OUTER HOUSE, COURT OF SESSION

2021 CSOH 14

P442/20

OPINION OF LORD CLARK

In the petition

ARBITRATION APPEAL NO 4 OF 2020

Petitioners: Mr Bowen QC; BTO Solicitors LLP
Respondents: Mr O'Neill QC; Brodies LLP

2 February 2021

Introduction

[1] The petitioners advanced sixteen grounds of appeal against the Part Award of an arbitrator dated 11 March 2020. Ground 1 is said to concern jurisdiction, under rule 67 of the Scottish Arbitration Rules. Grounds 2, 3, 4 and 16 each allege a serious irregularity, in terms of rule 68. Grounds of appeal which fall within those rules do not require leave to appeal. Grounds 5-15 are legal error appeals under rule 69 which, in terms of rule 70, require leave to appeal.

[2] The respondents submitted that, in reality, grounds 1-4 and 16 actually constituted grounds of appeal based on legal errors and therefore also required leave, and that leave should be refused. The respondents also raised a preliminary issue, that as the arbitration agreement stated that the award was to be "final and binding" all legal error appeals (on the respondents' submissions, all grounds of appeal in this case) were thereby excluded.

[3] Following consideration of written submissions by the parties, I concluded that no hearing was required in respect of grounds 5-15. Leave to appeal was refused in respect of each of those grounds. I have issued a separate Note to the parties explaining my reasons for refusing leave to appeal. A substantive hearing was fixed on the grounds of appeal that did not require leave. This Opinion deals with the matters raised in that substantive hearing of the appeal. After setting out the background, I deal with the preliminary issue and then turn to grounds 1-4 and 16.

Background

[4] The parties to the arbitration were, on one side, a Club, represented by three committee members and, on the other side, two companies, one of which acted as the administrator on behalf of the Club and the other was identified in the Club's constitution as the management company. This appeal is raised by the Club and its three committee members, who are the petitioners. The two companies are the respondents.

[5] The appeal arises from the second arbitration in Scotland between the parties. In the first arbitration, the arbitrator made a Part Award on 1 August 2017, involving a number of orders directed against the two companies. These included: (i) to make over control of all property belonging to the Club in their possession or control; (ii) to make over all books of account kept by them in respect of the Club; and (iii) to produce a bank account reconciliation showing what sums properly belong to the Club and to hand over such sums. An appeal was lodged against the first arbitrator's decision by the two companies. The petitioners in the previous appeal are the respondents in the present appeal. This court refused the previous appeal (*Arbitration Appeal No 2 of 2017* [2018] CSOH 12).

[6] As occurred in that previous case, I made an order in this appeal in terms of section 15 of the Arbitration (Scotland) Act 2010 prohibiting the disclosure of the identity of the parties. I have therefore again sought to avoid giving any information which will allow them to be identified. As a consequence, and as stated in my Opinion in the previous appeal, I have required to limit the explanation and discussion of the factual background. The parties were shown the draft Opinion in advance of it being issued, to confirm that they were content with the steps taken to preserve anonymity.

[7] In the arbitration which is the subject of this appeal, the arbitrator granted fourteen of the eighteen orders sought by the respondents. In broad summary, these orders declare that certain actings and correspondence of the petitioners since April 2017 were *ultra vires* and certain meetings were not properly convened. In particular, the Special General Meeting held in April 2017 and the Annual General Meetings held in September 2017 and April 2018 were improperly convened and conducted, such as to invalidate all and any business conducted at those meetings, and all and any resolutions which were voted on and passed at those meetings were null and void. The main consequences of the orders are that, in summary, changes made to the constitution of the Club in 2017 are of no effect and suspensions of the respondents' memberships of the Club are of no effect. The petitioners appeal against each of the fourteen orders.

Preliminary issue: the effect of the words "final and binding".

[8] The arbitration in the present case was conducted under clause 20 of the Club's constitution, which is in the following terms (emphasis added):

> "Any dispute or difference arising out of this Constitution shall be referred to the decision of a single Arbiter to be agreed between the parties or in default of agreement to be appointed upon the application of either party by the President for

the time being of the Law Society of Scotland and *the award of such Arbiter, including as to expenses, shall be final and binding on all parties."*

[9] Sections 8 and 9 of the 2010 Act deal respectively with the mandatory and default rules set forth in the Scottish Arbitration Rules in Schedule 1 of the Act:

> "8. Mandatory rules
>
> The following rules, called 'mandatory rules', cannot be modified or disapplied (by an arbitration agreement, by any other agreement between the parties or by any other means) in relation to any arbitration seated in Scotland—…rules 67, 68, 70, 71 and 72 (challenging awards)…
>
> 9. **Default rules**
>
> (1) The non-mandatory rules are called the 'default rules'.
>
> (2) A default rule applies in relation to an arbitration seated in Scotland only in so far as the parties have not agreed to modify or disapply that rule (or any part of it) in relation to that arbitration.
>
> (3) Parties may so agree—
>
> (a) in the arbitration agreement, or
>
> (b) by any other means at any time before or after the arbitration begins.
>
> (4) Parties are to be treated as having agreed to modify or disapply a default rule—
>
> (a) if or to the extent that the rule is inconsistent with or disapplied by—
> (i) the arbitration agreement…"

Section 11 deals with the final and binding nature of an arbitral award and section 13 deals with court intervention:

> **"**11. Arbitral award to be final and binding on parties
>
> (1) A tribunal's award is final and binding on the parties and any person claiming through or under them (but does not of itself bind any third party).
>
> (2) In particular, an award ordering the rectification or reduction of a deed or other document is of no effect in so far as it would adversely affect the interests of any third party acting in good faith.
>
> (3) This section does not affect the right of any person to challenge the award—
>
> (a) under Part 8 of the Scottish Arbitration Rules, or
>
> (b) by any available arbitral process of appeal or review…

…

13. Court intervention in arbitrations

(1) Legal proceedings are competent in respect of—

(a) a tribunal's award, or

(b) any other act or omission by a tribunal when conducting an arbitration, only as provided for in the Scottish Arbitration Rules (in so far as they apply to that arbitration) or in any other provision of this Act.

