Neutral Citation Number: 2017 EWHC 194 (Comm)

Case No: CL-2016-617

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 9 February 2017

Before:

THE HON. MR JUSTICE POPPLEWELL

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Between:

P	**Claimant**
- and -	
(1) Q	**Defendants**
(2) R	
(3) S	
(4) U	

- -
- -

Stephen Houseman QC (instructed by **Mishcon de Reya LLP**) for the **Claimant**
David Foxton QC and **James Willan** (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **First Defendant**
Wendy Miles QC and **William Hooker** (instructed by **Boies, Schiller & Flexner (UK) LLP**) for the **Second and Third Defendants**
The Fourth Defendant was not represented and did not attend

Hearing dates: 3 February 2017

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Approved Judgment

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

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THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell:

Introduction

1. On 3 February 2017 I heard an application by the Claimant to remove the Second and Third Defendants as arbitrators for failing properly to conduct proceedings, pursuant to section 24(1)(d)(i) of the Arbitration Act 1996 ("the Act"). In broad terms the complaint is one of improper delegation of functions by the tribunal to the secretary. At the conclusion of the hearing I announced my decision that the application would be dismissed. On 9 February 2017 I delivered my reasons. This is an anonymised version of those reasons.

The Dispute and the Arbitration

2. The Claimant and the First Defendant entered into a Joint Venture Framework Agreement and a Shareholders Agreement.

3. The First Defendant asserted claims against The Claimant for fraudulent misrepresentation and breach of warranty and alleged frustration of the contracts. Amongst other things, the First Defendant contended that The Claimant was in breach of express representations and warranties.

4. The Joint Venture Framework Agreement and the Shareholders Agreement, which were governed by English law, each contained an arbitration clause which provided for disputes to be resolved by arbitration in accordance with the rules of the London Court of International Arbitration ("the LCIA Rules") with a tribunal of three arbitrators. The First Defendant commenced an arbitration against the Claimant in respect of disputes arising out of the agreements.

5. The Second and Third Defendants ("the Co-Arbitrators) were the party appointed arbitrators in the arbitration. They are experienced international arbitrators with distinguished backgrounds. The tribunal was completed by the appointment of a chairman on 16 July 2014 ("the Chairman"). He is an experienced international arbitrator.

6. In or about August 2014 an individual was appointed by the Chairman as Secretary of the Tribunal ("the Secretary") with the agreement of the parties. He is a qualified lawyer. He was an associate with a large US Law Firm before becoming a legal advisor to the Chairman.

7. The Chairman has been replaced in circumstances to which I will refer; and the Secretary has recently resigned for personal reasons. I shall nevertheless refer to them respectively as the Chairman and Secretary, which were their positions at all times material to the issues in this application.

8. The Claimant is also engaged in another arbitration relating to the same rights as are in issue in the arbitration between the First Defendant and the Claimant.

9. The application for the removal of the Co-Arbitrators is founded on conduct in relation to three procedural decisions made by the Tribunal (collectively "the Decisions"):

   (1) In 2015, the Tribunal made a decision in relation to the sharing of documents between the two arbitrations to which the Claimant was party namely (1) the LCIA arbitration between the Claimant and the First Defendant and (2) the other arbitration between the Claimant and the opposing party ("the Record Sharing Decision"). So far as concerned documents in the other arbitration, the opposing party had agreed to the non-confidentiality of the record, and so the Claimant had agreed to share it with the Tribunal and the First Defendant in the LCIA arbitration. The Decision recorded this uncontroversial position. So far as concerned the question whether material in the LCIA arbitration could be shared with the parties to the other arbitration, by the time the Decision was reached both parties were agreed that such material could be shared, subject to a concern on the part of the Claimant that where witnesses had agreed to provide statements on the basis that the LCIA proceedings were confidential, such confidentiality would adequately be preserved in the other arbitration (the opposing party having offered to give an undertaking of confidentiality); and that the same should apply to documents supplied in confidence. The Tribunal's decision was that it was premature to make a ruling on disclosure of any such potentially confidential witness evidence or documents before any confidentiality had been identified or explained. The Decision set out a procedure for such identification and for the subsequent resolution of any confidentiality issues by the Tribunal.

   (2) On 24 July 2015 the Tribunal issued a decision refusing the Claimant's application for an order staying the LCIA arbitration until after the other arbitration had been heard ("the Second Stay Decision"). This was not the first application for such a stay. On 16 December 2014 the Tribunal had issued a 17 page written decision refusing the First defendant's application for such a stay. No criticism is made of the Tribunal's handling of this decision. It identified as one of the reasons for refusing a stay, albeit not the only one, that the other arbitration was at a relatively early stage; and expressly recognised that the Claimant could renew its application depending on how the other arbitration developed. The Second Stay Decision addressed and rejected the Claimant's submission that there were relevant subsequent developments in the other arbitration, in particular four "compelling" and "new" circumstances, which justified imposing a stay.

   (3) On 16 February 2016 the Tribunal issued a decision in relation to production of documents ("the Second Document Production Decision"). This followed

an earlier decision in relation to production of documents in which a major issue between the parties was the extent to which the Claimant had control over the relevant documents in the hands of third parties, including affiliates, or was able to procure them. In its first document production decision dated 17 October 2015, in respect of which the Claimant makes no criticism of the conduct of the Tribunal, the Claimant was ordered to take certain steps to seek to obtain documents, reflected in three formulations of different width applied to different categories of documents. The Second Document Production Decision arose because the First Defendant alleged that the Claimant was in breach of the first decision and had not been making genuine attempts in good faith to obtain the documents it was required to. Written submissions were exchanged and a teleconference hearing took place before the Chairman alone on 4 February 2016, with the agreement of the parties. By its Second Document Production Decision the tribunal concluded that it was premature to rule on whether the Claimant was in breach of the first decision, because that might prejudge the extent to which a particular individual exercised control over various entities described as affiliates of the Claimant, which was an issue in the dispute; but that the First Defendant was entitled to detailed information about the efforts which had been made to obtain documents, and therefore the Claimant's counsel should certify, in forms prescribed by the Tribunal, the steps taken in that respect. The Second Document Decision dealt with a number of categories of documents, but the reasoning was repetitive being essentially the same for many of the categories. Following the Second Document Production Decision, the Claimant disclosed an additional 10,000 or so documents to the First Defendant, which it is to be inferred should have been produced pursuant to the first document production decision.

10. The following month, on 23 March 2016 the Chairman sent an email which formed the trigger for the s. 24 application ("the Misdirected Email"). The email was intended for the Secretary, but was mistakenly sent to a paralegal at the Claimant's lawyers, who had the previous day sent by email a letter to the Tribunal addressing matters relating to the Claimant's compliance with the Second Document Production Decision and seeking an extension of time. The Chairman's email, intended for the Secretary, attached the Claimant's lawyer's covering email and asked "Your reaction to this latest from [Claimant]?"

11. On 29 March 2016 the Claimant's solicitors, Mishcon de Reya LLP, sought from the Tribunal a detailed description of all tasks delegated by the Tribunal or Chairman to the Secretary, and a wide range of documentary disclosure of communications between the Chairman, Co-Arbitrators and the Secretary.

12. The Chairman responded on behalf of the Tribunal by a letter of 8 April 2016 explaining the role of the Secretary and declining to provide documents.

13. Mishcon de Reya LLP responded on 12 April 2016 expanding the requests for information and documentation in relation to the Tribunal's internal processes. The Chairman responded by letter on behalf of the Tribunal on 21 April 2016.

14. On 5 May 2016 the Claimant filed a challenge with the LCIA Court (the "LCIA Challenge") seeking to have all three members of the Tribunal removed on the following five grounds:

    (1) Ground 1: the Tribunal improperly delegated its role to the Secretary by systematically entrusting the Secretary with a number of tasks beyond what was permissible under the LCIA Rules and the LCIA Policy on the use of arbitral secretaries;

    (2) Ground 2: the Chairman breached his mandate as an arbitrator and his duty not to delegate by seeking the views of a person who was neither a party to the arbitration nor a member of the tribunal on substantial procedural issues (i.e. the Secretary);

    (3) Ground 3: the other members of the Tribunal equally breached their mandate as arbitrators and their duty not to delegate by not sufficiently participating in the arbitration proceedings and the decision-making process;

    (4) Ground 4: circumstances existed which gave rise to justifiable doubts as to the Chairman's independence or impartiality; these arose out of comments the Chairman had made at an international conference;

    (5) Ground 5: the Chairman breached his duty to maintain the confidentiality of the arbitral proceedings.

