TRANSCRIPT OF PROCEEDINGS

Ref. CL-2016-000796

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
NCN [2020] EWHC 324

Rolls Buildings
Fetter Lane

Before MR JUSTICE BUTCHER

(1) XSTRATA COAL QUEENSLAND PTY LTD (COMPANY NUMBER 098156702) NOW KNOWN AS ROLLESTON COAL HOLDING PTY LIMITED AND FORMERLY KNOWN AS GLENCORE COAL QUEENSLAND PTY LIMITED (2) SUMISHO COAL AUSTRALIA PTY LIMITED (3) ITOCHU COAL RESOURCES AUSTRALIA PTY LIMITED (4) ICRA OC PTY LIMITED
Claimants

- and -

BENXI IRON & STEEL (GROUP) INTERNATIONAL ECONOMIC & TRADING CO LTD
Defendant

MR D LEWIS QC appeared on behalf of the Claimants
MR A GUNNING QC appeared on behalf of the Respondent

JUDGMENT
21st JANUARY 2020, 10.25-11.34
(AS APPROVED)

MR JUSTICE BUTCHER:

1. This is an application by the Claimants under section 68 of the Arbitration Act 1996, for remission to the arbitrator, of an arbitration award made by Mr Gerald Aksen, to whom I will refer as the Arbitrator, dated 23 August 2010, which was given under the rules of the LCIA, and/or for remission of a decision of the Arbitrator given pursuant to Article 27.1 of those rules. There is also before me a separate application to re-re-amend the claim form, which I will deal with at the end of this judgment. The case is a somewhat unusual one, in that this is a section 68 challenge brought by an award creditor.

Background facts

2. The underlying dispute arose out of an agreement by the Defendant to buy a substantial quantity of coking coal. There were four sellers, undoubtedly including the first three Claimants. The problem which has arisen relates to the identity of the Fourth Seller. The agreement between the Defendant as buyer and Sellers, was known as the Oaky Contract. It was executed by the Defendant and the First Claimant on 4 September 2008. The Oaky Contract contained a provision for arbitration under LCIA rules in the event of a dispute, and stipulated that the contract, including the arbitration clause, was to be governed by and construed in accordance with the substantive law of England and Wales.

3. The most important contractual provisions and their significance were summarised by Knowles J in paragraphs six to eight of a judgment of his(the significance of which I will explain in due course),as follows – and this is a quote from Knowles J's judgment:

> "6. The Oaky Contract is signed "for and on behalf of the Seller" by Xstrata Coal Queensland Pty Limited ("XCQ", the first named Claimant in these proceedings before the Commercial Court).
>
> 7. The Oaky Contract uses these words to describe "the Seller":
>
> "SELLER: Xstrata Coal Queensland Pty Limited (ABN 69098156702) as agent for the Oaky Creek Joint Venturers (being Sumisho Coal Australia Pty Limited, Xstrata Coal Queensland Pty Ltd, Itochu Coal Resources Australia Pty Limited and ICRA NCA Pty Limited) and [sic] Level 38, Gateway, 1 Macquarie Place, Sydney, N.S.W. 2000, Australia (as the Seller)".
>
> 8. It is therefore the fact that the words used in the Oaky Contract are "ICRA NCA Pty Limited" and not "ICRA OC Pty

> Limited". There is evidence that there do exist two companies, one by each name.
>
> 9. However the description of the Seller in the Oaky Contract also refers to "the Oaky Creek Joint Venturers". By a separate agreement dated 31 December 1997 and restated as at 1 March 2005, and named the Oaky Creek Joint Venture Agreement, four companies agreed and confirmed that they had by that agreement "associat[ed] themselves in an unincorporated joint venture, known as the "Oaky Creek Joint Venture", for the purpose of conducting" defined operations for the exploration and prospecting for, and mining and loading of, coal.
>
> 10. The fourth of the four companies so agreeing by the Oaky Creek Joint Venture Agreement was ICRA OC Pty Limited, not ICRA NCA Pty Limited (the company named as an Oaky Creek Joint Venturer under the Oaky Contract)."

4. A dispute arose under the Oaky Contract on 8 April 2009. The First Claimant only filed a request for arbitration against the Defendant. The Defendant in its statement of defence and counterclaim of 21 September 2009, took the point that the First Claimant had no title to sue other than in respect of its own interest in the Oaky Creek Joint Venture, being a disclosed agent of known principals. On 13 April 2010, the First Claimant applied to join the Second to Fourth Claimants as co-claimants, with their consent. On 17 April 2010, the Arbitrator granted the joinder of the Second to Fourth Claimants. An evidentiary hearing took place between 17 and 19 May 2010, at which the Defendant was represented by Leading and Junior Counsel, and by King and Wood, People's Republic of China Lawyers.