(2) In particular, a tribunal's award is not subject to review or appeal in any legal proceedings except as provided for in Part 8 of the Scottish Arbitration Rules."

Accordingly, while appeals in relation to jurisdiction (under rule 67) and serious irregularity (under rule 68) arise under the mandatory rules and hence cannot be excluded by agreement between the parties, legal error appeals (under rule 69, a default rule) can be so excluded.

Submissions for the respondents

[10] In their arbitration agreement, the parties had effectively opted out of this court's default jurisdiction. Section 13 had displaced and replaced in whole this court's former common law supervisory judicial review jurisdiction in relation to arbitrations. The respondents' position on the reading of the Act accorded with the long line of Court of Session case law on judicial review that accepted that while agreement to an arbitration which was expressed to be "final and binding on all parties" meant that the court's ordinary appellate jurisdiction on points of law was wholly excluded, it was nonetheless possible to apply to the Court of Session's supervisory or super-eminent jurisdiction to ensure that the arbitration had remained within the four corners of its jurisdiction (what would now be called a rule 67 "jurisdictional appeal") and its procedure had complied with basic principles of natural justice or fairness (what would now be called a rule 68 "serious

irregularity appeal"): see *Kyle and Carrick District Council* v *AR Kerr & Sons*, 1992 SLT 629. This was also consistent with the approach taken in a number of Commonwealth jurisdictions: see eg *Labourers' International Union of North America* v *Carpenters and Allied Workers* 34 OR (3d) 472, [1997] OJ No. 2649, Court of Appeal for Ontario.

[11] The petitioners were wrong to rely upon the fact that the respondents themselves applied to the court for permission to be allowed to make a legal error challenge to an earlier arbitration award on the basis of the same arbitration clause. Any earlier subjective misunderstanding of the meaning of the contract had no relevance to its proper interpretation and there could be no suggestion of any personal bar applying to prevent this point now being considered by this court. The petitioners' reliance upon *Essex CC* v *Premier Recycling Ltd* [2006] EWHC 3594 (TCC), in which Ramsey J in the English High Court took a different view of the meaning to be given to the use of the phrase "final and binding" in an arbitration agreement, was of no assistance. Ramsey J was deciding that issue against the background that in English law, unlike in Scotland, there was no general supervisory judicial review jurisdiction being exercised by the courts in relation to purely private law arbitrations: *R* v *Jockey Club, Ex parte Aga Khan* [1993] 1 WLR 909. The relevant provisions in the 2010 Act should be interpreted against the background of the common law in Scotland. The petitioners also relied upon the terms of section 11(1) of the Act. But that provision concerned and set out the fact that arbitration awards bind only the parties to the arbitration and can be enforced against those parties if necessary by a court judgment. It said nothing about how an arbitration agreement is to be interpreted and applied in the context of the 2010 Act and the policy of that law to uphold as far as possible the final and binding nature of arbitration awards. In effect, the petitioners' arguments, if accepted, would denude of all meaning the words of the arbitration clause that the award of an arbitrator shall be final and

binding on all parties. That was not a proper approach to contractual interpretation. The respondents' interpretation of this clause instead gave it proper and plain grammatical sense and one which fitted in with both the pre-Act judicial review supervisory jurisdiction exercised by the Court of Session in relation to private law arbitration awards and the limitation on any right of legal error appeal imposed by the 2010 Act. The arbitration agreement pre-dated the 2010 Act. While parts of the constitution had been varied, this provision in the agreement had always remained the same and had been there from the outset. On the petitioners' approach, the expression "final and binding" meant nothing.

Submissions for the petitioners

[12] The respondents had themselves appealed to the Court of Session in August 2017 in respect of first arbitrator's Part Award. Section 11(1) of the 2010 Act used the same language ("A tribunal's award is final and binding on the parties…") while still providing for the challenge to the award in rule 69. The words "shall be final and binding on all parties" were insufficient of themselves to amount to an exclusion of appeal: *Essex CC* v *Premier Recycling Ltd*. Further, as a matter of statutory construction, section 9(2) required that the specific rule is disapplied. In order to satisfy that requirement the rule which the parties are agreeing to disapply must either be expressly referred to in the arbitration agreement or be inconsistent with it. Neither of these applied to clause 20.

Decision and reasons on the preliminary issue

[13] I reject the submission for the petitioners that, as the respondents had themselves previously lodged appeals on grounds they now say cannot be appealed, they are thereby precluded from now challenging the petitioners' appeal. No basis for the petitioners being

able to rely upon the legal principles of personal bar or waiver was presented.

[14] Turning to the substance of the issue, the basis for the respondents' submission is that in terms of section 9 of the 2010 Act the parties have agreed to disapply rule 69, because the terms of clause 20 in the constitution are inconsistent with that rule or disapply it. I do not accept that submission. In each of the principal authorities relied upon by the respondents and the petitioners respectively (*Labourers' International Union of North America* v *Carpenters and Allied Workers* and *Essex CC* v *Premier Recycling Ltd*) and also in *Shell Egypt West Manzala GmbH* v *Dana Gas Egypt Limited* [2009] EWHC 2097 (Comm), to which I was not referred but I discuss below, the court proceeded on the basis of the standard approach to contractual interpretation, that is, by having regard to the context in which the arbitration agreement was entered into by the parties. In *Labourers' International*, it was noted that:

> "Looking at the agreement in appeal from this perspective, it is apparent that the parties intended to exclude, to the fullest extent possible under the law, any review of the resolution of their dispute. At the time of the making of the agreement, it was not necessary to exclude a right of appeal expressly, because there was no right of appeal without their express agreement under the former Arbitrations Act. The emphasis of the parties was on a 'speedy resolution of any disputes'…"

While in that case reference was made to other authorities indicating that a "final and binding" clause reflects an intention to exclude a statutory right of appeal, including cases dealing with the word "final" in the context of a court order, it is important to note that when the parties entered into the arbitration agreement there could, under the applicable law, be no right of appeal unless the parties expressly agreed to allow such a right. They had not done so. Those background circumstances contrast sharply with the present case. I was not given full details of the history of the constitution of the Club but I was told that while the constitution was varied from time to time, the arbitration clause had remained the same since its inception, which was in the late 1980s. Thus, at the time of entering into the

arbitration agreement section 3 of the Administration of Justice (Scotland) Act 1972 applied, which gave power to the arbiter (as then described) to state a case to the court on any question of law arising in the arbitration "Subject to express provision to the contrary in an agreement to refer to arbitration". In short, there was a route to an appeal on a point of law which existed unless excluded, to the opposite effect from the *Labourers' International* case where the parties had plainly decided not to have a right to appeal. There is nothing in the provision in the constitution which sought to exclude that extant power under section 3. This indicates that the parties were not intending to preclude a right of appeal on a point of law.

