (a) the goods did not have Fluidity of 500 DDMP nor MMR of 1.2% and therefore did not comply with the specification of the goods in clause 2 of the Contracts (para 17.1); (b) the seller was therefore in breach of its obligations in failing to provide goods that conformed to the criteria as set out in Clause 2 of the Contracts in particular because the goods were not of requisite Fluidity and did not possess the correct MMR percentage (para 17.2); and (c) the seller was in breach of both ss.13 and 14 of the SOGA.

53. Thus, as pleaded in the ACS, there can be no doubt that as at the date of the case management conference on 16 October 2013, the buyers were expressly advancing a case that the goods did not conform with the specification in clause 2 of the Contracts because the Fluidity fell below 500 ddpm and the MMR was 1.25% and the seller was in breach of ss.13 and 14 of the SOGA.

54. The "Order" drawn up following that CMC hearing set a timetable for the service of reply witness statements and expert evidence as well as the sequential exchange of "skeleton arguments" in advance of the hearing in November 2013. The Order expressly directed:

> "*The parties are required to disclose their entire case in their skeleton arguments, as it is known, at the time of opening. The parties are not keep any points "up their sleeves" for deployment at the hearing. Any point they wish to make or take should be covered in the skeletons.*"

55. Pursuant to that Order, the skeleton arguments were served sequentially – first by the buyers and then the seller.

56. The buyers' written opening skeleton ("BOS") extending to some 31 pages was served on 11 November 2013. At para 2, it stated that the document followed the tribunal's direction. The first main section was headed "*Relevant Facts*". For present purposes, it is sufficient to note the following:

    i) At paras 42-44, reference was made to the Singapore Inspectorate Certificate which (as stated above) purported to certify *inter alia* that the cargo had a Fluidity of 322 ddpm and an MMR of 1.25%. At para 43, the buyers stated:

    > "*43. The Inspectorate Certificate purported to certify the fluidity of the cargo as 322 ddpm (well below the "typical" 500 ddpm described in the Contracts, but above the rejection threshold of 250 ddpm), and the MMR as 1.25% (within the 1.05-1.3% bracket)*."

    Immediately following this passage, the buyers then went on to assert that this certificate was "non-contractual" for various reasons and, on any view, a "curious document".

    ii) At para 48, the buyers went on to say:

    > "*48. As the buyers started to put the coking coal to use it transpired to be off-spec in terms of fluidity and MMR and unsuitable for the purpose of producing coke unless mixed with considerable quantities of high quality blendstock….*"

57. The next main section of the BOS was headed "*The Respondents' obligations as CFR sellers*". Under that heading, para 65 referred generally to the seller's obligation to tender goods which conformed to the contractual specifications and the contractual documents in respect of the goods. Para 66 then stated:

> "*66. In this case, the [buyers] assert that the following were conditions of the Contracts and each of them.*"

Para 67 concerned the seller's obligations with regard to the documents and is not directly relevant. Paras 68-69 concerned the seller's obligations with regard to the goods and stated as follows:

> "*68. As regards the goods:*
>
> *a) The goods were to correspond with the contractual specification/description as set out in cl.2 of the Contracts (s.13 Sale of Goods Act 1979 (SOGA")).*

b) In any event the fluidity would be above 250 ddpm and the MMR between 1.05 – 1.30%.

c) The goods were to be of satisfactory quality (s.14(2) SOGA), including in this regard fitness for all purposes for which hard coking coal are commonly supplied (s.14(2B) SOGA).

69. There can be no dispute that the matters in (b) above went to the root of the Contracts as regards the goods because the parties expressly stipulated in the Contracts that the goods could be rejected outside of those parameters."

58. The next main section in the BOS was entitled "*The Respondent's breaches*". This included various subsections including one headed "*Tender of non-conforming Goods*". Under that heading, para 76 stated that there could be no serious dispute that the goods as received were non-conforming, that the experts were in agreement that the samples tested at the discharge port did not meet the "contractual specifications" and, in support of that assertion, referred to the various discharge port analyses. Further, at sub-paragraph (c), the buyers stated:

> "*Upon taking delivery it was discovered that the hard coking coal was unfit for its purpose of producing coke - at least not without using considerable quantities of high quality blendstock…*"

At para 78, the buyers stated:

> "*As against all this, the only evidence which **tends to suggest the cargo was on-spec** at the loadport is the Inspectorate Certificate…..*" (emphasis added)

That paragraph then continued by stating that that certificate should be treated with considerable caution for a number of detailed reasons.