The Award

5. The resulting Award, which is dated 30 September 2010, contained the following significant paragraphs:

> "1. The claimants are Xstrata Coal Queensland Pty Limited ("XCQ" or "Xstrata"), Itochu Coal Resources Australia Pty Ltd ("Itochu"), ICRA OC Pty Limited ("ICRA") and Sumisho Coal Australia Pty Limited ("Sumisho") (collectively, the "Claimants"). The Claimants are companies incorporated in

> Australia. XCQ's registered address is at Level 38, 1 Macquarie Place, Sydney, NSW 2000 Australia."
>
> "7. The dispute arises under the "Contract for Sale and Purchase of Coking Coal", numbered OCP/BEN/HCC-08/01/01, which is dated 15 August 2008 and was executed by Ben Steel and XCQ on 4 September 2008 ("Oaky Contract"). XCQ signed as the Seller as agent for the Oaky Creek Joint Venturers (being itself Itochu, ICRA and Sumisho)."

And paragraph 109, which was to this effect:

> "The Oaky Contract defines the "Seller" XCQ "as agent for the Oaky Creek Joint Venturers", which jointly comprise all four individual claimants. The Tribunal determines, in accordance with the Oaky Contract, that Claimants seek an award in favour of all the Claimants jointly."

6. The operative part of the Award was in these terms:

> "The arbitral tribunal renders its Final Award as follows:
>
> (i) Within thirty (30) days of the date of this Award, Respondent Benxi Iron & Steel (Group) International Economic and Trading Co. Limited, shall pay to Claimants Xstrata Coal Queensland Pty Limited, Itochu Coal Resources Australia Pty Ltd, ICRA OC Pty Limited and Sumisho Coal Australia Pty Limited, jointly, the amount of United States Dollars Twenty Seven Million Eight Hundred Forty-Six Thousand (US$27,846,000), with simple interest thereon at the rate of one and one-half per cent (1.5%) from 1 January 2009 until date of payment."

7. As Knowles J said at paragraph 16 of his judgment, from these paragraphs of the Award it is clear that the Arbitral Tribunal treated ICRA OC Pty Ltd, and not ICRA NCA Pty Ltd: a) as a party to the Oaky Contract (including the agreement to arbitration); b) as one of the Oaky Creek Joint Venturers; c) as a party to the claim before the Arbitral Tribunal; and d) as a beneficiary of the Award.

Attempted enforcement of the Award

8. The Defendant did not pay under the Award. The Claimants applied on 16 August 2011, for the recognition and enforcement of the Award in the People's Republic of China under the New York Convention. The Defendant is incorporated in China and conducts business there. The Claimants' application was made to the Shenyang Intermediate Peoples' Court. The Defendant resisted recognition and enforcement. In doing so it focused, at what was described as an informal hearing before the Shenyang court on 18 July 2013, on the point that the Oaky Contract used the words "ICRA NCA Pty Ltd".

9. The Defendant made, amongst others, the following submissions:

> "The parties subject to the arbitration clause were Bensteel and four Companies, including NCA; however the Arbitral Award was rendered to Bensteel and different Companies, three of which were the same while the fourth one turned out to be OC, but not NCA. There is no explanation about the change of the company in the Award; therefore we believe that there was a critical flaw in the arbitral process. We was shown this evidence today that NCA stated it didn't sign the contract, while in fact the contract parties included NCA since Article 1 of the contract demonstrated that the contract was signed between the Joint Venture consisted of four companies and Bensteel.
> If this evidence is authentic then we highly doubt the effectiveness of the contract itself. Not only has the evidence itself failed to support the Claimants' allegation, it furthered deepen our concerns and questions about the parties to contract.
> The correction of the parties to the contract and the arbitration clause, under the circumstances that the Award has been rendered, should not be made by the Court which determines whether or not to recognized and enforce the Award, but should be made by the Arbitral Tribunal in advance. It is not proper

> that the Claimants intend to correct such material mistake through the procedure of enforcement."

And further

> "OC is a distinct company, rather than the party to the contract or the arbitration clause. The arbitral procedure was not conducted properly, there was no explanation or statement whatsoever, just the result that the other three parties, including OC, were joined as co-claimants."

10. The Shenyang court issued a decision on 25 April 2014. It included the following:

> "The Joint Venture under the Contract for Sale and Purchase of Coking Coal was established by Sumisho, Xstrata, Itochu and ICRA OC. The evidence provided by the Respondent demonstrated that ICRA OC and ICRA NCA are two different companies since the Australian company registration number of ICRA OC is 106 260 593, and that of ICRA NCA is 106 260 584. The statement of ICRA NCA submitted by the Claimants, which represents that "ICRA NCA is never aware of, nor involved in the Contract for Sale and Purchase of Coking Coal executed with Benxi Iron & Steel (Group) International Economic & Trading Co. Ltd independently or as a party to any joint venture, ICRA NCA is not a party to and has no legal relationship with Oaky Creek Joint Venture". However, ICRA NCA cannot, solely by its subsequent statement, deny the fact that it is one of the parties to the Contract for Sale and Purchase of Coking Coal, or prove that ICRA OC is one of the parties of the Contract for Sale and Purchase of Coking Coal. Shenyang Court found that there is no contractual relationship between ICRA OC and the Respondent, therefore, the arbitration agreement (i.e. the arbitration clause in the Contract for Sale and Purchase of Coking Coal) does not exist. Therefore, ICRA OC shall not be deemed as one of the claimants under the arbitration

> request submitted to LCIA, and the arbitration award, which requires the Respondent to make payment to the four Claimants, including ICRA OC, is without merit because of a lack of supporting legal argument or factual basis."