[15] Senior counsel for the respondents is correct that Labourers' International refers to the distinction between judicial review and a right of appeal, but it would be quite wrong to regard the context in Ontario as equivalent to Scots law. Here, as the Inner House made clear in *Apollo Engineering* v *James Scott* 2009 SC 525 (at para [38]), the remedy available at that time of proceeding by way of a stated case would deal with the arbitrator's findings on relevancy, and judicial review would not be available on that issue since that statutory remedy applied. Even if I was to view the constitution as having been varied after the 2010 Act (which repealed section 3 of the 1972 Act) and therefore to take the provision as having been agreed in the context of that legislation, section 11(1) of the 2010 Act in essence repeats what this, and almost all, arbitration agreements state: the final and binding nature of the arbitrator's award. Under section 11(1) this is, in effect, a general rule. But section 11(3) then makes it clear that this does not affect the rights of appeal under the rules.

[16] For those reasons alone, I reject this line of argument for the respondents. However, separately, I accept the reasoning in the two English cases: *Essex CC* v *Premier Recycling Ltd* and *Shell Egypt West Manzala GmbH* v *Dana Gas Egypt Limited*. In the former case, Ramsay J

gave a full and detailed analysis of the case law and held that the words "final and binding" do not of themselves, in isolation, give rise to an exclusion of a right to appeal. He stated (at para [22]) that such a phrase is just as appropriate to mean that the decision was final and binding subject to the provisions of the Arbitration Act 1996 and added (at para [24]) that it was therefore necessary to consider whether the parties have otherwise agreed so as to preclude such an appeal, stating "To amount to such an agreement, sufficiently clear wording is necessary." Accordingly, he concluded, in my view correctly, that "If parties wish to enter into an agreement to exclude a right of appeal, I consider that a clear intention must be shown either from express words or from the context." In *Shell Egypt West Manzala GmbH* v *Dana Gas Egypt Limited* Gloster J said:

> "[38] Although, on their face, the words 'final, conclusive and binding upon them' are words of considerable width, which might, in an appropriate context, appear to be sufficient to exclude a right of appeal, the reality is that the expression 'final and binding', in the context of arbitration, and arbitration agreements, has long been used to state the well-recognised rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a *res judicata* between the parties. The expression was used for such purpose in section 16 of the Arbitration Act 1950, which was re-enacted in section 58(1) of the 1996 Act, with the added provision contained in section 58(2), that the finality and binding nature of an award does not exclude the possibility of challenging an award, by any available arbitral process of appeal or review or otherwise in accordance with Part 1 of the 1996 Act. As stated at page 342 of the *2001 Companion* to Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England*, Second Edition, this provision was inserted because the reference to finality in section 16 of the Arbitration Act 1950 was sometimes assumed 'wrongly' to exclude the possibility of challenging an award."

She later added:

> "[45] An award can be said to be 'binding' in that each party promises to abide by the award and to perform it; it is not a mere expression by the arbitrator of his view as to the referred dispute, which a party is at liberty to disregard. An award is 'final' in the sense that the successful claimant is precluded by the award from bringing the same claim again in a fresh arbitration or action."

I agree with those observations. Applying the standard principles of contractual interpretation, that is the correct approach. I recognise of course that the word "final" is

commonly used in various provisions or legal rules (including, for example, rules 68, 69, 70 and 71 of the Scottish Arbitration Rules) as an indication that a decision of the court cannot be appealed. However the context there is different. Under the 2010 Act, there is a specific default rule which will allow an appeal and that default rule requires to be excluded. Therefore, there has to be more than a mere reference to the arbitrator's decision being "final and binding" in order to avoid the application of that default rule. I also recognise that the wording in section 9, "if or to the extent that the rule is inconsistent with or disapplied by" *inter alia* the arbitration agreement, differs from the wording in section 69 of the Arbitration Act 1996 referred to in the cases I have mentioned, which uses the expression "Unless otherwise agreed by the parties" in relation to exclusion of the default rule. However, I do not consider that the expression "final and binding" is inconsistent with default rule 69. Ultimately, I conclude that the expressions in the two pieces of legislation mean the same thing and so the English authorities are of assistance.

[17] Accordingly, in order for the terms of the arbitration agreement to be inconsistent with or disapply the right to seek leave for a legal error appeal, it is necessary to have sufficiently clear wording. While no express reference to section 9 or rule 69 is required, the language must be sufficiently clear to indicate that a right to appeal has been agreed to be excluded or waived. The expression "final and binding" has been used in very many arbitration agreements over many years, including those entered into well before the 2010 Act. The meaning of that phrase is that the award is final and binding in the sense that it resolves the issues raised in the arbitration and this results in the principle of *res judicata* being applicable to those issues. The wording is therefore not of itself inconsistent with a right to appeal or seek leave to appeal in terms of the Scottish Arbitration Rules and it does not exclude or waive any such rights. While of no direct relevance for present purposes it is

no coincidence, as was referred to in submissions in *Shell Egypt*, that the well-developed rules of two leading arbitration bodies (the London Court of International Arbitration, LCIA rule 26.8 and the International Chamber of Commerce, ICC rule 35(6)) deal with exclusion of the right of appeal not simply by stating that the decision is final or binding but also by expressly referring to the parties having waived any form of recourse to challenge the decision.