59. Mr Lewis QC relied heavily upon the terms of the BOS in support of the seller's present challenge under s.68. In particular, he submitted that although the buyers expressly abandoned certain of their earlier allegations in their ACS with regard to misrepresentation, fraud and deceit, there is nothing in the BOS which makes specific reference to cargo with a Fluidity of 322 ddpm or an MMR of 1.25% constituting a breach of clause 2 of the Contracts or ss.13 or 14 of the SOGA; that, given the express terms of the CMC Order, if the buyers were maintaining their case that cargo with such characteristics constituted a breach of clause 2 of the Contracts or ss.13 or 14 of the SOGA, then it was incumbent on them to state such case plainly rather than keep it "up their sleeves"; that, on the contrary, the buyers' attack on the Singapore Inspectorate Certificate set out at paras 42-44 of the BOS was inconsistent with such case and unnecessary if and to the extent that the buyers' case was that cargo with such specification was, in any event, off-specification and in breach of clause 2 of the Contracts; and that the important statement at para 78 of the BOS that "*the only evidence which **tends to suggest the cargo was on-spec** at the loadport is the Inspectorate Certificate*" (emphasis added) confirms that the buyers were, in effect,

accepting that the cargo was on-specification if the tribunal accepted the figures as certified in the Singapore Inspectorate Certificate.

60. In response, Mr Henton submitted that this was, in effect, a mis-reading of the BOS. In particular, he submitted that the buyers never accepted that cargo with the specification certified by the Singapore Inspectorate Certificate (i.e. Fluidity 322 ddpm and MMR 1.25%) was on-specification; that it was tolerably clear that the breach of contract claims were pursued but the misrepresentation claims were not; and that the references in the BOS to the Inspectorate Certificate being the only evidence which "*tends to suggest*" the cargo was on-specification is hardly evidence of an unequivocal intention to abandon part of the buyers' case.

61. Rather, Mr Henton submitted that the buyers were in this last reference simply focussing on their primary case viz that the goods were sufficiently off-specification to justify rejection i.e. below the rejection thresholds in clause 9; that this is because they were seeking damages for the loss of the right to reject the documents (under the doctrine in *James Finlay v Kwik Hoo Tong* [1929] 1 KB 400 and *Kwei Tek Chao v British Traders* [1954] 2 QB 459): i.e., having paid for documents which did not reveal defects in the goods which would have justified rejection, the buyers were deprived of the right to reject the documents; that they should therefore recover the difference between the price they paid (but would not have paid had they known of the right to reject) and the value of the goods received in their defective condition; that the buyers would have had no claim for the return of the price (less damaged arrived value) had they not presented their case in this way; that, in short, the buyers were arguing that the true parameters were below the rejection threshold in clause 9 and that had the documents shown this then they would have been rejected; and that they needed to undermine the Singapore Inspectorate Certificate to make good that case.

62. In my view, Mr Lewis QC's criticisms of the BOS have much force. Although Mr Henton's submissions go some way to explaining the format and content of the BOS, there can be no doubt that it is a confusing document which, at best, lacked clarity and was, on one view at least, internally inconsistent. However, there is no doubt that para 68(a) referred specifically to the seller's obligation to provide goods which corresponded with the contractual specification/description in clause 2 of the Contracts; and that para 76(a) asserted that the experts were in agreement that the samples tested at the discharge port did not meet the contractual specifications which I read (at least arguably) as a reference back to clause 2 of the Contracts. In such circumstances, I think that it is difficult, if not impossible, to treat the other references in the BOS relied upon by Mr Lewis QC as constituting an abandonment of the buyers' case as previously pleaded in their AOCS that cargo with a Fluidity of less than 500 ddpm or MMR of 1.25% constituted a breach by the seller of its obligations under clause 2 of the Contracts and/or the SOGA.

63. In accordance with the CMC Order and shortly after service of the BOS, the seller served its own skeleton argument ("SOS") extending to some 44 pages. It has to be said that this is also a somewhat unsatisfactory document. In particular, although the SOS made repeated reference to the buyers' abandonment of their fraud/deceit etc. allegations, the SOS does not contain any suggestion that the seller considered that the allegations of breach of Clause 2 and/or the statutory implied terms in the AOCS had

been abandoned – as the seller now maintains. On the contrary, it is, for example, important to note that at the very beginning of the SOS, it was stated in paragraph 1:

> "*Properly analysed, the question of liability for [the buyers'] remaining claims boils down to a narrow dispute as to whether or not [the buyers] can prove the coking coal was off – specification as to MMR and fluidity – all their various claims for breach of contract stand or fall by that threshold issue*."