15. The first and third grounds concerned the actions of the Co-Arbitrators; the remaining grounds concerned the Chairman only.

16. All three members of the Tribunal declined to withdraw from the arbitration and the First Defendant declined to agree to the LCIA Challenge. Accordingly on 27 May 2016 the LCIA Court appointed a three person division to determine the challenge ("the LCIA Division"). As was to be expected, the three members of the Division were themselves experienced international arbitrators. Following written submissions an oral hearing took place on 19 July 2016.

17. The evidential basis for the grounds of challenge before the LCIA Division was essentially (a) the Misdirected Email and (b) an analysis of the time spent by the Secretary, Chairman, and the Co-Arbitrators respectively in relation to the three Decisions. In short it was said that the time spent by the Secretary was so high that it indicated that there had been an improper delegation of functions to him, and that by comparison the relatively short period of time spent by the Co-Arbitrators indicated that they had failed properly to fulfil their arbitral responsibility.

18. The Chairman sent two letters on behalf of the Tribunal, dated 20 June 2016 and 11 July 2016, by way of submissions in the LCIA Challenge, explaining the position of the Tribunal as a whole. The position of the Co-Arbitrators was additionally explained in two separate letters sent by them to the LCIA Division also on 20 June 2016 and 11 July 2016 respectively. On this application, the Co-Arbitrators adopted the contents of those letters and the letters of 8 and 21 April 2016 as an explanation of their position.

19. On 4 August 2016 the LCIA Division issued its decision on the LCIA Challenge ("The LCIA Decision"). The LCIA Division dismissed grounds 1 to 3 and 5 of the Challenge. It upheld ground 4, finding that circumstances existed giving rise to justifiable doubts as to the Chairman's impartiality and revoking his appointment.

20. In relation to grounds 1 and 3 its reasoning was essentially as follows. As to ground 1, it concluded that the tasks undertaken by the Secretary were the sort of tasks which it was permissible for him to perform, and that there had been no improper delegation (paragraph 262); and that there was no basis for concluding that the Secretary had been involved in the decision making process or drafting without adequate supervision (paragraphs 263-264). As to ground 3, the Division concluded that the Co-Arbitrators had spent appropriate and proportionate time on each of the Decisions in issue (paragraph 286); that their approach of commenting on drafts prepared by the Chairman , as described in their letters of 20 June and 11 July, was entirely in keeping with the way that arbitral tribunals function; and that the number of hours spent corresponded with the specific nature of the decisions with no indication that they had simply rubber stamped the decisions of the Chairman (paragraph 287).

21. The Third Defendant was appointed as the new Chairman by the LCIA Court on 17 August 2016. Because of the change in constitution of the Tribunal, it was required to decide whether, and if so to what extent, the previous proceedings should stand, in accordance with s. 27(4) of the Act. The Tribunal carefully reviewed the decisions previously made and decided that they should stand:

    (1) In Procedural Order No. 17 dated 17 October 2016, the Tribunal concluded that the Record Sharing Decision should stand because it gave effect to an agreement to share the record and could be treated as equivalent to a consent order.

    (2) In the same Order, the Tribunal also considered ("upon a review… and after deliberation") to confirm the Second Stay Decision. The Tribunal concluded that it was "appropriate" to dismiss that application for the reasons given in the decision, taking into account the differences between the LCIA and the other arbitration proceedings and the difference in parties.

    (3) In Procedural Order No. 19 dated 26 January 2017, the Tribunal carefully considered the Second Document Production Decision and decided, for brief reasons given in respect of each distinct category of documents, that the Decision was justified and should stand.

22. Those decisions under s. 27(4) of the Act were taken by the (reconstituted) Tribunal as a whole and the Secretary was specifically excluded from participation.

The section 24 challenge

23. The grounds of challenge have shifted somewhat during the course of the application. When first issued it was confined to the scope of challenge advanced before the LCIA Division, namely that the Misdirected Email, and the number of hours spent by the Chairman, Secretary and Co-Arbitrators respectively on the

Decisions, indicated improper delegation by the Co-Arbitrators to the Secretary. Exactly what was said to be improperly delegated by the Co-Arbitrators was described in the Claim Form as "their roles". The grounds were said to be set out in more detail in Mr Daele's witness statement in support of the application, where the essence of the case is set out in paragraphs 25.3 and 59 in the following terms:

> "25.3 The discrepancy between the Co-Arbitrators' time and the Secretary's time is so large that it can only be explained by the members of the Tribunal having delegated their tasks to the Secretary. The three decisions dealt with evidence in this case, and had (and continue to have) a substantial impact on the parties' respective positions and thus the outcome of the dispute. They required the involvement of the Co-Arbitrators in order for a fair decision to be reached.
>
> 59. The failure of the Co-Arbitrators to render their duties personally has frustrated, rather than furthered, the very object of arbitration. In particular the Co-Arbitrators have failed to deal with the issues put to the Tribunal in relation to the three decisions under review, failed to make their own decisions, and failed properly to participate in deliberations of the Tribunal. Instead the Co-Arbitrators effectively passed their pens to the Tribunal Secretary, in breach of their general duties. This causes prejudice which cannot be un-done. The decisions that were sent to the Co-Arbitrators were fully formed before the Co-Arbitrators considered them. They adopted them: they did not make them or properly participate in the discussions which led to them."

24. In substance the complaint was of a personal failure by the Co-Arbitrators properly to exercise their decision-making functions and responsibilities, and of an improper delegation of those responsibilities by them to the Secretary. The functions and responsibilities said to be improperly delegated were adjudicative. I shall refer to this ground as the Adjudicative Function Argument.

25. The Arbitration Claim Form was then amended, with permission, to add an additional ground of misconduct falling within s. 24(1)(d)(i) namely that the Co-Arbitrators "negligently and/or innocently misrepresented to [the Claimant] the position as to the existence and/or nature and/or extent and/or effect of such delegation [of their roles to the Secretary]".

26. At the hearing of the Claimant's application for disclosure in support of its removal application on 20 January 2017 a further argument was advanced in relation to delegation of adjudicative functions, namely that even if the Co-Arbitrators had not failed to conduct themselves properly in relation to delegating any tasks to the Chairman, it was sufficient if the Chairman had without their knowledge improperly delegated adjudicative functions to the Secretary; in other words, if the Co-Arbitrators had acted entirely properly in leaving it to the Chairman to produce drafts for their consideration, and given them adequate consideration so as to exercise their own decision-making functions properly,

nevertheless the Chairman's improper delegation of functions to the Secretary which led to the preparation of those drafts was an improper sub-delegation of tasks so as to amount to an improper delegation of adjudicative functions by the Co-Arbitrators to the Secretary. I shall refer to this ground as the Indirect Delegation Argument.

27. I ordered particulars to be served to clarify the grounds being alleged. Those Particulars raised in the alternative a further new argument. This was that the Co-Arbitrators were culpable in respect of the Chairman's improper delegation of functions to the Secretary because they ought to have known of the risk of it happening, and ought to have taken steps to satisfy themselves that it was not happening. This was not an allegation of improper delegation at all, nor did it relate to the Co-Arbitrators' adjudicatory functions. This was an allegation of a personal failure on the part of the Co-Arbitrators to supervise the Chairman in relation to the internal management processes of the Tribunal. It was said to justify the removal of the Co-Arbitrators even if the Chairman's delegation of functions to the Secretary was entirely proper. I shall call this the Supervision Argument.

28. The Particulars also particularised the allegation of misrepresentation. It was alleged that the effect of the language used in the Co-Arbitrators' letters of 8 April 2016 and 21 April 2016 was that "there had been no delegation in any way of any of the tribunal's functions or responsibilities at any time", which was false because the Co-Arbitrators themselves drew a distinction between appropriate and inappropriate delegation, thereby impliedly admitting some degree of delegation.