11. Thus, the Shenyang court refused recognition and enforcement of the Award.

Application under article 27 of the LCIA rules

12. The Claimants sought to address this situation by applying under Article 27 of the LCIA rules. Article 27 of the LCIA rules 1998, which it was agreed were the applicable version, provides as follows:

> "Correction of Awards and Additional Awards.
>
> 27.1. Within 30 days of receipt of any award, or such lesser period as may be agreed in writing by the parties, a party may by written notice to the registrar (copied to all other parties), request the Arbitral Tribunal to correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature. If the Arbitral Tribunal considers the request to be justified, it shall make the corrections within 30 days of receipt of the request. Any correction shall take the form of a separate memorandum dated and signed by the Arbitral Tribunal or (if three arbitrators) those of its members assenting to it; and such memorandum shall become part of the award for all purposes.
>
> 27.2. The Arbitral Tribunal may likewise correct any error of the nature described in article 27.1 on its own initiative within 30 days of the date of the award to the same effect.
>
> Within 30 days of receipt of the final award, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to make an additional award as to claims or counterclaims presented in the arbitration not determined in any award. If the Arbitral Tribunal considers the request to be justified, it shall make the additional award within

> 60 days of receipt of the request. The provisions of Article 26 shall apply to any additional award."

13. The Claimants' application was that the Arbitrator should make an additional award, or make corrections to the Award. That application under Article 27 faced the hurdle that an application for a correction of the Award, or an additional award, had to be made within 30 days of the making of the Award. The Claimants applied to the LCIA for an extension, but the LCIA confirmed on 11 June 2014, that in the absence of agreement between the parties, or an order from a competent court extending time, the arbitral tribunal was functus officio. The Claimants accordingly applied to this court for an extension of time, pursuant to its powers under section 79 of the Arbitration Act. That application came before Knowles J, on 27 April 2016. The judgment on that application is the one to which I have already referred and quoted from.

14. As I understand it, one of the arguments advanced before Knowles J by the Defendant was to the effect that there was no point in extending time, because the Arbitrator lacked any relevant power under Article 27. It was submitted that the terms of the LCIA Rules 1998, were significantly different from those of section 57 of the Arbitration Act. Section 57 of the Arbitration Act provides as follows:

> "(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
> (2) If or to the extent there is no such agreement, the following provisions apply.
> (3) The tribunal may on its own initiative or on the application of a party—
> (a)correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
> (b)make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.
> These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal …"

15. It was submitted to Knowles J that the absence of the words "clarify or remove any ambiguity" from Article 27.1 of the LCIA rules 1998, notwithstanding that they appear in section 57.3(a) of the Arbitration Act, indicated that the power of the tribunal under Article

27.1 was more limited. Knowles J summarised that argument and his conclusions on it in his judgment at paragraphs 30 to 34. There he said:

> "30. It was the words "clarify or remove any ambiguity" that were the focus of Cooke J's observations cited above. Mr Alexander Gunning QC, for the Defendant, submitted that the omission in the LCIA Rules 1998 of reference to a power to clarify or remove ambiguity was deliberate … Mr Gunning QC drew attention to the fact that in the LCIA Rules 2014 Article 27.1 does now contain reference to "ambiguity". He uses that point to reinforce his submission that there is significance in those words being absent in the LCIA Rules 1998.
>
> 31. I do not see, with respect, that the article relied on bears out the submission. Indeed in my view it tends against the submission. The article references a choice by the LCIA to take a different course from the UNCITRAL draft Model Law, by omitting provision for the parties to request "interpretations" of awards. That is one thing. However the article says something quite different of the authority that is given by Article 17 in the LCIA Rules 1985 (the forerunner of Article 27 in the LCIA Rules 1998): "If such an authority did not exist, there might be a problem if arbitrators having rendered an award were considered functus officio and therefore without jurisdiction to correct the clerical mistakes and omissions which occasionally may be made". And more generally the article describes the "guiding principles" for the LCIA Rules 1981 and 1985 as "party autonomy, on the one hand, and giving the tribunal maximum discretion and powers, on the other hand".
>
> 32. In my judgment clarifying or removing ambiguity would fall within the words "any errors of a similar nature" in Article 27.1 of the LCIA Rules 1998. I regard the amendment to the LCIA Rules 2014 as stating expressly what was previously implicit.

> 33. In a memorandum of 30 September 2010 the arbitral tribunal expressed the view when denying a (separate) request by the Buyer for clarifications of the Award that under Article 27 "the grounds for granting corrections are narrow in scope … [t]here are no provisions in LCIA Article 27 for "clarification" or insertion of additional language". I express no view either way on his decision to deny that particular request by the Buyer, but respectfully consider that Article 27 does allow clarification through the use of a memorandum which then becomes part of the Award.
>
> 34. The present case is not a case of "interpretation". Following Cooke J, it is not a case of a claim that has been presented to the arbitral tribunal but has not been dealt with. But it does involve an "omission which may occasionally be made", to use the language of Hunter and Paulsson. In these circumstances I am satisfied that, if time were extended by this Court, the Claimants would be entitled to request the arbitral tribunal to make corrections to the Award that would clarify a matter that omission had left unclear or ambiguous."