In paragraph 3, the seller then stated in footnote 3:

> "*The contractual specifications for MMR were typical 1.2% with rejection below 1.05% and above 1.30%. For fluidity the specifications were typical 500 ddpm and rejection below 250 ddpm.*"

Before me, Mr Lewis QC at one stage suggested in argument that clause 2 of the Contracts did not constitute a contractual specification at all with regard to Fluidity or MMR of the particular cargo because the stipulated figures in relation thereto were only stated to be "typical". But such suggestion would appear flatly inconsistent with the above footnote and, as I understand, that was never the seller's case before the tribunal. I accept that the use of the word "typical" obviously qualifies the contractual specification with regard to Fluidity and MMR but, as I again understand, that was not a point which was the focus of any specific argument in the arbitration. As I read that footnote 3, the seller was there accepting that the contractual specification required the cargo to have a "typical" Fluidity of 500 ddpm and 1.2% and that the cargo would be off-specification if it did not.

64. Having said that, there is no doubt that the seller's position was that the cargo was not off-specification as to either Fluidity or MMR and was fit for purpose - or as a minimum that the buyers could not prove otherwise: SOS para 5.1. In particular, with regard to the Singapore Inspectorate Certificate, the SOS stated at para 45.1:

> "*[It] is the only contemporaneous report of the fluidity of the coal at the time of loading.* ***It shows the coal to be on-specificatio****n*". (emphasis added)

65. I readily accept that para 45.1 appears to assert on its face that cargo with a Fluidity and MMR as stated in the Singapore Inspectorate Certificate (i.e. Fluidity 322 ddpm and MMR 1.25%) was on-specification; and it was an important part of Mr Lewis QC's case that that assertion was never subsequently contradicted by the buyers. However, looking simply at the SOS, I find it difficult, if not impossible, to reconcile what is stated in para 45.1 with the previously quoted footnote 3. To that extent, like the BOS, I find the SOS a confusing document. In any event, even taking what is stated in para 45.1 at face value as an expression of the seller's case, it cannot be read as an assertion that such case was accepted by the buyers or "common ground".

66. As stated above, there was then an oral hearing before the tribunal. In support of the alleged "common ground", Mr Lewis QC referred me to various parts of the transcript - in particular the oral opening when the buyers' Counsel is recorded as stating as follows:

> "*My learned friend is correct to say and to observe in his skeleton argument that the central question is therefore whether this cargo was off-specification at the loadport. And we say there is abundant evidence that it was.*"

Having referred to the evidence on which the buyers relied, including the Dr Chaudhuri Report and the SGS India Certificate, the buyers' Counsel then continued

> "*As against all of this, there is only one piece of evidence which, on its face, might tend to suggest conformity at the loadport and that's the inspectorate certificate…*" (emphasis added)

and a little later:

> "*…this document stands on its own, it is the only piece of evidence which begins to suggest that this – taken at face value that this shipment might have been on spec at the loadport, and we will be inviting you to reject that in the face of all the other evidence.*" (emphasis added)

67. Mr Lewis QC also referred me to various passages during the cross-examination of the seller's witness, Mr Shah, in relation to the Singapore Inspectorate Certificate:

> "*Q. I suggest to you that you were under considerable pressure to get hold of a certificate from somewhere which showed this cargo to be **on spec for fluidity and MMR** and what you did is this: you received Mr Sharma's chaser on the 7th and you contacted inspectorate and asked them to send you a certificate. That's what happened."*
>
> *A. No, I don't agree to this.*" (emphasis added)

and

> "*Q. And I suggest to you Inspectorate already knew the parameters and the levels that you were expecting to see because you had told them the specification and you prevailed upon them to send you a report **showing conformity** with those parameters?*
>
> *A. Why I need to prevail upon them? It's their job. They have to provide.*
>
> *Q. You needed to prevail upon them because there were no documents suggesting that this cargo was **on spec for MMR and fluidity** because this cargo wasn't **on spec for MMR and fluidity** and you needed to get some proof that it was **on spec***

from somewhere, so you went to Inspectorate and you prevailed upon them to send you a report asap.

A. I don't agree to this." (emphasis added)

68. As stated above, the hearing was then adjourned, a further hearing took place in April 2014 and the parties thereafter served two rounds of written closing submissions. For present purposes, it is sufficient to note that Mr Lewis QC sought to rely upon various passages in the buyers' first round of written closing submissions (i.e. following the second hearing) to the effect that they (a) maintained their case (as pursued in cross-examination) that Mr Shah had pressurised Inspectorate to "*release a certificate which **showed conformity** on the key parameters*" at para 24(c) and "***showed compliance** with the contractual parameters"* at para 78, while (b) stating in terms that the Singapore Inspectorate Certificate was "*the only document of any sort ever provided which purports to certify that **the cargo was on-spec for fluidity***" at para 77(b), and (c) apparently conceding that the Dr Chaudhuri Report analysis of 1.24% for MMR was on-spec. at paras 88(d), 117(a). Further, Mr Lewis QC relied on the fact that the seller's final closing submissions continued to rely on the Singapore Inspectorate Certificate results as demonstrating that there was no breach, at paras 2, 4, 22.3, 23.3, 38-40; and that this was not contradicted in the buyers' final reply closing submissions.