29. In the week before the hearing of the application, amended Particulars were served without forewarning or permission, seeking to add to or amend the grounds in three ways:

    (1) A new argument was advanced that the Co-Arbitrators had improperly delegated to the Chairman the task of deciding the Secretary's role and the scope of his responsibilities. This was a variation of the improper supervision allegation but framed as an allegation of improper delegation. It was said to justify removal irrespective of whether the Chairman, Secretary or Co-Arbitrators had failed properly to delineate or perform their respective decision-making functions. I shall call this the Secretary Tasks Delegation Argument.

    (2) The misrepresentation argument was amended so that the nature of the representation said to be extracted from the letters became "there had been no delegation in any way of any of the tribunal's functions or responsibilities at any time and that only tasks of an administrative nature had been assigned to and undertaken by the Secretary." The falsity of the allegation was still said to lie in the implied admission that some function or responsibility had been delegated, but additionally in the fact that "The Secretary reviewed voluminous written submissions (at least in respect of [the Second Document Production Decision]) and formulated and/or drafted reasons and/or analysis forming or intended to form part of or the basis of (what became) each of the Decisions."

(3) A new misrepresentation argument was advanced. A further misrepresentation was said to have been made by the Co-Arbitrators in their letter dated 20 June 2016, namely that all tasks entrusted to the Secretary had been delegated to him by the Tribunal as a whole i.e. with their involvement and oversight, whereas neither of them took part in instructing or delegating tasks to the Secretary or in supervision of his performance of delegated tasks.

30. This changing pattern of allegations is entirely inappropriate on an application under s. 24(1)(d) of the Act. An allegation against an arbitrator that he has failed properly to conduct the reference so as to cause substantial injustice is a serious allegation. It should only be made after careful consideration. It should be formulated with precision. Both the arbitrator in question and the opposing party are entitled to certainty and clarity in knowing what criticisms are being made so as to be able to assess the challenge and formulate any response. Moreover, since it is always a relevant factor if the arbitral institution has considered and rejected the criticisms (see below), it is important that they be formulated with clarity and advanced at that stage. In this case, the evolution of the alternative ways of mounting the challenge betrays their weakness.

The Adjudicative Function Argument

31. In their letter of 20 June 2016, the Co-Arbitrators said:

(1) "….. There was no inappropriate delegation of Tribunal decision-making to the Secretary… In this case it is impossible to suggest that the Secretary actually decided anything or influenced the Tribunal improperly.

It is normal for a Secretary to work under the direct supervision of the Chairman, who will give multiple written and oral instructions to the Secretary in relation to the work which he/she wants the Secretary to do. The Secretary's job (among other things) is to assist the Chairman to prepare the work product for the review of the co-arbitrators. It is unnecessary and impractical for the co-arbitrators to be apprised of all communications between the Chairman and the Secretary. We are confident that, in the present case, the Chairman and [the Secretary] have worked closely and properly together to produce the drafts of the relevant decisions for our comment. The proposed conclusions contained in those drafts for our review had been those of the Chairman. The Chairman has then taken our comments into consideration and decided upon any appropriate amendments before providing a final draft for our approval. All relevant decisions referred to by [the Claimant] in this challenge had been made unanimously.

… In any event, we have repeatedly said there has been no delegation of the decision-making process."

(2) "We have read the relevant correspondence and participated in all key decisions… It is evident from the time spent by the Chairman on this case that the way in which this Tribunal has functioned on important procedural/interlocutory matters (such as document production and applications for a stay of proceedings) has been that the Chairman, with the

assistance of the Secretary, has prepared a draft decision for our review. Having studied the relevant materials beforehand, including the submissions of the parties, we would then comment on the draft and review any subsequent drafts incorporating our suggested amendments. As expected, neither co-arbitrator was involved in the substantive drafting of the final decisions. This is, in our experience, standard procedure which is both expeditious and cost efficient."

(3) In relation to the Record Sharing Decision:

(a) "[The First Defendant] requested an order from the Tribunal to share the LCIA record with the [other arbitral] Tribunal... Further correspondence was received … with an email from the Tribunal … and further correspondence …. The Tribunal's decision was issued. ...

We can confirm that, at the time, we read the party correspondence and considered the issues which arose in that connection. A draft was provided to us by the Chairman of the proposed decision. We read and approved the draft decision before it was issued and we were both in full agreement with the contents of that decision. The decision was six pages long and did not contain issues that were controversial, as the parties had agreed on most of the issues and a decision on the issues still in dispute was deferred to a later date."

(b) The letter then went on to identify that the Second Defendant had spent a total of 3 hours in relation to the decision. The times spent by others in respect of that decision were 1½ hours by the Third Defendant, 9 hours by the Secretary, and 8½ hours by the Chairman.

(4) As to the Second Stay Decision:

(a) "We confirm that we read the parties' correspondence and submissions on this issue and reviewed the draft decision thoroughly before it was issued. This was a short decision, prepared once again by the Chairman with the assistance of the Secretary and sent to us for our approval. We were in full agreement with the reasoning and the outcome contained in this Decision."

(b) The letter identified the time spent by the Second Defendant in relation to the Decision as having been 2 hours. The time spent by others was 4¾ hours by the Third Defendant, 10 hours by the Chairman, and 14 hours by the Secretary.

(5) In relation to the Second Document Production Decision:

"We confirm that we read the parties' correspondence and submissions and participated in internal tribunal discussions on relevant matters (both before and after the draft decision was produced).

Each of us were sent and reviewed three drafts of the Decision before it was issued and read the transcript of the telephone hearing conducted by the Chairman with the parties.

> Although this was a 65 page decision, a large proportion of the document contained summaries of the parties' positions on the various applications. In relation to the sections which contained substantive reasoning and the Tribunal's decision on the requested documents, we note that there was much repetition – given that the same reasoning was essentially applied to several categories of similar documents. Contrary to [the Claimant's] suggestion … we consider it reasonable to have reviewed the final draft (being the third draft we had been sent) in one hour."

32. The 11 July 2016 letter from the Co-Arbitrators included the following:

(1) "[The Claimant] repeatedly alleges that the Co-Arbitrators "rubber stamped" the proposed draft. This is a patently wrong characterisation, as has been made plain in our earlier Submissions. We confirm that we both carefully examined the draft Rulings before deciding to assent to them and did not "rubber stamp" the draft. We had read the relevant papers, and had formed a preliminary view of the merits of the applications before the Chairman sent us his draft rulings. As to the … Second Decision on Document Production,… comprised of… 68 pages, … we commented on the first draft received and subsequent drafts were exchanged and commented upon by us until we received a final draft, which we approved. Generally, and more broadly, the Chairman's drafts accorded with our views on the merits of the issues they addressed, and his skill and experience in drafting Rulings resulted in our often having little (if anything) to criticize or seek to amend significantly. In short, we emphatically affirmed his conclusions as expressed in his drafts after having considered the matters ourselves. Being of one mind with the Chairman clearly does not equate to "rubber stamping"."

(2) "[The Claimant] argues here that "The Tribunal Secretary's substantial influence is further confirmed by the little time that the co-arbitrators spent on reviewing the decision". This is plainly a *non sequitur.* If the drafts had been drafted solely by the Chairman, we would most likely have spent exactly the same amount of time on reviewing the drafts and commenting on them. Our only responsibility was to study the work product placed before us by the Chairman and to respond with our views, having studied the relevant papers, listened to the oral arguments (in the case of the First Stay Application) and read the transcripts of the oral arguments (in the case of the Second Decision on Document Production). All we were concerned with was whether the Chairman's draft expressed our own views on the outcome of the application to our satisfaction. So long as we had (in our own estimation) spent enough time on reviewing the relevant papers to form a clear view on the desired outcome, all we needed to do was to check that the Chairman was on the same page as us, and that his drafts accorded with our views on how the application in question should be disposed of, and why."

"…We also confirm that the draft sent to us was the Chairman's draft decision, regardless of whether the Secretary assisted in drafting duties. It was then our task to independently examine the draft and decide whether to agree to it or to offer amendments (or alternative conclusions) based on our prior reading of the parties' submissions…. The precise point is whether all three

members of the Tribunal had examined for themselves the draft prepared by the Chairman, with the assistance of the Secretary, and agreed with the draft. This is what happened."