16. Knowles J proceeded to find that this was a case in which substantial injustice would be done if time were not extended for an Article 27 application. His reasons were expressed as follows:

> "39. I take into account everything I have summarised above. Neither the parties to the arbitration nor the Shenyang Intermediate People's Court have the benefit of an explanation from the arbitral tribunal of how it dealt with the fact that the Oaky Contract used the words "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited".
>
> 40. The absence of an explanation from the arbitral tribunal thus leaves uncertainty about the Award, and that impedes the arbitral process. Justice requires that that uncertainty be resolved one way or another, and that the Claimants have the opportunity

> to seek that resolution. The Claimants wish to attempt that resolution by enabling the arbitral tribunal to add the explanation that is presently missing.
>
> 41. Enabling the arbitral tribunal to add an explanation that is present missing, so as to provide clarity or remove ambiguity, is in my judgment (as I have sought to explain above) a permissible approach under the applicable rules. It is also a just and reasonable approach. In the context of this case it is an approach that is designed to serve the objectives of holding parties to their agreement if they have agreed to arbitrate, and then of assisting the process of arbitration.
>
> 42. The arbitral tribunal will carefully control the process of receiving, considering and responding to the request. If the arbitral tribunal accedes to the request then the explanation will be available to the Courts of the People's Republic of China and it may be of assistance."

17. As to whether the Commercial Court should exercise its power to extend time, Knowles J dealt with this at paragraph 48, where he said:

> "As to the question whether the Commercial Court should exercise the power to extend time in circumstances where the Commercial Court is entitled to exercise the power, I am quite sure that the power should be exercised. I have had regard to the guidance in Gold Coast Ltd v Naval Gijon SA [2006] EWHC 1044 (Comm); [2006] Lloyd's Rep 400 (Gloster J). The matters to which I have referred in this judgment militate strongly in favour of the exercise of the power."

18. Accordingly, an order was made by Knowles J in terms which included that:

> "(1) The time for the Claimants to make a request to the Tribunal under Article 27.1 of the LCIA Arbitration Rules 1998 to explain how the Tribunal dealt

with the fact that the Oaky Contract used the words "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited" is extended until 16 September 2016."

19. The Claimants then made their Article 27 application to the Arbitrator. In their written submissions to the Arbitrator, they said, inter alia, the following:

> "12. With the benefit of [the extension granted by Mr Justice Robin Knowles], the Claimants hereby apply under Article 27.1 of the Rules for the tribunal to explain how it dealt with the fact that the Oaky Sale Contract used the words "ICRA NCA Pty Limited", and not "ICRA OC Pty Limited".
>
> 13. The way in which the Tribunal dealt with this fact should clarify how, as the Claimant understands and as the Judgment held, the Tribunal proceeded on the basis that ICRA OC was a party to the Oaky Sale Contract and therefore to an arbitration agreement with the Respondent, despite the description of the Joint Venturers in the Oaky Sale Contract referring to ICRA NCA.
>
> 14. Pursuant to Article 27.1 of the Rules, the Claimants request a "separate memorandum dated and signed by the Arbitral Tribunal", which will supplement and thereby "become part of the award for all purposes". Given the passage of time, the Claimants will now remind the tribunal of the relevant evidence and events in the Arbitration."

20. At paragraph 27, they said this:

> "While it is ultimately for the Tribunal, the Claimants respectfully submit that the matters below may assist to explain how the Tribunal dealt with the fact that the Oaky Contract used the words "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited":
>
> (1) In terms of the facts, the identity of the parties to a contract is a question of fact pursuant to English law. English law was

the governing law of the Oaky Sale Contract and the arbitration agreement, as well as the curial law of the Arbitration. The Oaky Sale Contract stated in terms that the Respondent was contracting with the Oaky Creek Joint Venturers. As a matter of fact, the relevant background evidence clearly showed that ICRA OC was one of those Oaky Creek joint venturers (whereas ICRA NCA was not) - each of the Oaky JV Contract and the Oaky SAA showed that it was ICRA OC (and not ICRA NCA) who was the relevant Oaky Creek Joint Venturer.

(2) In light of that background evidence, the identification of ICRA NCA in the Oaky Sale Contract was a mistake - the identification of ICRA NCA in parenthesis as one of the joint venturers in the Oaky Sale Contract was plainly a typographical error given the other evidence before the Tribunal as to the identity of the Oaky Creek Joint Venturers. It was clear what mistake had been made in the Oaky Sale Contract (namely listing ICRA NCA), and clear what correction needed to be made (instead identify ICRA OC as the relevant Oaky Creek Joint Venturer). ICRA OC (and not ICRA NCA) was, as a matter of fact, party to the Oaky Creek Sale Contract and to the arbitration agreement, and accordingly was a proper party to the Arbitration, despite the reference to ICRA NCA in the Oaky Sale Contract.