Grounds of appeal

Ground 1: rule 67 – jurisdiction

[18] Rule 67(1)(a) states:

> "67(1) A party may appeal to the Outer House against the tribunal's award on the ground that the tribunal did not have jurisdiction to make the award (a 'jurisdictional appeal')"

Submissions for the petitioners

[19] The Part Award in the first arbitration *inter alia* ordered the first respondent to make over control of all property belonging to the Club, which was in their possession or control, to the chairman. This included the Register of Members. The First Respondent has failed to comply with any of these orders. In reaching his decision, the first arbitrator had considered Spanish data protection law, that the Club Committee is the data controller, that the first respondent is a processor of that data and that there was nothing in Spanish data protection law which prevented the first respondent from complying with the order to lodge and intimate the Register. In her Part Award in the second arbitration, the arbitrator stated:

> "13.28 However, I agree that it is not for me in this Arbitration to deal with a matter which has already been dealt with by the First Arbitrator. I agree that I am not permitted in this Arbitration to make a finding on matters of Spanish Data Protection Law which have already been dealt with in the First Arbitration. The question I need

> to deal with is to consider whether it was reasonable for the Committee to have taken the view that this amounted to a substantial breach of the Constitution or conduct unbecoming of a member as provided for in Clause 11.5.4 of the Constitution. In that context, the matters dealt with in the First Arbitration clearly do not include the issue of enforceability of the First Arbitrator's Award in Spain. To the extent that the Spanish Law evidence from [A] and [B] deals with the enforceability of the Award, I consider that evidence to be relevant."

The arbitrator required to determine the issue within the confines of her jurisdiction, which she had expressly defined as excluding her from making a finding on matters of Spanish data protection law, that having already been dealt with in the first arbitration. The arbitrator had no jurisdiction in relation to the issue of Spanish data protection law to make any other finding. The arbitrator was not entitled to extend her own jurisdiction by distinguishing the first arbitrator's finding as not including the issue of enforceability of the first arbitrator's award in Spain. In concluding that the first respondent's failure to disclose the Register could not reasonably be considered as "substantial breach" or as "conduct unbecoming" the arbitrator exceeded her jurisdiction and her award should be set aside.

Submissions for the respondents

[20] There could not be parallel grounds of appeal on the same point but characterised under different classifications, eg of jurisdiction but also of serious irregularity or errors of law. Reference was made to *Arbitration Application 1 of 2013* [2014] CSOH 83, *Lesotho Highlands Development Authority* v *Impregilo SpA* [2002] EWHC 2435 (Comm) [2003] 1 All ER (Comm) 22 and the decision of the House of Lords in that latter case, reported at [2005] UKHL 43 [2006] 1 AC 221. The petitioners' ground 1 was not properly classified as a substantive jurisdiction challenge under rule 67. Reference was made to *Union Marine Classification Services LLC* v *The Government of the Union of Comoros* [2015] EWHC 508 (Comm), [2015] 2 Lloyd's Rep and *Obrascon Huarte Lain SA (t/a OHL Internacional)* v *Qatar*

Foundation for Education, Science and Community Development [2020] EWHC 1643 (Comm). Instead, it should properly be classified either as an allegation that the tribunal was acting outwith its powers (and thus a rule 68(2)(b) serious irregularity challenge) or as a rule 69 legal error challenge. If properly to be classified under either of these heads, the court should refuse this challenge without reference to the substance of the petitioners' ground 1 argument because no application was timeously made to this court to raise the points under these heads and if now made it would come too late and in a manner which is prejudicial to the respondents and contrary to the governing principles and overriding objectives of Scottish arbitrations, as set out in section 1 of the 2010 Act. In any event, however the petitioners' ground 1 was classified by the court it should be refused on its substance as it reveals no basis to justify this court's intervention in the arbitrator's decision and award against the background of section 1 of the 2010 Act.

Decision and reasons on ground 1

[21] The proper classification of the points taken by way of challenge to an arbitration is crucial to the proper working of the 2010 Act in accordance with its founding principles, which discourage judicial involvement in the decisions and awards of arbitrators except in strictly defined circumstances. I accept the position advanced by senior counsel for the respondents that, contrary to the petitioners' submission, the same point cannot be treated as arising under different heads of appeal. In *Arbitration Application 1 of 2013* [2014] CSOH 83, Lord Woolman noted (at para [28]):

> "I find it surprising that the tenant relies upon the same factors for both branches of its case. If something is an error of law, it cannot also be an irregularity."

In *Lesotho Highlands Development Authority* v *Impregilo SpA* [2002] EWHC 2435 (Comm) [2003]

1 All ER (Comm) 22 Morison J observed (at para [25])

> "(1) The court is astute to ensure that what is, in *substance and reality* a section 69 [Arbitration Act 1996 legal error] challenge, for which permission is required, is not dressed up as a challenge under sections 68 [serious irregularity], or 67 [substantive jurisdiction]"

On appeal to the House of Lords (*Lesotho Highlands Development Authority* v *Impregilo SpA and Others* [2005] UKHL 43 [2006] 1 AC 221), Lord Steyn observed (at para [31]) that "… it would be strange where there is no exclusion agreement, to allow parallel challenges under section 68(2) (b) and section 69."

[22] The proper classification of a ground of appeal under the Scottish Arbitration Rules in the 2010 Act is a question of law for the court to determine, rather than simply a choice open to the appellant. In considering that matter, the court has to have regard to the substance and reality of the challenge made, however the appellant seeks to classify it. The heads of challenge (jurisdiction, serious irregularity or error in law) are plainly intended to be discrete and distinct classes of allegedly erroneous decision making. In light of the fact that unless otherwise agreed leave to appeal is required for legal error challenges, I accept the comments of Morison J that the court has to be astute to ensure that what are, in reality and substance, legal error challenges are not "dressed up" and presented under another head. I would also add, however, that if a ground is wrongly classified, that of itself will result in its refusal and difficulties may well arise should the appellant seek to re-classify it. It is to be noted that in the present case no suggestion of re-classification of any ground was made.

[23] A challenge under rule 67 relates, as the heading of the rule makes clear, to substantive jurisdiction. While unlike the 1996 Act in England the 2010 Act does not define "substantive jurisdiction", it is clear that it includes the question of what matters have been

submitted to arbitration in accordance with the arbitration agreement. It is not concerned with questions about whether the arbitrator was entitled to rule as she did (see *Union Marine Classification Services LLC* v *The Government of the Union of Comoros* [2015] EWHC 508 (Comm), [2015] 2 Lloyd's Rep 49 (*per* Eder J at paras [20]-[24]) and *Obrascon Huarte Lain SA (t/a OHL Internacional)* v *Qatar Foundation for Education, Science and Community Development* [2020] EWHC 1643 (Comm) (*per* Butcher J at paras [19]-[20]).