(3) "[The Claimant] contends that "the time records of the wing members indicate that they cannot have formed any form of ***independent review*** (emphasis added) of the matters in issue and as such were simply "rubber stamping" the decisions of [the Secretary]". This begs the question of what is meant by an "independent review" by [the Co-Arbitrators]. [The Claimant] does not explain why the reviews [the Co-Arbitrators] conducted were not "independent". …. In short the fact that we:

(a) appreciated the Chairman's wisdom and experience in articulating what to the three of us were the appropriate decisions to make in respect of the three applications placed before us; and

(b) fully agreed with his conclusions,

does not make us any the less independent."

(4) "This is the last point directed against the wing arbitrators, where [the Claimant] complains we breached our duty not to delegate by:

(a) not sufficiently participating in the decision making process; and

(b) allowing the Tribunal Secretary to exercise substantial influence over the decision.

We have in our previous Submissions explained why we did not delegate our essential decision making duties to [the Secretary]… we have in those Submissions …explained why we have sufficiently participated in the decision making process.

We now respond to the charge of allowing the Tribunal Secretary to exercise substantial influence over the decision. We do not accept that [the Secretary] "exercised substantial influence over the decision". We believed that, while [the Secretary] would have provided assistance to the Chairman in the draft rulings and orders, those drafts had been painstakingly worked out by the Chairman, who would have been ultimately responsible for every word of the drafts. In other words, we considered the drafts as the Chairman's drafts, reflecting his personal view of the substance and wording of each ruling or order, regardless of whatever assistance he may have received. Accordingly while we did ultimately exercise our own independent judgement on each draft ruling or order, we dealt with the various drafts on the basis that these were the Chairman's views, and not those of [the Secretary]."

33. There can be no valid criticism of the manner in which the Co-Arbitrators went about discharging their adjudicatory functions in the way articulated in their letters. When dealing with procedural or interlocutory decisions it is entirely proper for co-arbitrators to consider submissions, leave it to the Chairman to prepare a draft of a decision, consider the draft, and approve it or discuss revisions

to it as appropriate. Such an approach ensures that the decision reflects the views of all three members whilst avoiding unnecessary delay or expense on procedural matters, as the tribunal is bound to seek to do pursuant to s. 33(1)(b) of the Act. It is the way in which international arbitration panels commonly function and is in keeping with the way in which multi-member judicial tribunals function as well. The LCIA Division, comprising three experienced arbitrators, held that the manner in which the Tribunal worked in this case was "entirely in keeping with the way in which arbitral tribunals function" (paragraph 287).

34. Article 14.3 of the LCIA Rules entitles the co-arbitrators to delegate to the chairman authority to make procedural rulings alone. Although the Co-Arbitrators did not in fact do so in respect of the three Decisions, the parties would have no cause for complaint had the Chairman dealt with them without any involvement by the Co-Arbitrators. Where parties have agreed that the chairman may make interlocutory decisions alone, as they have by subscribing to LCIA arbitration in accordance with the LCIA Rules, they have clearly also agreed that the chairman may take the lead in proposing to the co-arbitrators a draft decision for their consideration.

35. The Co-Arbitrators' observations to the LCIA Division, the honesty of which are not challenged, are to the effect that they spent sufficient time to understand the arguments and gave proper and adequate consideration to the submissions of the parties and the drafts provided by the Chairman. That ought to have been an end to the matter, as Flaux J, as he then was, observed in ***Sonatrach v Statoil Natural Gas LLC*** [2014] 1 CLC 473 at [49], another case dealing with an allegation of improper delegation to a tribunal secretary, which was expressly refuted by the tribunal.

36. The only basis put forward for doubting what the Co-Arbitrators have said about the sufficiency of their deliberations is the Claimant's reliance on the time spent by them. In fact, however, when the nature of the Decisions is taken into account, it is apparent that the time spent by the Co-Arbitrators was clearly sufficient for them to have discharged their functions appropriately.

37. By the time the Record Sharing Decision came to be made, the Claimant had abandoned its objection to sharing the LCIA record with the other tribunal and had agreed to do so; accordingly, the overwhelming majority of the parties' arguments had become irrelevant. The only issue was whether witness statements and documents provided to the Claimant on a confidential basis should be excluded from the material shared with the other tribunal. The Tribunal decided to defer deciding that question until the Claimant had identified the relevant statements/documents and further submissions had been made. The Record Sharing Decision therefore was a short decision (of 6 pages) which did not resolve controversial issues, but contained an order reflecting the agreement between the First Defendant and the Claimant and gave directions for resolution of the outstanding issue relating to confidential material. The time spent by the Third Defendant (1½ hours) and by the Second Defendant (3 hours) was more than sufficient.

38. The Second Stay Decision arose out of the Claimant's renewed application to stay proceedings in light of the pending claim brought by the Claimant (to which the

First Defendant is not a party) before the other Tribunal. The Second Stay Decision must therefore be seen in light of the fact that the Tribunal had already carefully considered the interaction of the LCIA arbitration and the other arbitration and the relevant principles in their first stay decision, in respect of which the Claimant does not suggest that the Co-Arbitrators failed properly to participate. The renewed application essentially repeated the Claimant's first application, but argued that a stay had become appropriate because of procedural developments in the other arbitration. The Second Stay Decision was a short decision (the analysis runs to about three pages) in which all the Tribunal had to consider was whether, in light of the principles previously identified, the procedural developments in the other arbitration proceedings – which were not controversial as a matter of fact – constituted a significant change of circumstances which now justified a stay. The Co-Arbitrators have explained that they reviewed the draft decision and fully agreed with it. Again, the time spent by the Third Defendant (4.75 hours) and by the Second Defendant (2 hours) was more than sufficient.

39. The Second Document Production Decision concerned questions of the Claimant's compliance with particular aspects of the first decision on production of documents. The Tribunal was familiar with the issues relating to document production from that earlier decision, and had, for example, already concluded as a matter of principle that (notwithstanding its opposition) the Claimant should be required to make a good faith effort to obtain and produce documents held by third parties. Although the Second Document Production Decision is relatively long (64 pages), the majority of the text consists of summaries of the relevant issues, the First Defendant's arguments and then the Claimant's arguments. Moreover, as the Co-Arbitrators have observed, a significant part of the reasoning was repetitive because the same decision was used for several categories: this is because, for many of the categories of documents in issue, the Tribunal decided to apply a general ruling which required certification of the efforts used to obtain those documents. The Second Defendant and the Third Defendant and spent a significant amount of time on this decision (10 hours and 13.5 hours respectively, which expressly included, for each of them, time for reviewing the submissions, the transcript of the oral hearing and the draft decision). There is no proper basis to conclude that that time was insufficient to consider the issues and review the Chairman's draft decision.

40. I have reached this conclusion, without real hesitation, with the benefit of my own experience of litigation and arbitration. More important, however, is the conclusion reached by the LCIA Division which was satisfied that "*… the time spent by the co-arbitrators on each of these Decisions, whether categorised as procedural or evidentiary, was appropriate and proportionate given the obligation placed on them by Article 10.2 of the LCIA Rules to use reasonable diligence but to avoid unnecessary delay and expense" and that "… the number of hours spent corresponds with the specific nature of the Decisions"* (paragraphs 286-287 of its Decision).

41. This Court should be very slow to differ from the view of the LCIA Division. The LCIA Division was the parties' chosen forum for resolution of the question in issue. It had considerable experience and was well placed to judge how much

time would be required for a co-arbitrator properly to consider interlocutory issues of this type. Moreover, the Report on the Arbitration Bill by the Departmental Advisory Committee of February 1996 ("the DAC Report") states at paragraph 107:

> "We have also made the exhaustion of any arbitral process for challenging an arbitrator a pre-condition of the right to apply to the Court. Again it would be a very rare case indeed where the Court will remove an arbitrator notwithstanding that that process has reached a different conclusion."

42. For all these reasons there is no merit in the Adjudicative Function Argument, quite apart from the issue of substantial injustice which I address below.

The Indirect Delegation Argument

43. There are a number of reasons why the Indirect Delegation Argument is misconceived.

44. First, it is logically incoherent. It starts from the premise that the Co-Arbitrators delegated some part of their adjudicative functions to the Chairman by entrusting the Chairman with the task of preparing drafts of the Decisions for their consideration. They did no such thing. They delegated to the Chairman that task in fulfilment of their own adjudicatory functions and responsibilities, not in delegation of them. They retained their own adjudicatory responsibilities, and fulfilled them as I have explained above. There was no part of the Co-Arbitrators' own adjudicatory responsibility which was delegated to the Chairman or which could have been sub-delegated by the Chairman to the Secretary.