(3) In terms of the procedure, during the Arbitration, the Respondent did not challenge ICRA OC as a proper party to the Arbitration or as a party to the Oaky Sale Contract and to the arbitration agreement. In view of that fact, it is hardly surprising that the Tribunal did not explain how it dealt with the fact that the Oaky Sale Contract used the words "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited". The Tribunal did not need to - and so omitted to - clarify its findings that the Oaky Creek Joint Venturers included ICRA OC and that the Oaky Sale Contract and the arbitration agreement were

> concluded by Xstrata as agent for the four claimants in the arbitration, including ICRA OC."

21. The Defendant's submissions to the Arbitrator included that the Arbitrator probably did not deal with the matter by any process of reasoning at all, in light of the parties' submissions at the time. The Arbitrator gave his decision in writing, that decision is dated 23 November 2016. That decision included the following:

> "17. What Claimants seek, by way of "explanation", is a correction to the Award, stating that "the identification of ICRA NCA in the Oaky Sale Contract was a mistake … and plainly a typographical error…." … Claimants assert that ICRA OC is a proper party claimant because it is listed in a separate agreement as one of the four Oaky Creek Joint Venturers, whom the Contract states Xstrata represents as agent on behalf of the Seller. The fact that the Contract lists ICRA NCA as a joint venturer instead of ICRA OC is claimed to be a mistake. The question before the tribunal, therefore, is whether Claimants' requested relief falls within the scope of Article 27.1.
>
> 18. During the arbitration, neither the Parties nor the Tribunal ever directly dealt with the fact that the Contract identified ICRA NCA and not ICRA OC as a contracting seller. The original 2009 arbitration request specifically named only the two actual signatories to the Contract, that is, Xstrata Coal Queensland Pty Limited … as Claimant and Benxi Iron & Steel (Group) International Economic & Trading Co Ltd as Respondent.
>
> 19. On 20 April 2010, the Tribunal granted the application of Xstrata to join the three additional co-claimants, i.e., Itochu Coal Resources Australia Pty Limited, ICRA OC Pty Limited, and Sumisho Coal Australia Pty Limited. The LCIA changed the case caption to include the newly joined co-claimants, including ICRA OC. At no time during the arbitration did the Parties raise the issue of the two different names.

20. The Tribunal is sympathetic to the situation in which the Claimants now find themselves, in that a jurisdictional objection not raised during the arbitration was the basis for an attack on the Award during post-Award proceedings. Respondent had the right under the LCIA rules to raise a jurisdictional plea based upon ICRA OC's alleged non-party status but did not do so. Whether the Tribunal can now remedy the situation is a different matter.

21. Claimants acknowledge that "the identity of the parties to a contract is a question of fact…" … However the question of whether ICRA NCA was mistakenly identified as a party in the Contract was, put simply, never addressed or considered by either the Parties or the Tribunal during the arbitration. Consequently, the Tribunal made no finding in the Award concerning that question.

22. Article 27.1 is limited to correction of computational, clerical and typographical errors or errors of similar nature. Dealing with the allegedly mistaken reference to ICRA NCA in the Contract involves more than correcting a simple "typographical" mistake. A finding as to the proper identity of a contracting party would be an addition to the Award, not a mere correction. As Respondent notes, the Tribunal found in the 2010 Memorandum that Article 27.1 of the LCIA Rules has no provision for clarification or insertion of additional language, and it, furthermore, denied request by Respondent on that basis.

23. Claimants point out in their Reply that Justice Knowles took a broad view under which Article 27.1 allows corrections to the Award that would clarify a matter than an omission had left unclear or ambiguous. Even assuming, respectfully, that such were the case, the problem remains that the "clarification" sought by Claimants would, in this instance, require evidentiary fact-finding by the Tribunal concerning the relationship of ICRA OC and ICRA NCA. The Tribunal cannot grant the relief

sought by Claimants on the existing record. However broadly the scope of Article 27.1 is construed, it does not contemplate additional evidentiary proceedings.

24. With regret, Claimants' Application is, therefore, DENIED."

The application under section 68 of the Arbitration Act

22. It is in the light of that decision that the present application is made under section 68. The application was issued on 19 December 2016. The reason it has taken such a long time to come before the court is essentially due to delays in effecting formal service in China. The remedy claimed in the Claim Form was explained in this way:

"4. The Claimants rely upon section 68(2)(f) and/or section 68(2)(c) of the Act, in circumstances where (1) there is uncertainty or ambiguity as to the effect of the Award as reflected in the refusal of the Courts of the PRC to recognise and enforce the Award; and/or (2) the Tribunal failed to conduct the proceedings in accordance with the procedure agreed by the parties because the Tribunal failed to deal with the application pursuant to Article 27.1 in accordance with the LCIA rules.

5. There was and is substantial injustice to the Claimants in that recognition and enforcement of the Award has been refused, whereas if the Award and/or Decision is remitted for reconsideration and a fresh award is issued thereafter the Courts of the PRC may reconsider that decision and/or obstacles to enforcement in other jurisdictions may be removed.

6. This application is within time under section 70(3) of the Act as it has been brought within 28 days of the outcome of the arbitral process of review pursuant to Art 27.1 of the LCIA Rules, which process resulted in the Decision.

7. The Claimants claim orders that the Award be remitted to the Tribunal to reconsider the identity of the parties to the Oaky Contract."