[24] The respondents submitted that "The petitioners' complaint in substance is, then, that the arbitrator erred in law by holding that the first arbitrator did not consider or rule on the issue of the *enforceability* of the first arbitrator's award in Spain". However, as I understand the petitioners' challenge on this ground, it is in essence that the matter determined in the arbitration had previously been decided upon by the first arbitrator and therefore, by necessary implication, was not submitted to this second arbitration. Viewed from that perspective, it is therefore a point raised about jurisdiction and I reject the respondents' contention that it is a legal error appeal.

[25] I conclude, however, that this ground must fail. The arbitrator was considering one of the issues raised in the arbitration: whether it was reasonable for the Committee to have taken the view that the failure to hand over the Register amounted to a substantial breach of the constitution or conduct unbecoming of a member, as provided for in Clause 11.5.4 of the constitution, hence allowing suspension. In deciding upon that point she placed particular emphasis on expert evidence that in order to execute a foreign arbitral award in Spain, in addition to a request for recognition and effectiveness before the competent Superior Court of Justice being made (which had occurred), there required to be an application for, and issuance of, a judicial order for enforcement by the competent court of first instance. The evidence was that in the absence of either express consent of the data subjects or a judicial

order for execution of the foreign award, the data transfer would not be allowed according to Spanish law. She was not therefore dealing with the issue of Spanish law addressed by the first arbitrator (which concerned substantive issues of data protection law in that jurisdiction) but rather was focusing upon the law of Spain as regards the subsequent enforcement of the order he made. The arbitrator was entitled, within her jurisdiction, to consider that point. She quite properly stated that the matters dealt with in the first arbitration did not include the enforceability of the award. That issue was not something upon which the first arbitrator heard evidence or submissions and there is no reason to suggest that it was somehow implicitly dealt with in his findings.

Ground 2: rule 68(2)(h) - serious irregularity, unfairness

[26] The relevant parts of rule 68 for the purposes of this case are as follows:

> "68(1) A party may appeal to the Outer House against the tribunal's award on the ground of serious irregularity (a 'serious irregularity appeal').
>
> (2) 'Serious irregularity' means an irregularity of any of the following kinds which has caused, or will cause, substantial injustice to the appellant—
>
> …
>
> (e) uncertainty or ambiguity as to the award's effect,
>
> (h) an arbitrator having not treated the parties fairly
>
> …"

Grounds 2, 3 and 4 rely upon rule 68(2)(h) and ground 16 relies upon rule 68(2)(e).

Submissions for the petitioners

[27] The arbitrator's failure to acknowledge that the first arbitrator had found that in data protection terms the Committee was the controller of the data was a material omission and a serious irregularity which resulted in the unfair treatment of the petitioners because the

arbitrator based her decision on the evidence of the two experts on Spanish law, which she should not have taken into account. It was a material omission from any consideration she gave to the issue of data protection as a reason for non-compliance. Had the arbitrator accepted that the Committee was the data controller she would potentially have reached a decision that the Committee was justified in requiring the Register of Members and as a result the actions the Committee took were things they were entitled to do in light of the absence of the Register. Reference was made to the test for serious irregularity, as set out in *Arbitration Application 1 of 2013* [2014] CSOH 83. The first arbitrator's finding that the Committee was the data controller was *res judicata*. It was an implied term of an arbitration agreement that the parties agree to perform the award (*Associated Electric & Gas Insurance Services Ltd* v *European Reinsurance Co of Zurich* [2003] 2 CLC 340, Privy Council, at [9]). The first respondent was bound to perform the first award but failed to do so. The arbitrator's failure to acknowledge that the first respondent was in breach of the arbitration agreement was a serious irregularity which was profoundly unfair to the petitioners as the innocent party. The submission made by the petitioners that the first respondent had failed to comply with orders in the first arbitration to lodge and intimate the up to date Register was plainly correct. The irregularity caused substantial injustice to the petitioners by failing to treat the petitioners fairly and was a serious one (*Vee Networks Ltd* v *Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192, Colman J at [90]).

Submissions for the respondents

[28] The petitioners' ground 2 was not a serious irregularity challenge under rule 68. Even if it was, the court should refuse this challenge without reference to the substance of the argument because the petitioners simply made assertions, but had provided no evidence

of any sort to satisfy the court that the irregularity complained of has caused, or will cause, substantial injustice to the appellant as required by rule 68(2). The petitioners' ground 2 was in any event properly to be classified by the court as a rule 69 legal error challenge. As a rule 69 legal error challenge the court should refuse this legal error appeal without reference to the substance of the petitioners' ground 2 argument for all the reasons in the same submission made in relation to ground 1.

[29] In any event, however the petitioners' ground 2 was classified by the court, it should be refused on its substance as it revealed no error in law such as to justify this court's intervention in the arbitrator's decision and award against the background of section 1 of 2010 Act. Reference was made to the provisions of the Act and the Arbitration Act 1996. Against that background, it was not open to the petitioners to assert (as they appear to in their ground 2) that there had been a failure to conduct the proceedings in accordance with the procedure agreed by the parties amounting to a "serious irregularity" by reason of a failure to provide a more detailed explanation on how the arbitrator reached her conclusions on the evidence and submission made to her. If this court was to require any further explanation of how aspects of the evidence were dealt with by the arbitrator, the court would have to review the findings of fact and the evaluation of such evidence by the tribunal. On the authorities that is not a permissible approach and would be contrary to the limited role of the court given by the 2010 Act. Reference was made to *London Underground Ltd* v *CityLink Telecommunication Ltd* [2007] EWHC 1749 (TCC); *Arbitration Application 1 of 2013* and *Islamic Republic of Pakistan* v *Broadsheet llc* [2019] EWHC 1832 (Comm) [2019] Bus LR 2753.