45. Secondly, the Claimant's case is based on the remarkable proposition that legitimate reliance by the Co-Arbitrators on the Chairman to prepare first drafts of interlocutory decisions for their review becomes illegitimate, and justifies sanction by removal of the Co-Arbitrators if, in fact, the Chairman himself has improperly delegated functions or tasks to the Secretary and irrespective of the Co-Arbitrators' state of knowledge. Unsurprisingly this argument is unsound as a matter of law. Section 24(1)(d) requires that "he" – that is, "the arbitrator" whom it is sought to remove – has failed properly to conduct the proceedings. If a co-arbitrator performs his own functions in an entirely conventional and proper manner, he does not fail properly to conduct the proceedings merely because another member has not performed their functions properly. Similarly, his conduct cannot have caused substantial injustice. Section 24 cannot sensibly be construed to allow such a serious intervention in the arbitration, and serious sanction against an arbitrator, who has, himself, done nothing wrong.

46. Thirdly, there is in this case no basis for concluding that the Chairman's use of the Secretary in relation to the three Decisions involved delegating to the Secretary any adjudicative functions or responsibilities, or was in any way inappropriate.

47. The Tribunal explained the role of the Secretary in this case in its letter of 8 April in the following terms:

> "First, for the avoidance of any doubt, neither the Tribunal nor any of its members has "delegated" any function to the Tribunal Secretary. The Tribunal Secretary operates, and from the time of his appointment with the agreement of the Parties has operated, as circumscribed by the LCIA's "Notes for Arbitrators" (paragraphs 68-73), the LCIA website's "What is the LCIA's position on the appointment of Secretaries to Tribunals?" and the "Young ICCA Guide on Arbitral Secretaries" (Article 3 ("The Role of the Arbitral Secretary")). Thus the Tribunal Secretary has assisted the Tribunal "with the internal management of the case" and has engaged in such matters as organising papers for the Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, preparing drafts of orders and correspondence for consideration by the Tribunal, and sending correspondence on behalf of the Tribunal. Therefore there has been no occasion for any of the members of the Tribunal to have "passed [communications] between [them] in connection with the role of and the tasks delegated to [the Secretary] in this arbitration," and in fact none exist. As the three members of this Tribunal reside… [around the globe], all three of whom travel frequently around the world for hearings and other professional engagements, the Tribunal Secretary necessarily must spend a proportionately large amount of time relative to that spent by the Tribunal members, which results in maximum efficiency of the proceedings and overall lower total cost to the Parties."

48. The Chairman described the working practices he had adopted in this case in paragraphs 3.6 and 3.7 of the written observations of 20 June 2016. He explained that he supervised the work of the Secretary and that anything drafted by the Secretary would not be circulated before he had commented on, edited and adopted it as his own document.

49. In relation to the Misdirected Email, the Chairman explained the position in the letter dated 8 April 2016 sent on behalf of the Tribunal, as follows:

> "For the sake of completeness however and in order to dispel the "confusion" experienced by [the Claimant's] counsel, it is appropriate to note that the request by the Tribunal Chairman to the Tribunal Secretary encompassed in the misdirected e-mail of 23 March 2016 had been intended simply to elicit from him, on behalf of the Tribunal, a response as to the status of outstanding issues relating to the Tribunal's First, Second and Third decisions on Document Production based on the letter of [the Claimant's] counsel dated 22 March 2016."

50. The LCIA Rules provide at Article 14.2 that unless otherwise agreed by the parties under Article 14.1, the Tribunal shall have the widest discretion to discharge its duties permitted by the applicable law. The parties agreed to the appointment by the Chairman of the Secretary as a tribunal secretary. They did not seek to place

any constraints upon the tasks and functions which he might perform so as to assist the Tribunal. There was no agreement as to the limits of his permitted involvement in the process.

51. A number of sources indicate a divergence of views amongst practitioners and commentators as to the appropriate use of tribunal secretaries.

52. The LCIA's "Notes for Arbitrators" were published on 29 June 2015Paragraph 2 of the Introduction states that they are:

> "…..by no means intended to provide an exhaustive list of "*best practices"* in the conduct of arbitration, nor do [they] supplant or interpret the LCIA Rules. Rather [they] highlight the broad principles by which Arbitral tribunals should be guided in the conduct of LCIA arbitrations."

53. Section 8 comprises paragraphs 68 to 73 which include the following:

> "8. SECRETARIES TO TRIBUNALS
>
> 68. Subject to the express written agreement of the parties, an Arbitral Tribunal may, if it considers it appropriate in a particular case, appoint a tribunal secretary to assist it with the internal management of the case.
>
> 69. The duties of the tribunal secretary should, however, neither conflict with those for which the parties have contracted with the LCIA, nor constitute any delegation of the Arbitral Tribunal's authority.
>
> 70. The LCIA Secretariat will deal with all matters required of it under the LCIA Rules; will provide any reminders that may be required on the procedural timetable; and will, if requested, finalise arrangements for hearing venues, transcripts and so on.
>
> 71. Tribunal secretaries should therefore, confine their activities to such matters as organising papers for the Arbitral Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, reserving hearing rooms, and sending correspondence on behalf of the Arbitral Tribunal."

54. On the LCIA's website under Frequently Asked Questions there is a slightly different formulation:

> "The LCIA will provide the Tribunal and the parties with the administrative support that they require.
>
> However, the LCIA has no objection, in principle, to the appointment of a Secretary or to the Tribunal, provided that the parties agree, and subject to the usual conflicts checks.

> The duties of the administrative secretary should neither conflict with those for which the parties are paying the LCIA Secretariat, nor constitute any delegation of the Tribunal's authority. Whilst the LCIA is prepared to liaise with the Secretary on administrative matters, the LCIA Secretariat will finalise arrangements for hearing venues, transcripts and so on; provide any reminders that may be required on the procedural timetable; and deal with all matters required of it under the LCIA Rules.
>
> Administrative secretaries should, therefore, confine their activities to such matters as organising papers for the Tribunal, highlighting relevant legal authorities maintaining factual chronologies keeping the Tribunal s time sheets and so forth."

55. As the expressions "such matters as" and "and so forth" make clear, the guidance is intended to be illustrative but not exhaustive of the tasks which are to be entrusted to a tribunal secretary.

56. In 2014 the International Council for Commercial Arbitration published a report under the title Young ICCA Guide on Arbitral Secretaries ("the Young ICCA Guide"). It was compiled by authors with collective experience of acting as tribunal secretary in over 90 arbitrations. They took account of a survey in 2012 sent to a cross section of international arbitration practitioners, users and providers, and a second more focussed survey of about 100 practitioners in 2013. 95% of the 2012 survey respondents supported the use of arbitral secretaries, but, as the foreword recorded, the major area of disagreement amongst responses to both surveys lay in the nature of the tasks properly assigned to arbitral secretaries. In the 2012 Survey, 38.7% of respondents were in favour of the secretary analysing the parties' submissions; 45.2% in favour of the role including drafting parts of the award; 60.2% favouring the secretary drafting procedural orders; and 68.8% in favour of the secretary performing legal research for the tribunal. In the 2013 survey results only 16.5% were in favour of the secretary participating in the tribunal's deliberations, with 83.5% against.

57. The recommendations of the authors of the Young ICCA Guide were set out under the heading "Best practices for the Appointment and Use of Arbitral Secretaries". Article 1 provided:

> "Article 1. General Principles on the Appointment and Use of Arbitral Secretaries
>
> (1) An arbitral secretary should be appointed to support an arbitral tribunal where it considers that such appointment will assist it in resolving the dispute effectively and efficiently.
>
> (2) An arbitral secretary should only be appointed with the knowledge and consent of the parties.

> (3) An arbitral tribunal should notify the parties of its intention to appoint an arbitral secretary at its earliest convenience.
>
> (4) It shall be the responsibility of each arbitrator not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary.
>
> (5) It shall be the responsibility of the arbitral tribunal to appropriately select and supervise the arbitral secretary.
>
> (6) Where an arbitration is proceeding under institutional arbitration rules, any rules and policies of the institution relating to arbitral secretaries shall apply."