69. Thus, Mr Lewis QC submitted that the clear position taken by the buyers in their submissions and cross-examination before, at, and after the hearing accepted that coal with Fluidity of 322 ddpm and MMR of 1.25% was on-specification; that it was on this basis that the buyers referred repeatedly to the Singapore Inspectorate Certificate results as showing the cargo to be on specification or in conformity for Fluidity and MMR. It is against that background that Mr Lewis QC submitted that the tribunal's conclusion that the cargo was nevertheless off-specification constitutes a serious irregularity.

The seller's alternative case

70. The above is a summary of the seller's primary case viz. that it was deprived of a result consistent with the common ground between the parties. Alternatively, Mr Lewis QC submitted that, at the very least, the seller had been deprived of the opportunity to present further argument and evidence. In that context, Mr Lewis QC submitted in summary as follows:

    i) The seller's assertion that coal with Fluidity of 322 ddpm etc. was "on-spec" in its *responsive* SOS was not developed at all because the buyers had themselves accepted in their BOS that the Singapore Inspectorate Certificate tended to suggest the cargo was "on-spec". Had the buyers advanced any semblance of alternative case that such coal was "off-spec", the seller would have developed its submissions.

    ii) As to further evidence, given the timing when expert quantum evidence was served, the seller was deprived of the opportunity to adduce evidence on the value of coal having Fluidity of 322 ddpm etc.

iii) This was because the buyers never advanced (even as an alternative) any case that they suffered loss and damage because the coal had that degree of Fluidity. The buyers' entire case was premised upon it having the Fluidity for which they contended, namely 29 (or at most 44) ddpm.

iv) It is correct that the seller did not advance any quantum expert evidence prior to the first hearing in November 2013, but nor did the buyers and so the seller argued that the buyers were entitled to nominal damages only, having failed to discharge the burden of proving any loss – the directions for, and service of, quantum expert evidence came later in February-April 2014 (Award para 12). The November 2013 exposition of the parties' cases therefore came long before the quantum expert evidence was *in fact* adduced. The relevant question is whether the seller would have adduced different/further evidence at the time when the quantum expert evidence was *in fact* adduced.

v) Had the seller understood from the buyers' written and oral openings, and the witness handling at the November 2013 hearing, that the buyers were advancing an alternative case that it suffered loss and damage by receiving coal with fluidity of 322 ddpm etc., the seller could (and would) have adduced evidence that such coal is considered very good coal.

71. In summary, Mr Lewis QC submitted that if the buyers had advanced in the BOS an alternative case that coal with fluidity of 322 ddpm etc. was off-specification, the seller would have presented further submissions, and evidence, and the tribunal might well have reached a different view and produced a significantly different outcome (especially in light of the uncontradicted evidence before this Court that coal with a Fluidity of 322 ddpm is considered very good coal).

Discussion and conclusion on s.68 challenge

72. As to these submissions, I readily accept that the seller continued to advance its case that if the Singapore Inspectorate Certificate were correct the cargo was not off-specification. Thus, for example, in para 1 of the seller's (first) written closing submissions, it is stated:

> "*....Accordingly, unless the Tribunal finds that Mr Shah and Inspectorate (Singapore) Ltd did dishonestly conspire for Inspectorate (Singapore) Ltd deliberately to misstate figures in their report, there is no basis for finding that the coal was off-specification at the loadport in the face of the Inspectorate (Singapore) report..*"

73. I also accept that although there is no doubt that the buyers continued to assert a case throughout that the cargo was off-specification for both Fluidity and MMR (see, for example paras 129 and 131 of their first round written closing submissions), the reference in para 77(b) of those submissions (which I have already quoted above) would appear, on its face, to accept that the Singapore Inspectorate Certificate did indeed purport to certify that the cargo was on-specification. That is, perhaps, the highpoint of Mr Lewis QC's primary case.

74. In response, Mr Henton submitted that para 77(b) and the other references relied upon by Mr Lewis QC referred to above have to be seen in the context of the argument that the buyers would have rejected the documents and the goods were it not for the fact that the Inspectorate Singapore Certificate suggested their parameters were not rejectable; that what was being put to the witness was that he was trying to obtain a certificate which would have persuaded the buyers to part with the price; that this was necessary for the claim for loss of the right to reject documents (because, had the certificate revealed the truth, the price would not have been paid); that the buyers would only have been entitled to reject the documents if they showed parameters below the rejection thresholds; and that the Court should treat isolated transcript extracts with caution since inevitably they may be taken out of context of the proceedings as a whole. Further, Mr Henton drew my attention to certain additional passages in the transcripts (in particular at Day 1 at 40:10-14, Day 1 at 55:22-5, Day 1 at 57-8, Day 3 at 74:23-4) which it is unnecessary to quote verbatim but which, he submitted, make clear the case being put in context.