[30] The submissions for the petitioners in the present case were in effect that the arbitrator had overlooked evidence or failed to deal with it in her reasons. The petitioners'

classification of these unfounded complaints against the arbitrator was nothing more than an attempt to dress up supposed legal errors by the arbitrator as serious irregularity challenges, which in the light of the authorities they are clearly not. The complaint under ground 2 should accordingly be dismissed on that basis. No application for a legal error appeal was timeously before this court and there was no basis for the court to grant its permission for a legal error appeal to be made out of time. Reference was made to *Gold & Resource Developments Limited* v *Doug Hood Limited* [2000] NZCA 131.

Decision and reasons on ground 2

[31] The key elements of the test for serious irregularity are succinctly summarised by Lord Woolman in *Arbitration Application 1 of 2013* [2014] CSOH 83:

> "[18] Three general points can be made about serious irregularity appeals. First, they are designed as 'a long stop available only 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': *Departmental Advisory Committee on Arbitration Report on the Arbitration Bill 1996*. That passage has been quoted with approval in several cases, see for example *Walsall Metropolitan Borough Council v Beechdale Community Housing Association Ltd* [2005] EWHC 2715. Second, the court will not intervene on the basis that it might have done things differently, or expressed its conclusions on the essential issues at greater length. Third, such an appeal can only succeed if there has been substantial injustice. If the result of the arbitration would have been likely to be the same or very similar, then there is no basis for overturning the award: *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84. Accordingly a dissatisfied party has to meet a high test. It is the substantial injustice which makes the irregularity 'serious'."

[32] Further observations, of some assistance for present purposes, were made in *Islamic Republic of Pakistan* v *Broadsheet llc* [2019] EWHC 1832 (Comm) [2019] Bus LR 2753, in which Moulder J stated:

"Relevant law

[17] The following principles relevant to a challenge under section 68 were common ground:

(i) Section 68 imposes a high hurdle for applicants—*Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, § 26:

> 'a major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process';

(ii) there will only be a serious irregularity if what has occurred is 'far removed from what could reasonably be expected from the arbitral process': Field J in *Latvian Shipping Co v Russian People's Insurance Co (ROSNO) Open Ended Joint Stock Co (The Ojars Vacietis)* [2012] 2 Lloyd's Rep 181,§ 30;

(iii) the importance of upholding arbitration awards has been repeatedly stressed: Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (cited in *The Ojars Vacietis*, § 34):

> 'as a matter of general approach the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it.'

(iv) The requirement of 'substantial injustice' in section 68 is additional to that of a serious irregularity and an applicant must establish both: *Terna Bahrain Holding Co WLL v Al Shamsi* [2013] 1 All ER (Comm) 580, § 85(vi)."

Moulder J then referred to *UMS Holding Ltd* v *Great Station Properties SA* [2018] Bus LR 650, in which Teare J, having considered individual complaints of serious irregularities, then returned to the submission that this was an exceptional case of failing to dealing with key evidence such as to amount to a breach of a tribunal's duty to deal with the losing party's case fairly, and said:

> "[134] When an arbitral tribunal chooses to deal concisely with the essential issues and to express its reasons by reference to the evidence regarded by the tribunal as key, without dealing with the objections to that evidence or with the evidence that each party submitted was key the tribunal has, in my judgment, discharged its duty of dealing with the essential issues and of giving the reasons for its award. When an arbitral tribunal chooses to do that it is not unjust or unfair; 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 Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, to limit the court's intervention in arbitration. As Tomlinson J said in *ABB AG v Hochtief Airport GmbH* [2006] 1 All ER (Comm) 529, para 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.'"

[33] I accept the statements of principle in these cases. It is evident from the kinds of irregularity listed in rule 68 that the suggestion that an alleged failure by the arbitrator to deal with a specific point, even when viewed by the appellants as a key point, does not constitute an irregularity. The theme to be drawn from the nature of the items listed in rule 68(2), as adverted to in the authorities, is whether matters have been dealt with by due process. A failure by the tribunal to deal with all the issues that were put to it can be an irregularity (rule 68(2)(c)), but that is not contested here; rather the point argued is that particular matters bearing upon an issue were not acknowledged or considered. It is not for this court to determine, in a serious irregularity appeal, whether the arbitrator made the right decision, or to assess the adequacy of her reasons. Such scrutiny does not fit with the test of serious irregularity or indeed the principal purposes of the 2010 Act. From the petitioners' submissions in the present case, it is therefore not possible to identify any serious irregularity.

[34] Even if the failures complained of were taken to amount to an irregularity, which they are plainly not, there is no basis for concluding that the arbitrator has gone so wrong in her conduct of the arbitration that justice calls out for it to be corrected. The arbitrator's approach cannot be described as far removed from what could reasonably be expected from the arbitral process. There was no requirement for the arbitrator to make specific reference to the fact that the Committee was the data controller or to acknowledge that the first respondent was in breach of the arbitration agreement by failing to hand over the Register. She plainly had regard to the Part Award of the first arbitrator, but as I have noted above, focused particularly upon the separate issue of the steps required to make the award enforceable in Spain. The points raised by the petitioners do not materially affect the conclusion she reached on the matter. She did not treat the petitioners unfairly and there was no serious irregularity. In any event, there is nothing to support the contention that this caused substantial injustice. The passage in *Vee Networks Ltd* v *Econet Wireless International Ltd* relied upon by the petitioners is of no real assistance to their contentions. It refers to "an irregularity of procedure" which is simply not established in this case.

[35] In relation to the respondents' contention that this is in reality a legal error appeal, I see some force in that view. However, it was at no point suggested by the petitioners that the ground should be considered on that alternative basis and there were no submissions that it could satisfy the relevant test. I see no need to comment further on that matter.

Ground 3: rule 68(2)(h) - serious irregularity, unfairness

Submissions for the petitioners

[36] The arbitrator's Part Award was tainted throughout by her failure to attach significance or weight to the fact that the first respondent did not begin the second

arbitration with clean hands. The first respondent had not complied with any of the orders *ad factum praestandum* made against it in the previous arbitration. This was not given due consideration and was not treated as a material fact by the arbitrator, as it ought to have been. The arbitrator was informed at the outset that the petitioners would be unable to afford the second arbitration. She ought to have regarded the failure to comply with the first arbitrator's order to make payment to the petitioners as highly material and prejudicial to the interests of the petitioners, including in relation to the timing of the failure. By not acknowledging the extent of the non-compliance and attaching no weight to the fact of non-compliance the arbitrator did not treat the petitioners fairly. The arbitrator completely failed at any point to acknowledge that the previous arbitrator repeatedly warned the now first respondent of the consequences of its failure to hand over the Register and that ultimately, in the face of continued non-compliance, that first arbitrator had required to invoke his power to make a sanctions order against the first respondent under rule 39(2) of the Scottish Arbitration Rules. These were material omissions.