58. The commentary to Article 1(5) provided:

> "Although there may be a risk of a "dilution in mandate" when appointing an arbitral secretary, the Task Force considers the fact that 95.0% of 2012 Survey respondents supported the use of arbitral secretaries as showing that there is significant acceptance within the arbitration community that this risk is outweighed by the benefits inherent in the use of arbitral secretaries. In order to minimize that risk, however, arbitral tribunals must ensure that they maintain tight control over the tasks entrusted to the arbitral secretary and provide close oversight of the arbitral secretary's responsibilities. While 55.2% of 2012 Survey respondents indicated that the arbitral secretary is controlled by the chairperson, the remaining 44.8% indicated that the entire arbitral tribunal is in control of the arbitral secretary. The Task Force believes that, while it is common practice for the arbitral secretary to be selected from the chairperson's law firm or organization, the benefits associated with the use of an arbitral secretary would be furthered if he or she was controlled by, and tasked with supporting, the arbitral tribunal as a whole."

59. Article 3 provided

> "Article 3. Role of the Arbitral Secretary
>
> (1) With appropriate direction and supervision by the arbitral tribunal, an arbitral secretary's role may legitimately go beyond the purely administrative.
>
> (2) On this basis, the arbitral secretary's tasks may involve all or some of the following:
>
> > (a) Undertaking administrative matters as necessary in the absence of an institution;
> >
> > (b) Communicating with the arbitral institution and parties;

(c) Organizing meetings and hearings with the parties;

(d) Handling and organizing correspondence, submissions and evidence on behalf of the arbitral tribunal;

(e) Researching questions of law;

(f) Researching discrete questions relating to factual evidence and witness testimony;

(g) Drafting procedural orders and similar documents;

(h) Reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence;

(i) Attending the arbitral tribunal's deliberations; and

(j) Drafting appropriate parts of the award".

60. The Commentary to Article 3 provided:

"Article 3(1):

In practice, many arbitrators responsibly make full use of arbitral secretaries, beyond the purely administrative sphere, to help them in the discharge of their functions. Indeed, to ensure that the maximum benefit is derived from the appointment of an arbitral secretary, the responsibilities entrusted to the arbitral secretary must go beyond the purely administrative. To limit the arbitral secretary's role in supporting the arbitral tribunal to administrative matters only would largely eliminate the gains in efficiency sought through the appointment of a secretary. In order to minimize the risk of diluting the arbitrators' personal mandate, however, tribunals must closely instruct and supervise the arbitral secretary. Ultimately, it should be left to the discretion of the tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary's level of experience and expertise. If an arbitrator exercises poor judgment in determining what tasks to assign to the arbitral secretary, it reflects badly on the institution of arbitral secretaries.

Article 3(2):

This article sets out those tasks that may reasonably be undertaken by the arbitral secretary (subject to the caveats set out in relation to Article 3(1) above). This is not an exhaustive list and should be seen as a default list of responsibilities that is subject always to the preferences of the parties. If the parties so

> desire, they may discuss with the arbitrator the scope of tasks and duties to be undertaken by the arbitral secretary at or prior to the time of his or her appointment."

61. As these recommendations recognise, they are directed to best practice and are not prescriptive, in the same way as the LCIA Notes. They do not form a single unified view of practitioners in general about the limits of a tribunal secretary's role.

62. The Federal Supreme Court of Switzerland held in a decision dated 21 May 2015 (4A_709/2014) that the tasks of an administrative secretary could include a certain degree of assistance with respect to drafting the award, under the supervision and in accordance with the tribunal's instructions ("Elles n'excluent pas une certaine assistance dans la redaction de la sentence…").

63. In Gary B Born's book on *International Commercial Arbitration* (2014), described by Lord Mance in ***Hashwani v Jivraj*** [2011] 1 WLR 1872 at [77] as an authoritative work, the author observes:

> "International Arbitrator's Obligation Not to Delegate Duties
>
> An arbitrator's obligations include the duty not to delegate his or her responsibilities or tasks to third parties. This duty is widely reflected in ethical guidelines, national court decisions and commentary. Most fundamentally, an arbitrator cannot delegate the duty of deciding a case, attending hearings or deliberations, or evaluating the parties' submissions and evidence to others: these are the essence of the arbitrator's adjudicative function and they are personal, non-delegable duties.
>
> It is nevertheless common for arbitrators to obtain a range of assistance in connection with the arbitral proceedings from third parties. Arbitrators obviously use clerical assistance, which can readily extend beyond typing, organizing files and the like, to dealing with administrative matters; these tasks will often be conducted either by secretarial or similar staff, but sometimes by junior lawyers or interns. As discussed below, in some instances arbitrators will appoint a "secretary" to assist the tribunal, being a younger lawyer (often from the presiding arbitrator's law firm).
>
> …
>
> A central premise of the role of the secretary is that he or she may not assume the tribunal's (or an arbitrator's) functions and may not influence the tribunal's decision. In the words of the ICC Secretariat's Note Concerning the Appointment of Administrative Secretaries

> "Under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. Nor should the Arbitral Tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator."

> Nevertheless, it is common practice for secretaries (or other junior lawyers) to conduct legal research for tribunals, to organize files and witness statements (sometimes going beyond merely administrative work) and sometimes to draft portions of awards. Obviously, the latter tasks can, if not carefully monitored and checked, risk inappropriately involving a secretary or other junior lawyer in the tribunal's deliberations or decision-making. Nevertheless, the better view is that there is no *per se* prohibition on secretaries or junior lawyers performing such tasks, provided that the members of the tribunal carefully review and make appropriate use of any preparatory work."

64. The conclusions of a 2006 report by joint committees of the New York City Bar Association (The American Review of International Arbitration 2006 Vol 17 No4) included the following passages:

> "The role of the arbitrator is characterised by its *intuitu personae* nature. The appointment of a secretary may be reconciled with this fundamental principle so long as the arbitral tribunal exercises both close supervision of and has ultimate authority over the decision-making process." (p.586).

and

> "There is concern that a secretary permitted substantial involvement may exercise undue influence over the arbitral tribunal and, as a result, affect the disposition. This concern is best addressed by disclosure, transparency and informed consent of the parties." (p.591).

65. Whatever the divergence of views amongst practitioners and commentators as to best practice, the critical yardstick for the purposes of s. 24 of the Act is that the use of a tribunal secretary must not involve any member of the tribunal abrogating or impairing his non-delegable and personal decision-making function. That function requires each member of the tribunal to bring his own personal and independent judgment to bear on the decision in question, taking account of the rival submissions of the parties; and to exercise reasonable diligence in going about discharging that function. What is required in practice will vary infinitely with the nature of the decision and the circumstances of each case.

66. The parties in this case have agreed to the use of a tribunal secretary, and his identity, and have conferred upon the tribunal, by the agreement reflected in Article 14.2 of the LCIA Rules, the widest possible discretion as to how to go

about discharging their core decision-making responsibilities with the assistance of a tribunal secretary.

67. As I observed in my judgment on the disclosure application, performing the adjudicatory function is often an iterative process. There is nothing offensive per se to performance of that function in receiving the views of others, provided the adjudicator makes his own mind up by the exercise of independent judgment. A judge may be assisted by the views of a judicial assistant or law clerk, but that does not prevent him or her from reaching an independent judgment in accordance with the judicial function. An arbitrator who receives the views of a tribunal secretary does not thereby necessarily lose the ability to exercise full and independent judgement on the issue in question. When Mr Born treats as impermissible the delegation of "evaluating the parties' submissions or evidence" I anticipate that he is speaking of delegation of the function; it is not the case that the involvement of a secretary in such tasks as part of the overall process is of itself incompatible with the non-delegable duties of the tribunal. Process and function are not the same.

68. Nevertheless there is considerable and understandable anxiety in the international arbitration community that the use of tribunal secretaries risks them becoming, in effect, "fourth arbitrators". Care must be taken to ensure that the decision-making is indeed that of the tribunal members alone. The safest way to ensure that that is the case is for the secretary not to be tasked with anything which involves expressing a view on the substantive merits of an application or issue. If he is so tasked, there may arise a real danger of inappropriate influence over the decision-making process by the tribunal, which affects the latter's ability to reach an entirely independent minded judgment. The danger may be greater with arbitrators who have no judicial training or background, than with judges who are used to reaching entirely independent adjudicatory decisions with the benefit of law clerks or other junior judicial assistants. However the danger exists for all tribunals. Best practice is therefore to avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide. If the secretary's role is circumscribed in this way, the parties can have confidence that there is no risk of inappropriate influence on the personal and non-delegable decision-making function of the tribunal.