75. In addition, Mr Henton drew my attention to the fact that following the November 2013 adjournment, the buyers were permitted to serve Re-Amended Claim Submissions in both references further setting out their case on quantum, and to adduce expert quantum evidence in support of that case. These pleaded: (i) a primary quantum case of damages for loss of right to reject documents – on the basis that "*This is a case in which the Sellers' breaches comprised not just delivering off-spec. goods, but also tendering discrepant documents which on their face did not reveal the fact that the goods suffered from* ***a defect which justified rejection***"; and (ii) an alternative quantum case of damages to be assessed under s. 53(3) SOGA – on the basis that "*This alternative case only arises if the* ***defects were not such as would have led to the documents being rejected***." Thus, Mr Henton submitted that the distinction between rejectable and non-rejectable breaches was clearly being maintained; and that the fact that the buyers' primary case was that the two measures produced a similar result in monetary terms is irrelevant. The buyers were also permitted to adduce expert quantum evidence in support of that Re-Amended case, and the seller was permitted to put in quantum evidence in response. Thus, Mr Henton submitted that the seller therefore had the opportunity to put in any expert evidence it saw fit in respect of the position if the goods were found to suffer defects which would have justified rejection, or (as in the event occurred) defects which did not.

76. In summary, Mr Henton submitted that when it came to making findings of fact on conformity with the description/specification, the tribunal's choice was not a binary one between the parties' respective primary cases on Fluidity/MMR levels; that there were in fact nine pieces of evidence which could potentially bear on the issue either directly (by certifying Fluidity and MMR levels) or indirectly (by inference from what was certified about other parameters); that there were innumerable permutations open to the tribunal – whether accepting particular certified figures for Fluidity/MMR, or a median of two or more such figures, or drawing inferences from other parameters altogether; that whichever approach it adopted, it would have to decide whether that was within the description/specification or not, and would then have to assess quantum as best it could on the evidence available; that there was no "*common ground*" as to how the tribunal should answer those questions if it adopted one particular permutation of those available; that ultimately the tribunal found non-conformance, albeit non-conformance "*which [did] not reflect the more serious*

criticisms of the Coal advanced by the Claimants" (Award para 227); that this is not a "*half-way house*" but simply part and parcel of the arbitral process.

77. Although these submissions were advanced most forcefully by Mr Henton, they do not, in my view, provide a very satisfactory explanation of what seems to me the plain language of some of the various passages of transcripts and submissions relied upon by Mr Lewis QC. Even so, the conclusion that I have reached is that this is not a case which can properly be regarded as giving rise to a serious irregularity within s.68(2)(a) or (c) of the Act. My brief reasons are as follows.

78. First, in order to succeed under either s.68(2)(a) or (c) of the Act, the seller must show that the tribunal failed to comply with its general duty under s.33 of the Act or failed to conduct the proceedings in accordance with the procedure agreed by the parties. In both cases, the focus is on some failure by the tribunal.

79. Second, although I fully accept that an arbitral tribunal may be guilty of serious irregularity if it reaches a conclusion contrary to the common ground between the parties without giving the parties an opportunity to make appropriate submissions, I bear well in mind the long line of authority summarised above to the general effect that the remedy available under s.68 is intended to operate only as a long-stop in extreme cases.

80. Third, although I also fully accept that certain of the language used by the buyers is – or at least would appear to be - to the effect stated by Mr Lewis QC, the position is not all one-way. In particular, I have already drawn attention to footnote 3 in the SOS where the seller appeared to accept that clause 2 of the Contracts contained the contractual specifications for the cargo including "typical" figures for Fluidity of 500 ddpm and MMR of 1.2%. On that basis, it would seem at least open to conclude that the cargo was off-specification even if the Singapore Inspectorate Certificate was correct.

81. Fourth, although Mr Lewis QC emphasised that the buyers are unable to point to any instance at, during, or after the arbitral hearing where they put forward any case to the effect: "*If, which is denied, the coal had fluidity of 322 ddpm and MMR of 1.25%, nonetheless it was in breach of contract as off-specification*", it is fair to say that they certainly came very close to that in para 75 of their first round closing submissions when they referred to the figures in the Singapore Inspectorate Certificate as being "*..well below the "typical" 500 ddpm described in the Contracts…*". As I have already said, this seems an obvious reference back to clause 2 of the Contracts – although I readily accept that this statement does not fit happily with what is stated in para 77(b) of the same first round closing submissions (which I have already quoted above).