[37] By her failure to include these matters in her Part Award, the arbitrator proceeded upon an incomplete and flawed understanding of the petitioners' perspective when making an assessment of the first respondent's conduct. This in turn affected the arbitrator's judgement as to the adequacy of the reasons given by the petitioners for suspending the membership of the respondents. Thus, the arbitrator reached an erroneous conclusion. The arbitrator had also wrongly observed that the parties were "in the midst of" the first arbitration in April 2017. That arbitration was at *avizandum* and as a matter of fact, the petitioners had, as at April 2017, been left substantially out of pocket, had not received the €125,000 payment and were not in possession of the Register, production of which had already been ordered not once but twice. It was reasonable for the petitioners to adopt both

items of non-compliance as reasons for suspending the membership of the first respondent and its parent. In the foregoing circumstances, for the arbitrator to hold that procedure within the first arbitration was at the mid-point so as to give the impression the petitioners had jumped the gun was a serious irregularity and unfair to the petitioners.

Submissions for the respondents

[38] This ground of appeal was again presented as a serious irregularity and unfairness appeal when it was nothing of the sort. All of the procedural and threshold objections which the respondents had made in relation to ground 2 were adopted for this ground. The petitioners were making the basic error that the serious irregularity head allowed (wholly unfounded) allegations of substantive unfairness or an unfair result whereas this head was concerned only with procedural fairness. There was nothing procedurally unfair in the manner in which this arbitration was conducted. On the point that the petitioners said they were unable to afford a second arbitration, in fact the petitioners were represented prior to and throughout the arbitration not just by an experienced solicitor-advocate, but by senior and junior counsel. There was no basis for the repeated, but never actually substantiated, claims that the issue of any unavoidable delay in the payment of funds to the petitioners in terms of the first arbitration award in fact resulted in any form of prejudice (whether material or otherwise) to the petitioners in their conduct of and legal representation before this second arbitration, or otherwise compromised their legitimate interests. In any event, an explanation of the delay was given in a hearing before the second arbitrator with the petitioners having a full opportunity to challenge that explanation or make any further motion to the arbitrator in respect of that delay.

[39] As with ground 2, although presented as a serious irregularity appeal, the

petitioners' ground 3 was in fact a supposed legal error appeal. Any attempt to re-classify it should be refused and in any event it simply could not be said that the arbitrator's decision on the issue was either obviously wrong or that the ground raises a point of general importance and the decision of the arbitrator on it is open to serious doubt.

Decision and reasons on ground 3

[40] It is clear from the submissions on behalf of the petitioners that, as in the previous ground of appeal, the point argued is that particular matters bearing upon an issue were not acknowledged or considered. The petitioners are in effect asking this court to review the evidence and have regard to a number of evidential issues said not to have been mentioned or taken into account by the arbitrator. That falls well outside the concept of serious irregularity. Again, even if the failures complained of were taken to amount to an irregularity the criteria as explained in the authorities quoted above is not met. In any event, the arbitrator made specific reference to the first respondent having failed to pay in terms of the first arbitrator's award and was plainly fully aware of what had occurred in respect of non-compliance. There was every opportunity for the petitioners to advance their arguments before the arbitrator on the points referred to in this ground. I see no basis whatsoever for concluding that she failed to take into account the matters actually raised by the petitioners. The criteria for a serious irregularity creating substantial injustice are not met. For the same reasons as given in relation to ground 2, while in reality this may be a legal error appeal, no suggestion or submissions seeking to invoke that basis for the ground were made by the petitioners and so I do not comment further on that point.

Ground 4: rule 68(2)(h) - serious irregularity, unfairness

Submissions for the petitioners

[41] At the time of the arbitration, there was a report said to be in the course of preparation by Ernst & Young, on behalf of the first respondent. This report was a significant document as it would finally disclose how much of the petitioners' funds were sitting in a joint bank account controlled by the first respondent. A hearing for interim orders due to take place on 11 January 2019 relating to funding matters was postponed to 31 January 2019 in anticipation of the Ernst & Young report being produced. No such report was ever furnished. Complaints to the arbitrator that it had not been provided were met with the response that this was outside the scope of the arbitration. That was a serious irregularity which was unfair to the petitioners. The first respondent had made averments about the Ernst & Young report. Reference was made to correspondence with the arbitrator and the first respondent. The first respondent's failure to provide the Ernst & Young report was not mentioned by the arbitrator in her Part Award. Important sections of the correspondence, acknowledging the Committee's right to an accounting and delivery of its own funds were omitted from mention in the Part Award. Notwithstanding the fact that the Ernst & Young report was not produced, the hearing took place on 11 February 2019 and in her written decision of 27 March 2019 the arbitrator refused to sist the arbitration. The Club could not afford to appeal the 27 March 2019 decision either financially or in terms of delaying the arbitration for say six to eight months. The petitioners' complaint that the first respondent had failed to produce the Ernst & Young report was clearly a relevant matter and the arbitrator's ruling that it was outside the scope of the arbitration was an irregularity. The failures were serious irregularities and unfair to the petitioners since an important factor in relation to its expectation of payment of its own funds, its motivation and its

reasonableness in its dealings with the first respondent were all left out of account.

Submissions for the respondents

[42] The respondents repeated and adopted all of the procedural and threshold objections for this ground made in relation to ground 2. This was again, in reality, just another poorly disguised and poor attempt at a legal error appeal. The legal error in fact being complained of by the petitioners under this head was that the arbitrator ruled, in response to the matter being raised before it by the petitioners, that the question of the production of an accounting report into the division of funds held in a joint Spanish bank account was outside the scope of the arbitration, which is why it would not be either appropriate or necessary to mention it in the Part Award. That was a decision by the arbitrator on a point of law as regards the scope of her jurisdiction under the arbitration. It was notable that this decision is not challenged by the petitioners on the basis of rule 67, to the effect that the arbitrator misunderstood the extent of her jurisdiction in so ruling against the petitioners. Instead the complaint is simply made that the decision was "unfair" to the petitioners. A complaint of substantive unfairness in result is not a matter which is properly raised in terms of a rule 68 serious irregularity appeal which primarily concerns the process of the arbitration, not its result. There was no valid application for leave on the ground of a legal error and in any event the test for leave on that basis was not met.