69. However a failure to follow best practice is not synonymous with failing properly to conduct proceedings within the meaning of s. 24(1)(d) of the Act. Soliciting or receiving any views of any kind from a tribunal secretary on the substance of decisions does not of itself demonstrate a failure to discharge the arbitrator's personal duty to perform the decision-making function and responsibility himself. That is especially so where, as in this case, the relevant arbitrator is an experienced judge who is used to reaching independent decisions which are not inappropriately influenced by suggestions made by junior legal assistants.

70. Against that background, the conduct of the Chairman in relation to tasks performed by the Secretary in this case demonstrates no failure properly to conduct proceedings. In particular:

(1) The use of a tribunal secretary to analyse submissions and draft procedural orders is not an improper delegation of decision making functions, absent contrary agreement by the parties. Nor would it necessarily be such an improper delegation were the chairman to solicit or take account of the views of this arbitral secretary on the merits of these procedural decisions.

(2) The account given by the Chairman of the use of the Secretary in relation to the Decisions is within the bounds of the proper and appropriate use of such a secretary. The Chairman explained in the letter of 20 June 2016 that for the first year of the reference the Secretary was employed as his "Legal Adviser" and they worked side by side in the same building. The Chairman's comment that he "*worked cheek by jowl"* with the Secretary does not, as the Claimant submitted, indicate any impropriety. It indicates careful supervision of the Secretary's work, not that the latter improperly participated in or influenced the decision-making process.

(3) The Misdirected Email is not indicative of improper delegation. The explanation given by the Chairman that he was asking for a status update is one there is no reason to doubt, and would not involve any improper delegation. In any event, had the Chairman been asking the Secretary's view on the merits of the submission, it cannot be inferred (and the Chairman has denied) that he thereby surrendered any part of his own decision-making role.

(4) The number of hours worked by the Chairman on each of the Decisions under consideration (8.6 hours on the Record Sharing Decision, 10 hours on the Second Stay Decision and 45 hours on the Second Document Production Decision) strongly corroborate his statement that he did not improperly delegate his decision-making functions but rather performed them fully and properly.

(5) Mr Daele's witness statement relies on what he suggests was a disproportionate number of hours billed in respect of the Decisions by the Secretary relative to those of the Chairman (9 hours to 8.6 hours, 14 hours to 10 hours and 33 hours to 45 hours). This is misconceived. No criticism is addressed to the number of hours spent by the Chairman as such. If the time spent by him was sufficient for his decision making responsibilities, the time spent by the Secretary tells one little. In any event, the time spent by the Secretary is not indicative of any inappropriate role on his part. The Decisions recited some of the relevant procedural background and, as is common in international arbitrations although not strictly necessary, recited in detail the rival submissions of the parties. Marshalling the material for those parts of the Decisions and being involved in their drafting would be a proper function of the Secretary and would account for the hours spent.

(6) The LCIA Division considered and dismissed the allegation of improper delegation against the Chairman: paragraphs 262-266. The Court should be slow to differ from such a conclusion for the reasons identified earlier in this judgment.

71. For all these reasons I reject the Indirect Delegation Argument, quite apart from the issue of substantial injustice which I address below.

The Secretary Tasks Delegation Argument

72. This is a vain attempt to find something which the Co-Arbitrators improperly delegated to the Chairman in the absence of any improper delegation of their decision-making function.

73. As the Co-Arbitrators correctly observed in their written observations of 20 June 2016, it is "normal for a Secretary to work under the direct supervision of the Chairman." That is not only normal but entirely appropriate. The chairman of an experienced tribunal can quite properly be left to determine the tasks to be performed by the tribunal secretary without the need for the co-arbitrators to be involved. In an experienced tribunal such as that involved in the present case, the co-arbitrators can proceed upon the assumption that the secretary will be tasked appropriately in the absence of something to alert them to the contrary.

74. The statements of best practice in the Young ICCA Guide as to supervision of a secretary by "the tribunal" are not to be read, as Mr Houseman QC would have them read, as if the three members of a panel each have a non-delegable duty of supervision. It is not the case that the Co-Arbitrators were under a personal, non-delegable duty to direct or manage the Secretary collectively. Direction and supervision will normally be exercised by the chairman who will be the main point of contact between the secretary and the tribunal.

The Supervision Argument

75. The Claimant's argument that the Co-Arbitrators failed to comply with some supposed duty to satisfy themselves that the Chairman was not improperly delegating his functions to the Secretary is equally hopeless.

76. There is no such duty. It was not the Co-Arbitrators' role to supervise the Chairman, especially given his extensive experience. There was no reason for the Co-Arbitrators to identify a real risk of improper delegation by the Chairman. None was advanced by the Claimant. Moreover the Chairman did not, in fact, make any improper delegation, for the reasons I have explained.

The Misrepresentation argument

77. The first misrepresentation argument is that the effect of the language used in the letters of 8 April 2016 and 21 April 2016 was that "there had been no delegation in any way of any of the tribunal's functions or responsibilities at any time and that only tasks of an administrative nature had been assigned to and undertaken by the Secretary", which was false because (1) the Co-Arbitrators themselves drew a distinction between appropriate and inappropriate delegation, thereby impliedly admitting some degree of delegation, and (2) the Secretary had undertaken more than administrative tasks.

78. The Claimant's Counsel previously submitted to Blair J that the Co-Arbitrators "took steps to conceal" the true position as part of a "strategy" of "self-interested

obstruction". That very serious allegation has been abandoned. It is unfortunate that it should ever have been made. Nevertheless the Claimant's case still makes the serious allegation that the misrepresentations were made negligently by the Co-Arbitrators. This argument cannot succeed for a number of reasons.

79. First, this ground was not raised before the LCIA Court as a distinct basis for revoking the Co-Arbitrators' appointments under Art. 10 of the LCIA Rules. It was not one of the five grounds on which the challenge was based. Whilst the Claimant made a passing comment in its submissions to the LCIA Court that the Tribunal's "explanations have varied over time", this was made in the context of setting out the Claimant's case as to what role the Secretary had played for the purposes of advancing ground 1 of its challenge (regarding inappropriate use of the Secretary). There was never any allegation of misrepresentation and, critically, it was never suggested that the supposed change in the explanations was a ground for removal of any of the members of the Tribunal.

80. As a result and pursuant to s. 24(2) of the Act, the Court cannot exercise its powers under s. 24 in respect of this claim because the Claimant did not exhaust recourse to the arbitral institution. Contrary to the Claimant's submissions at the disclosure hearing, this is not simply a question of timing and of staying this part of the claim: the challenge cannot now be raised before the LCIA Court given that the time for making a challenge under Art. 10.4 (15 days from the date of awareness) has long since expired.

81. Secondly, even if the Court could exercise its powers, there was no representation as is alleged. The Claimant's allegation of what was represented is not a realistic or fair reading of the relevant passages in the two letters taken in context. The Claimant picks out the phrases "… neither the Tribunal nor any of its members has 'delegated' any function to the Tribunal Secretary…" from the letter of 8 April 2016, and "none of the powers and responsibilities of any of the Members of the Tribunal has been delegated, surrendered or assigned in any way to the Tribunal Secretary…" from the letter of 21 April 2016. However, the letters must be read as a whole. In the letter of 8 April 2016, the Tribunal went on to say that the Secretary has "… engaged in such matters as organising papers for the Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, **preparing drafts of orders and correspondence** for consideration by the Tribunal, and sending correspondence on behalf of the Tribunal" (emphasis added). It was therefore clear, from the outset, that the Secretary had performed tasks on behalf of the Tribunal, including preparing drafts of orders and correspondence. Similarly, in the letter of 21 April 2016, the Tribunal stated that the "Secretary has at no time participated in the deliberations of the Tribunal", whilst making clear that the Secretary prepared drafts for the Chairman's use ("… the Chairman must perforce have conversations and e-mail communications very often with the Tribunal Secretary in order to instruct him on preparatory work for the Chairman's eyes only in the first instance that will lead to further preparation of drafts that the Chairman will present to the other Members of the Tribunal…" and "As to drafting orders etc., this is done all the time by tribunal secretaries under the supervision of the tribunal chairperson…").