82. Fifth, whatever criticisms can be made of the buyers' submissions, it seems to me important to bear in mind that the seller never said plainly what is now at the core of Mr Lewis QC's complaint on this application viz. that it was common ground that if the tribunal concluded that the cargo had a Fluidity of 322 ddpm and an MMR of 1.25% this was not a breach of clause 2 of the Contracts. Certainly, it was the seller's case in the arbitration that the tribunal should so conclude. However, the seller never said that this was "common ground". In such circumstances, I do not think that it is generally incumbent on a tribunal whether as part of its duty under s.33 of the Act or

otherwise to hunt through the transcripts of evidence or lengthy written and oral submissions to try itself to identify what might conceivably be said to be common ground based on certain questions put in snippets of cross-examination or isolated bits of the submissions made by one or both of the parties at least where, as in the present case, (i) the buyers' pleaded case was certainly that the seller was in breach because the cargo was not in accordance with the specification in Clause 2 of the Contracts with regard to Fluidity and MMR; (ii) such pleading remained extant; and (iii) the parties were represented by experienced Counsel and given the full opportunity to address the tribunal by way of written submissions. It is, of course, always possible for a tribunal to misunderstand the evidence or even the submissions of one or more of the parties. Sadly, that is not unknown. However, a challenge under s.68 of the Act can only get off the ground in an extreme case which falls within one of the specified categories of s.68 of the Act.

83. Sixth, I do not consider that Mr Lewis QC's alternative case as summarised above takes the matter much further – if at all. In truth, such alternative case overlaps to a large extent with his primary case. Further, as submitted by Mr Henton, it is important to note that Mr Lewis QC does not allege "abandonment" of the argument by the buyers until written openings were served; that these were respectively dated Wednesday 11 and Friday 13 November 2013; and that the first oral hearing started on Monday 18 November 2013. However, the seller chose not to adduce any expert evidence on quantum prior to the November 2013 hearing whatsoever i.e., even at a time when, as Mr Lewis QC accepts, the buyers had a pleaded case along the lines of the tribunal's eventual findings. As submitted by Mr Henton, it seems to me that this gives the lie to the suggestion that they would have adduced such evidence had it known the point to be in issue. The first alleged "abandonment" came long after any expert quantum evidence would have needed to be served, had the seller wished to do so. (I should mention that Mr Henton advanced a further argument based on the fact that the seller chose not to adduce such expert evidence even following the adjournment and the service of Re-Amended Claim Submissions. However, given my earlier conclusions, it is unnecessary to address such argument.)

84. In summary, the conclusion that I have reached is that although I see some force in certain of the points made by Mr Lewis QC, I do not consider that they justify the conclusion that there was any serious irregularity falling within s.68(2)(a) or (c) of the Act. For the avoidance of doubt, I have reached that conclusion whether such points are taken individually or cumulatively.

85. In light of this conclusion, I return to the question as to whether I should extend time under s.80(5) to bring the challenge under s.68. I have already expressed my preliminary conclusion in that regard putting on one side factors 6 and 7. Given the conclusion which I have now reached as to the merits, there is nothing to persuade me to change that preliminary conclusion. On that basis, it is my conclusion that the appropriate order is to refuse any extension of time and to dismiss the challenge under s.68.

The buyers' alternative case

86. That conclusion is sufficient to dispose of the s.68 challenge. However, I should deal briefly with Mr Henton's alternative submission on the merits of the s.68 challenge viz even if there was a "serious irregularity", nevertheless the seller's challenge would

fail on the merits because there was, in any event, no substantial injustice. The foundation of that submission was that the buyers advanced and succeeded in the arbitration on an alternative and entirely separate argument in relation to the quality of the coal under s.14(2) of the SOGA. To be clear, in light of my conclusion that there was no "serious irregularity", this point is now academic but, since the point was argued in some detail, I deal with it briefly.