23. It is helpful here, also, to set out the relevant parts of section 68 of the Arbitration Act 1996, which are as follows:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant …
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties …
> (f) uncertainty or ambiguity as to the effect of the award …"

24. It is also necessary to refer to the terms of section 70(3) of the Act, which are as follows:

> "Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

Section 80(5) can also be referred to at this juncture; it provides:

> "Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement."

25. Thus, that subsection gives the power to the court to extend the time for making a section 68 application.

26. The Defendant gives two answers to the Claimants' present application. The first is that the application is out of time, and the second is that none of the heads of section 68 is engaged, and that the application fails for that reason also. I will take those points in turn.

Is the application out of time?

27. The Defendant's case that the application's case is out of time is as follows:

(1) By section 70(3) of the Arbitration Act, an application under section 68 should have been made within 28 days of the Award or, if there has been any arbitral process of appeal or review, within 28 days of the date when the applicant was notified to the result of that process.

(2) An application under Article 27 of the LCIA rules is not an arbitral process of appeal or review.

(3) The Defendant accepts that, had that application been successful and the Award corrected, the Award would be treated as having been made insofar as materially corrected on the date of the corrected award.

(4) Here, however, the Article 27 application was not successful, and the Award was not corrected. Accordingly, the date of the Award was 23 August 2010.

(5) The Defendant recognises that the Claimants could make an application to the court to extend time under the power recognised in section 80(5) of the Arbitration Act, but point out that no such application has been brought before the court, and say that no such extension should be permitted were such an application made.

28. The Claimants' case is that in the case of a material application under Article 27 of the LCIA rules, even if that application is unsuccessful, the period of 28 days starts to run following the response of the tribunal to the Article 27 application. Accordingly, here, time started to run from 23 November 2016. The Claim Form was issued on 19 December 2016, 26 days after the arbitrator made his decision, and, therefore, in time. I was referred to a number of authorities which bore more or less directly on this issue, namely *McLean Homes South East Limited v Blackdale Limited*, a decision of HHJ Humphrey Lloyd QC, dated 2 November 2001; *Al Hadha Trading Company v Tradigrain SA & Ors* [2002] 2 Lloyd's Rep.

512; *Price v Carter* [2010] EWHC 1451 (TCC); *K v S* [2015] EWHC 1945 (Comm); and *Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Equinox Ltd and another* [2018] EWHC 538 (Comm).

29. Having considered the Act and in the light of those authorities, it is in my judgment clear that an application under section 57 of the Act, or its equivalent under an agreed power to correct an award, such as Article 27 of the LCIA rules, is not an arbitral process of appeal or review within section 70(2)(a) of the Act. Section 70(2) draws a clear distinction between a process of appeal or review and any available recourse under section 57. Mr Lewis QC accepted that this was the case, and that the Article 27 application was not an arbitral process of appeal or review.

30. The authorities also provide clear support to the proposition that, if there is a material application for a correction under section 57 of the Act, or an agreed process to the same effect such as Article 27 of the LCIA rules, and if that leads to a correction, then on the proper construction of section 70(3), the 28 day period runs from the date of the award as corrected.

31. The reference to materiality in that proposition is explained in *K v S* by Teare J at paragraph 21 of his judgment:

> "… the mere fact that there had been an application for a correction pursuant to section 57 [or an agreed equivalent does not of itself] mean that the 28 day period ran from the date of the corrected award; otherwise a party could simply extend the time for challenging the award by finding some slip in the award which had no connection with the proposed challenge and issuing an application for a correction."

32. What constitutes a material application for correction of an award is described in paragraph 24 of *K v S*, as being one "where the correction is necessary to enable the party to know whether he has grounds to challenge the award". Such an application stands in contrast to one where the grounds of challenge are already known, and are not dependent on the outcome of the application for clarification.

33. The issue which is raised in this case is what is the relevant date, given that there was an application under section 57, or rather an agreed equivalent thereto, but it resulted in no correction of the Award. Is the relevant date the date on which the decision that there should be no correction is made known, or the date of the Award? As I have said, there will be no postponement of the starting date for the 28 day period, unless the section 57 or equivalent application is material.

34. Accordingly, the first issue to decide in the present case is whether the application under Article 27 was material to the section 68 application. In my judgment, it was. The application under Article 27, which was permitted by Knowles J's grant of an extension of

time, was specifically in order to seek that the Arbitrator should clarify a matter which rendered the Award unclear or ambiguous, as Knowles J put it in paragraph 34 of his judgment, or uncertain, as he put it in paragraph 40, by reason of an omission to explain why the Oaky Contract had used the words "ICRA NCA Pty Ltd" and not "ICRA OC Pty Ltd".

35. That application was directly relevant to the application now made under section 68(2)(f), in that, had it been successful, there would have been no basis for the present application under that subsection. Equally, it is obvious that the Article 27 application was material to the Claimants' subsidiary application under section 68(2)(c), because that is founded on the way in which the Arbitrator dealt with the Article 27 application.