82. As the Tribunal confirmed in its letter of 21 April 2016, the Chairman's and Secretary's statements of fees were being submitted simultaneously with that letter and were forwarded to the parties by the LCIA secretariat on 28 April 2016. These statements demonstrated that the Secretary had undertaken substantial work on the Second Document Production Decision, just as his previous statement of fees had recorded his work on the Document Sharing Decision and the Second Stay Application. Given that the Claimant relies upon these documents as showing the extent of the drafting undertaken by the Secretary, it is unrealistic to contend that it was being suggested at the time that no tasks whatsoever were being performed by the Secretary.

83. The argument the Claimant now advances appears to turn on a semantic analysis of how the Tribunal used the word "delegate" in correspondence to the LCIA Court. However, even taking the correspondence in April 2016 in isolation, any reasonable reader would understand that the Tribunal was denying (improper) "delegation" of the functions/powers/responsibilities reserved to its members, i.e. of their decision-making role. Nobody reading the letters (and time sheets) in April 2016 could reasonably have thought that the Secretary was not, amongst other tasks, preparing drafts.

84. Indeed, it is clear that the Claimant itself understood the true meaning of the correspondence, and did not read it in the way it now contends it should be read. In the Claimant's LCIA Challenge (i.e. shortly after the April 2016 letters) it said that "… the Tribunal has implicitly admitted in its letter dated 21 April 2016 that the Secretary was indeed involved in the drafting process…"; and later, to justify the timing of its challenge, it said that the Tribunal "admitted for the first time [in its letter of 21 April 2016] that the Secretary had been involved in the preparation and drafting of various Decisions".

85. Thirdly, even if the correspondence in April 2016 was potentially ambiguous, the Tribunal subsequently explained its position with clarity. The Tribunal explained in paragraphs 3.1 and 16.1 of its observations of 11 July 2016 that its denial of delegation was intended to convey that the tribunal had retained its "intuitu personae powers and responsibilities to be the sole deciding person" and was never meant to suggest that the Secretary had not carried out any tasks for the benefit of the Tribunal. The Co-Arbitrators explained that certain tasks were performed by the Secretary in their letters of 20 June 2016 and 11 July 2016.

86. The new misrepresentation argument added by amendment to the Particulars in the week before the hearing is similarly devoid of merit. The passage relied on in the letter of 20 June 2016 is "Any delegation of tasks to the Tribunal Secretary was a matter for the Tribunal in the exercise of its discretion." This was said to be a representation that the delegation had been by the Tribunal as a whole and so had taken place with the involvement and oversight of each of the Co-Arbitrators. This is simply not what it means or would reasonably have been understood to mean. The normal practice would be for the chairman to perform those roles on behalf of the tribunal. It is in this sense that the letter identified what had been done by the Tribunal through the Chairman in this case. This is made clear only two sentences later in the very same letter when the Co-Arbitrators say "It is normal for a Secretary to work under the direct supervision of the Chairman, who

will give multiple written and oral instructions to the Secretary in relation to the work he/she wants the Secretary to do."

Conclusion on failure properly to conduct the proceedings

87. There is no merit in any of the arguments, either singly or cumulatively, that the Co-Arbitrators failed properly to conduct the proceedings. That is sufficient to dispose of the application. However even had there been merit in them, the application would have failed because the Claimant has not established any substantial injustice.

Substantial Injustice

88. As the DAC Report notes at paragraph 106, substantial injustice has resulted or will result *"… only… where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended"*. Thus, s. 24(1)(d) "… *exists to cover what we hope will be the very rare case where an arbitrator so conducts proceedings that it can fairly be stated that instead of carrying through the object of arbitration as stated in the [Act], he is in effect frustrating that object"*. This test has been repeatedly adopted and applied by the courts.

89. A test of "substantial injustice" is also used as a necessary threshold ingredient for challenging an award under s. 68 of the Act. In that context, it is well established that this places a burden on the applicant to show that the arbitrator's failure caused the tribunal to reach a decision which, but for that failure, it might not have reached: see per Andrew Smith J in ***Maass v Musion Events Ltd*** [2015] 2 Lloyd's Rep. 383 at [40]; ***Terna Bahrain Holding Company WLL v Al Shamsi*** [2012] EWHC (Comm) 3283 at [85(7)].

90. The Claimant cannot show that substantial injustice has resulted or will result in this case. Even if, contrary to my earlier conclusions, the Co-Arbitrators had failed to conduct the proceedings properly in relation to the Decisions, it cannot seriously be suggested that the decision-making process which they adopted went "*beyond anything that could reasonably be defended*", especially in circumstances where the LCIA Division held that the manner in which this Tribunal worked was "*entirely in keeping with the way in which arbitral tribunals function"*.

91. Moreover the Claimant makes no attempt to show that the Decisions might have been different had the Co-Arbitrators taken a different approach to decision-making. This is a burden which must be addressed on the evidence; substantial injustice cannot simply be assumed: ***Lesotho Highlands Development Authority v Impregilo SPA and Ors*** [2005] UKHL 43 at [35].

92. The nature of the three decisions which are attacked is not such as to be capable of causing substantial injustice:

    (1) The Record Sharing Decision merely gave effect to an agreement to make the LCIA record available in the other arbitration, deferring the contentious issue about whether certain statements/documents should be excluded.

(2) The Second Stay Decision merely concluded that there had been no significant change of circumstances since the First Stay Decision but left open the possibility of a further stay application.

(3) The Second Decision on Document Production was intended to secure the Claimant's compliance with the Tribunal's (unchallenged) previous orders requiring efforts to be made to obtain documents from third parties, largely by requiring certification of what efforts it had used to obtain documents in accordance with the previous order. Contrary to the Claimant's submissions, the Second Decision did not order the Claimant to undertake large-scale search and production of documents, the scope of the disclosure exercise having been determined by the first decision, about which no complaint is made; nor did it pre-judge whether the Claimant controlled certain third parties, the Tribunal being careful not to do so but, instead, requiring certification of the efforts used to obtain documents from those third parties. There can be no substantial injustice in requiring a party to identify and affirm the efforts that it has made to obtain identifiable categories of documents.

93. The only specific injustice identified by the Claimant is an assertion that a finding of improper delegation would entail a wholesale breakdown of trust and confidence in the Co-Arbitrators on the Claimant's part. However, a professed loss of confidence cannot, of itself, constitute substantial injustice, absent some concrete or substantive prejudice. As Dyson J, as he then was, explained in ***Conder Structures v Kvaerner Construction Ltd*** (unreported, 15 April 1999):

> "… I do not accept that an alleged loss of confidence in an arbitrator caused by an irregularity in the proceedings is capable itself of being substantial injustice. In my judgment, an applicant who invokes s. 68 must show that the irregularity has caused, or will cause him to suffer substantial concrete or substantive prejudice. It is not sufficient to show that the irregularity has demonstrated incompetence on the part of the Arbitrator and has undermined the confidence of the applicant in the ability of the Arbitrator. Loss of confidence is neither a sufficient nor a necessary condition of substantial injustice. It is simply not the test. It is possible for an arbitrator to commit an irregularity which raises a question as to his competence and yet which causes no injustice to either party, still less any substantial injustice. Conversely it is possible for a competent arbitrator to make a mistake which causes substantial injustice and which needs to be put right by the court but in circumstances where, in the general sense, the applicant retains full confidence in the arbitrator. After all, Homer does sometimes nod."

94. Dyson J went on to conclude that "The fact that, for the reasons that I have given earlier, it has not been shown that substantial injustice has been or will be caused to Conder is as fatal to the application under s. 24 as it is to the application under s. 68".

95. Further, the confirmation of the Decisions by the newly constituted Tribunal after careful consideration, without involvement of the Secretary, pursuant to s. 27(4) of the Act is fatal to the establishment of substantial injustice.

96. The suggestion by the Claimant that the Co-Arbitrators' position on the Claimant's failed disclosure application, and the costs incurred by them in opposing that application, have a bearing on the question of substantial injustice is risible. Those matters are incapable of constituting a substantial injustice. It was legitimate for the Co-Arbitrators to resist the disclosure application in light of the confidentiality of deliberations and the potential impact of disclosure on the Tribunal's ability to perform its continuing functions; and the Claimant will only pay such costs to the extent ordered by the Court in the exercise of its discretion.