87. In my view, there is no doubt that the buyers did indeed advance such alternative and entirely separate argument. In particular, it was the buyers' case in the arbitration that, on the facts, (i) one of the "*purposes for which goods of the kind in question are commonly supplied*" was the production of blast-furnace coke as a single ingredient coal; rather than merely as one component of a blend; and (ii) the seller was in breach of this requirement because the coal supplied was not fit for the purpose of being used as a single ingredient coal, as opposed to a blending material. As summarised by Mr Henton in his skeleton argument, this is also clear from the following passages in the parties' written submissions:

i) In the BOS, para 68 set out the buyers' three main arguments with respect to the goods as follows. I have already quoted this above, but for convenience, it stated as follows:

> "*a. The goods were to correspond with the contractual specification/description as set out in cl. 2 of the Contracts (s. 13 Sale of Goods Act 1979 ("SOGA")).*
>
> *b. In any event the fluidity would be above 250 ddpm and the MMR between 1.05 – 1.30%.*
>
> *c. The goods were to be of satisfactory quality (s. 14(2) SOGA),* ***including in this regard fitness for all purposes for which hard coking coal are commonly supplied*** *(S. 14(2B) SOGA).*"
>
> (emphasis added)

The buyers alleged breach of the third of these requirements at, for example, para 48 and 76(c).

ii) In the SOS, the seller correctly recognised and appreciated that this was an alternative argument as appears, for example, in para 49:

> "*[49] The Claimants' first alternative allegation is that the goods were not of satisfactory quality and were not fit for all purposes for which coking coal is commonly supplied, contrary to the implied terms in s. 14(2) and 14(2B) of SOGA respectively*."

In the SOS, the seller argued over a number of pages (paras 49-55.3) that, for a variety of reasons, there was no breach of this separate requirement, including because "*The relevant purpose was not use of the coking coal singly. The statutory implied term requires fitness for the purpose for which Indonesian*

coking [coal] is "commonly supplied". It is commonly supplied for use as a blend" (para 54.1); because it was "*never communicated to the [sellers]*" that the buyers required the coal for single use rather than in a blend (para 54.3); and because the coal was "*evidently fit for that purpose [i.e. blending]*" (para 55.1). The submissions contained separate sections addressing the other alleged breaches, including that as to Fluidity/MMR levels.

iii) Similarly, this alternative argument was advanced in the buyers' first round written closing submissions in particular at para 134 where it was stated:

> "*[134] The Buyers say that,* ***in addition to being off-spec. for MMR and fluidity****, the Cargo was of unsatisfactory quality, being oxidised and weathered and unfit for the purposes for which such cargoes are commonly supplied – namely the production of blast furnace grade coke either individually or as the predominant component of the blend.*"

This was followed by a lengthy section in paras 135-138 which analysed in detail the factual and expert evidence as regards the uses for which such cargoes are commonly supplied; and whether the cargo was fit for such purpose. Again, there were separate sections addressing the other allegations of breach, including as to Fluidity/MMR.

iv) In the first round seller's written closing submissions, the fitness for common purposes argument was once again addressed in a separate section, by reference to the factual and expert evidence on the point: see paras 41-43 (including various sub-paragraphs), concluding by arguing that:

> "*[43] Accordingly, the Tribunal should dismiss the claims for alleged breach of the implied terms as to quality/purpose, not least because even if of the quality asserted by SGS, the coal was nonetheless still capable of use in a blend to produce coke.*"

v) Both sets of written reply closing submissions contained separate sections dealing with the "fitness for use as single coal" issue viz paras 23-4 of the buyers' reply; paras 34-5 of the seller's reply.

88. Against that background, Mr Henton submitted that it was plain from the Award that the tribunal found for the buyers on this point – and, in that regard, he referred me to various passages of the Award including paras 53(ii), 75-82, 133, 161, 196, 204-5, 209-212, 222, 224, 229. In particular, he submitted that it was found that one common purpose for the coal was the production of coke individually (not as part of a blend), and that as a matter of fact the coal was not suitable for this purpose. That may be right but, in my view, it is an over-simplification which requires some explanation.

89. The tribunal deals specifically with the topic of "*[The seller's] obligations to supply goods which were of satisfactory quality*" in a section under that heading at paragraphs 204-212 of the Award. I have already quoted the relevant parts of this

section of the Award but, at the risk of repetition, it is worth restating the tribunal's conclusion in para 212 of the Award which was as follows:

> "*212. We conclude that, because [the seller] supplied Coal which was off-specification, in the circumstances of this case they were also in breach of the implied terms under s.14(2) of the Sale of Goods Act by failing to supply goods of a "satisfactory quality*". (emphasis added).

As I read this part of the tribunal's reasons, the conclusion that the cargo was not of "satisfactory quality" and that there was a breach of s.14 of the SOGA is based firmly on the premise that the buyers were entitled to receive coal which conformed to the specification in clause 2 of the Contracts. It seems to me that this is so not only because of the language in para 212 itself but also because of what is stated by the tribunal in the earlier paragraphs – in particular paras 208(d), 209, 210 and 211 – which I have already quoted above. I acknowledge that, in theory, it might have been open for the tribunal to conclude that the cargo was not of "satisfactory quality" and that there was therefore a breach of s.14(2) of the SOGA because as a matter of fact the cargo had (as the tribunal had concluded) a Fluidity of 322 ddpm and an MMR of 1.25% or because the coal was not suitable for all the purposes which goods of the kind in question are commonly supplied. However, it does not seem to me that that is the analysis which led the tribunal to its conclusion. On the contrary, such a possible approach ignores an important part of the tribunal's reasoning which, in my view, runs through in particular paras 209, 210 and 211 viz that the specification in Clause 2 of the Contracts in effect identified (at least in part) what constituted "satisfactory quality" in the context of s.14(2) of the SOGA. Thus, I accept that, as Mr Lewis QC submitted, the tribunal connected the two breaches and based the finding of unsatisfactory quality on the finding that the coal was off-specification.