36. That conclusion leaves to be decided the issue of whether a material application under section 57, or equivalent, operates in effect to postpone the start of the 28 day period, even if it does not result in a correction. Only a limited number of legal authorities have considered the situation where there is no correction. One which does raise that question directly is the decision in *McLean Homes v Blackdale*. There, HHJ Humphrey Lloyd QC decided that the relevant date for the commencement of the 28 day period was the date on which the arbitrator had decided that the award should stand as it was, and that it did not have to be clarified – see in particular paragraphs 19 to 21 of the judgment.

37. HHJ Havelock-Allan QC reached a similar conclusion in *Al Hadha v Tradigrain* in relation to ground one in the section 68 application, which he found, in paragraph 72 of his judgment, not to be out of time, notwithstanding that the section 57 or equivalent application had not resulted in any further reasons being given or in any correction to the award on the point relevant to ground one – see paragraphs 28 to 29 - and notwithstanding that the section 68 application was made within 28 days of the award which resulted from the section 57 application, but not within 28 days of the original award.

38. HHJ Humphrey Lloyd QC's reasoning in *McLean Homes v Blackdale* has been referred to with approval in subsequent cases and in particular (apart from in *Al Hadha v Tradigrain* at paragraph 63), in *K v S* at paragraph 24, albeit that *K v S* was not a case in which there was no correction made. In *Daewoo Shipbuilding v Songa*, at paragraph 57, Bryan J, in considering the reasoning in *McLean Homes v Blackdale*, summarised the relevant reasoning in that case as having been that the date to be taken for the starting point of the 28 day period "is the date of correction (or non-correction)" of the award. Bryan J expressed no reservations about the relevant date being, in some cases, the date of non-correction. What Bryan J was emphasising in paragraph 57 of his judgment was that the section 57 application which led to the correction or non-correction had to be material.

39. For the Defendant, Mr Gunning QC, in his attractive and careful submissions, challenged the approach adopted in *McLean Homes v Blackdale*. His submission was that there was no justification for considering the starting date of the 28 day period as being the date when the result of an application under section 57 or equivalent led to no correction being made. The ordinary reason why such an application led to no correction, he suggested, was that there was nothing that needed correction or clarification. An unsuccessful application of that sort should not postpone the start of the period for making a section 68 application. Any cases in which that might cause injustice could be addressed by an application to extend time pursuant to section 85 of the Act. The existence of that power made it unnecessary and inappropriate to construe the Act in such a way that an application

which was not one to which section 70(2)(a) applied and which did not lead to a correction, might lead to a deferral of the relevant date for the purposes of section 70(3).

40. I do not accept those submissions. In my judgment, the approach in *McLean Homes v Blackdale* and, indeed, in *Al Hadha v Tradigrain*, is correct. Those cases are now of long standing, having been decided relatively shortly after the passage of the Arbitration Act 1996, and do not appear to have been doubted by any court which has been referred to them. Although Mr Gunning QC cited *Price v Carter* there is no indication that *McLean Homes v Blackdale* or *Al Hadha v Tradigrain* were referred to the court. And, in any event, Edwards-Stuart J made it quite clear in *Price v Carter* that he was not expressing any concluded view on any matter relevant to the issue which I am considering – see paragraph 73.

41. Were the *McLean Homes v Blackdale* approach not correct, then the result would be to encourage protective applications at the time of the making of the section 57 or equivalent application. These would be likely to be applications under section 68 itself, notwithstanding section 70(2), and/or precautionary applications for extensions of time to bring section 68 applications. Well-advised parties would certainly be likely to bring at least the latter, in order to take advantage of the provision in CPR 62.9(2), rather than have to comply with the requirements of CPR 62.9(3). The proliferation of protective applications to the court would, I consider, be contrary to important principles underlying the Arbitration Act, reflected in its section 1, namely the avoidance of unnecessary expense and the restriction of interventions by the court.

42. I consider that this approach whereby, in the case of a material application under section 57 or equivalent, time should be treated for the purposes of section 70(3) as starting when the outcome of the application is known, is clear and easy to apply, to use the words of Bryan J in *Daewoo Shipbuilding v Songa*, at paragraph 65. I do not consider that there is a significant risk of this approach leading to the postponement of time by unmeritorious applications under section 57 or equivalent, because of the requirement that the application should be material. For these reasons, and given that I am of the view that the Article 27 application in the present case was material, I hold that the arbitration claim initiating the section 68 challenge was brought within the period of 28 days from the date relevant for the purposes of section 70(3).

Is section 68(2)(f) engaged?

43. I accordingly turn to consider the merits of the application under section 68 of the Arbitration Act. I commence with the application under section 68(2)(f). Mr Lewis QC submits that there is uncertainty or ambiguity as to the effect of the Award; that this has not been cured by the Article 27 application; and that this uncertainty or ambiguity has caused, or will cause, substantial injustice by rendering it impossible or difficult to enforce the Award as it stands, as shown by what happened in front of the Shenyang court.

44. On behalf of the Defendant, it was submitted that there is no uncertainty or ambiguity as to the effect of the Award. Any uncertainty or ambiguity that there may have been, and that Knowles J considered that there was, was at most as to the reasoning and not as to the effect of the Award. Mr Gunning QC submitted that the Shenyang court had not itself

expressed any doubt as to the effect of the Award. He submitted that the Shenyang court had decided that the unambiguous Award should not be enforced. He also submitted that to recognise the present case as being a challenge which fell within the terms of section 68(1)(f) would open the door to unmeritorious applications challenging awards, where those awards had a clear meaning and effect as a matter of the curial law.