Decision and reasons on ground 4

[43] This ground of appeal founds upon a decision by the arbitrator on a preliminary issue, that the petitioners' application for production of an accounting report into the division of funds held in a joint Spanish bank account was outside the scope of the

arbitration. The decision is alleged to be unfair and to have resulted in a serious irregularity and substantial injustice, including that the report was not mentioned in the arbitrator's Part Award. As the petitioners observed, they did not appeal this decision of the arbitrator. The present appeal is about the Part Award. In light of the fact that the arbitrator had held that production of the report was outside the scope of the arbitration, and that decision was not challenged, I fail to see any basis for the petitioners' contention that it was appropriate or necessary to mention it in the Part Award. The arbitrator's approach does not fall within the criteria to be met for there to be a serious irregularity and there is also no support for it causing substantial injustice. For those reasons, this ground fails.

[44] I also accept the submission for the respondents that the true basis for this challenge is a decision by the arbitrator on a point of law as regards the scope of her jurisdiction under the arbitration, which also causes this ground to be rejected. However, once again no contention was made that this ground should be viewed and considered under an alternative head of appeal and I therefore need not do so.

Ground 16: rule 68(2)(e) - serious irregularity, uncertainty as to the effect of the award

Submissions for the petitioners

[45] The arbitrator's Part Award had in practical terms nullified all business of the Committee and all business transacted at the Club's special general meetings and annual general meetings from April 2017. Her Part Award in effect reinstated the 2014 constitution. This may mean that the first respondent can claim to be the petitioners' "administrator" even though its contract admittedly ended on 3 May 2017 and it has as a matter of fact had no contract with the petitioners since then. The petitioners have appointed a new administrator. If the Part Award were to stand, there is no certainty as to who the

Committee members of the Club presently are, or have been since the September 2017 AGM. Contracts have been entered into by the Committee on behalf of the Club since 2017. Several of these cannot be cancelled. The arbitrator ought to have given parties the opportunity to make submissions on these and related practical matters by circulating her opinion and inviting comment, rather than proceeding straight to a Part Award. The petitioners were in substantial difficulty in ascertaining exactly where they stand following her Part Award. This constituted a serious irregularity and it was unfair to the petitioners to leave them in this position. If she had invited submissions based on a draft award these difficulties flowing from the results of her findings could have been dealt with.

Submissions for the respondents

[46] The respondents repeated and adopted all of the procedural and threshold objections for this ground which they made in relation to ground 2. The petitioners' claim was nonsense. The fact that the respondents complained that the petitioners were acting in an *ultra vires* fashion and thus the purported actions complained of were null and void *ab initio* were known to the petitioners from the outset of this arbitration. The petitioners had a full opportunity to set out their submissions as to the effect of any such finding in their final submissions to the arbitrator.

[47] Further, and in any event, if their complaint was indeed to the effect that the terms of the arbitrator's award were unclear or ambiguous then their proper remedy lay under rule 58(1)(b) which provides a mechanism for a party to seek clarification where an award is ambiguous. The petitioners had made no such rule 58 application to the arbitrator for the clarification they now apparently seek from this court. But rule 71(2) provides in terms that "An appeal is competent only if the appellant has exhausted any available arbitral process of

appeal or review (including any recourse available under rule 58)." Accordingly their attempt to appeal on the basis of ground 16 was incompetent because they did not avail themselves of the rule 58 remedy first.

[48] But, in any event, their somewhat confused complaint was predicated on a misapprehension that the arbitrator had any power or discretion on the issue of the legal consequences of an *ultra vires* action. It was a straightforward and indisputable proposition of law that all and any actions of a Committee outwith the limitations imposed on it by the constitution on the basis of which it operates are null and void. If there was any confusion on or around the matter it was of the petitioners own making and of no relevance to the question before this court. As with grounds 2 and 3 and 4, although presented as a serious irregularity appeal the petitioners' ground 16 was in fact a supposed legal error appeal. The petitioners had not, however, properly set out any ground as to why this court should grant leave in respect of that ground. In any event the criteria for such an appeal were not met.

Decision and reasons on ground 16

[49] Rule 68(2)(e) concerns a serious irregularity consisting of "uncertainty or ambiguity as to the award's effect". In my view, it is clear that this provision covers issues arising from the terms of the award itself and how it is to be understood. It does not cover the consequences of a clearly articulated award made by an arbitrator. In the present case, there is no lack of clarity or ambiguity in relation to the meaning of the terms of the awards made, and none is suggested by the petitioners. Rather, the issue now being raised is how these awards may affect other matters. As such, this ground of appeal does not therefore concern an issue under rule 68(2)(e) or any serious irregularity in the process or anything that caused substantial injustice to the petitioners. The contentions by the respondents in the arbitration

that certain conduct was *ultra vires* resulting in decisions being null and void were set out from an early stage in the arbitration and it was at all material times open to the petitioners to contemplate and identify the practical and other consequences which might flow from the orders sought by the respondents. If for some reason these consequences could have been material to the arbitrator's decision they should have been ventilated, but as I have noted, from the terms of the submissions now made it appears that the terms of the orders themselves are not criticised as uncertain. If there had been any such uncertainty or ambiguity, the appropriate course would have been for the petitioners to make an application under rule 58, as required under rule 71, which did not occur. As a result, had this submission concerned uncertainty or ambiguity of the award itself, it would not have been competent. I do not require to consider how this ground would fare had it been presented as a legal error appeal, since no such application was made, but I have serious difficulty in seeing any basis upon which it could be viewed as a legal error.

Conclusion

Disposal

[50] For the reasons given, I refuse the appeal on grounds 1, 2, 3, 4 and 16 and confirm the arbitrator's Part Award, reserving all questions of expenses.