90. On that basis, it seems to me that Mr Henton's alternative case stands or falls together with the conclusion as to "serious irregularity"; and that if I had concluded that there had been a serious irregularity, this alternative case would equally have failed. At the very least, the tribunal might well have reached a different view on breach of s. 14(2) in such circumstances – which is the relevant test: see *Terna* at para 85(vii).

S.69 – seller's application for leave to appeal

91. On the basis that the seller's s.68 challenge has failed (as I have now concluded), it is necessary to consider the separate application for leave to appeal under s.69 of the Act. In that context, Mr Lewis QC sought leave to appeal on the following questions of law:

i) Question 1: Where a contract for the sale of coal provides for a "*typical"* level in respect of a certain parameter, is there a presumption that (subject to contrary clear wording) the parties do not intend there to be a strict obligation that the coal meet exactly that "*typical"* level?

ii) Question 2: On a proper construction of the Contracts as a whole, was it a breach of contract for the sellers to provide coal that failed to match exactly the "*typical"* parameters of 500 ddpm for Fluidity and of 1.2% for MMR? In

particular, on a proper construction of the Contracts, where coal supplied had Fluidity of 322 ddpm and MMR of 1.25%:

a) Question 2.1: was there a breach of Article 2 and/or CFR Incoterm A1 and/or an implied term under s.13 Sale of Goods Act 1979 that the coal should correspond with its description?

b) Question 2.2: was there a breach of an implied term under s.14(2) Sale of Goods Act 1979 that the coal be of "satisfactory quality"?

It was Mr Lewis QC's case that the answers are: Q1: Yes. Q2: No (Q2.1: No. Q2.2: No).

92. In support of such application, Mr Lewis QC made a number of detailed submissions. However, I do not consider that it is either necessary or appropriate to set these out. For present purposes, it is sufficient to say that it is my conclusion that such application should be dismissed for the following brief reasons.

93. First, as stated above, in order to get this application off the ground, the seller needs an extension of time. Putting aside factors 6 and 7, my preliminary conclusion is as I have already stated i.e. the application for an extension of time should be refused.

94. Second, by virtue of s.69(3)(b) of the Act, it is a prerequisite of the giving of leave that the court is satisfied that the question is one which the tribunal was asked to determine. Here, I am not satisfied that was the case in respect of Question 1 nor, at least, the first part of Question 2. The position with regard to the second part of Question 2 – beginning with the words *"In particular…"* - is more problematic. I accept that the tribunal was asked to determine the questions as stated in Questions 2.1 and 2.2 but, as formulated, these questions are plainly advanced as a "particular" of the main Question 2.

95. Third, even on the assumption that some or all of the questions were ones which the tribunal was asked to determine and, further, can properly be said to arise out of the Award, it seems to me (i) that they raise (at least in part) mixed questions of law and fact which fall outwith the proper scope of s.69(1) of the Act; alternatively, (ii) that the Court should, as a matter of discretion, refuse to grant leave for that reason.

96. Fourth, in any event and on the basis of the facts found in the Award, I am not persuaded that the decision of the tribunal on the questions posed (to the extent that the tribunal was asked to determine those questions) is "*obviously wrong*" within the meaning of s.69(3)(c)(i) of the Act. Nor am I persuaded that the questions posed are of "*general public importance*" or at least "*open to serious doubt*" within the meaning of s.69(c)(ii) of the Act.

97. For all these reasons, if the application for leave to appeal had been made in time, it would be my conclusion that it should be refused on its merits. On any view, such application is, at very best, extremely weak and, given that conclusion together with my earlier conclusion with regard to the delay in making the application, the appropriate course is that the application for an extension of time under s.80(5) of the Act should be refused; and that the application for leave to appeal should also be refused for that reason.

Conclusion

98. For all these reasons, it is my conclusion that the seller's application for an extension of time to bring both the s.68 challenge and the application for leave to appeal under s.69 of the Act should be refused. It follows that the substantive applications should also be refused for that reason. Counsel are accordingly requested to seek to agree an order (including costs) for my approval. Failing agreement, I will deal with any outstanding issues.