45. Furthermore, and as a general point, Mr Gunning QC submitted that section 68 was a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. For that proposition, he cited the DAC Report on the Arbitration Bill at 280, adopted in *Lesotho Highlands Development Authority v. Impregilo SpA* [2006] 1 AC 221, paragraph 27, per Lord Steyn.

46. As to the general point, I accept that serious failure by the tribunal to comply with due process is the paradigm case in which there can be a successful application under section 68. Section 68 is not, however, confined exclusively to cases in which the tribunal has gone wrong in its conduct of the arbitration, if that is understood to mean that the tribunal has done something which it should not have done in the circumstances which were presented to it. Thus, for example, an application could potentially be made under section 68(2)(g) if the award had been procured by fraud of the parties, without the tribunal having gone wrong in the sense that I have described.

47. Merkin on *Arbitration Law*, paragraph 20.12, recognises that not all heads of section 68(2) require a default on the part of the tribunal, although that paragraph suggests that the only heads which might not are sections 68(2)(g) and (i). I consider that cases falling within subsection 68(2)(f) might also arise without default on the part of the tribunal.

48. I do not accept Mr Gunning QC's argument that there was in the present case no uncertainty or ambiguity as to the effect of the Award. In my judgment there was. That uncertainty or ambiguity manifested itself in the enforcement proceedings.

49. I recognise that an English lawyer might readily reach the conclusion, as did Knowles J, that the Arbitrator treated ICRA OC and not ICRA NCA as a party to the Oaky Contract, including the arbitration agreement, as one of the Oaky Creek joint venturers, as a party to the claim before the Tribunal and as a beneficiary of the Award. By a combination of paragraphs 1, 7 and 109, the Arbitrator held that ICRA OC was, or was to be taken for the purposes of the determination of the rights of the parties in the Award, as the correct party to the Oaky Contract and, thus, to the arbitration. But these points were not unambiguously spelt out. This permitted the Defendant, in the Chinese enforcement proceedings, to make the submission that there needed to have been a correction of the parties to the Oaky Contract in advance, rather than in the process of enforcement. It was in accordance with the Defendant's submissions that the Shenyang court held that ICRA OC should not be deemed to be one of the Claimants under the arbitration request submitted to the LCIA, and that the Award was without merit.

50. What had accordingly manifested itself was uncertainty or ambiguity that the Award was holding that ICRA OC was entitled to recover, as one of the Claimants, on the basis either, a) that it was the actual party to the Oaky Contract, or b) because the Defendant had waived its rights to claim an objection to the claim by ICRA OC, on the basis that it was not party to the arbitration clause, because that would have been an objection to the Arbitrator's

jurisdiction which was not raised by the Defendant in the arbitration, and which by reason of section 73 of the Arbitration Act was no longer open to it.

51. I consider that this conclusion is consistent with that reached by Knowles J. While it is correct to say that Knowles J did not have to decide whether there was an uncertainty or ambiguity in the effect of the Award, as opposed to its reasoning – because Article 27 did not impose that as a requirement – I do not consider that he was saying that the uncertainty or ambiguity which he found there to have been was confined to a defect of reasoning. On the contrary, I consider that paragraphs 40 to 41 of his judgment, in particular, suggest that he regarded that the uncertainty or ambiguity extended to the effect of the Award.

52. Mr Gunning QC submits that the conclusion I have expressed, that there was an uncertainty or ambiguity as to the effect of the Award, cannot be correct because, he says, there cannot be such an uncertainty or ambiguity if that effect can be readily ascertained as a matter of English law. He relies on the passage in Merkin on *Arbitration Law*, paragraph 20.30.21, to the effect that an award is not to be taken as too uncertain if the obligations of the parties are apparent from it – and the authorities which are cited in paragraph 18.44. He also relied on the last sentence of paragraph 20.30.21, which is to the effect that an award that is not uncertain or ambiguous falls outside section 68(2)(f), even if there may be some difficulty in enforcing it in some other jurisdiction. He relied on that sentence even though he accepted that *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm) is not authority for that proposition, notwithstanding that it is cited as such in the footnote.

53. In my judgment there can be cases in which an award may be ambiguous or uncertain in its effect for the purposes of section 68(2)(f), notwithstanding that English lawyers may be able to determine and, indeed, say with confidence, what the effect is – although, doubtless, they will be rare.

54. I consider that assistance is gained in this regard from the decision of Jacobs J, in *Mobile Telecommunications Co KSC v HRH Prince Hussam Bin Abdulaziz Al Saud* [2019] EWHC 3109 (Comm). There, Jacobs J had to deal with a case in which there was an application to set aside an extension of time for arbitrators to correct or clarify an award that they had previously made, pursuant to Article 27 of the LCIA rules. The original award had been in terms of the claimant's being entitled to payment of a specified sum. A problem had arisen on enforcement, when the Saudi court had found that the words used were not sufficient to impose a clear obligation on Prince Hussam to pay, with the result that the award was found not to be enforceable. When the matter came before Jacobs J, the defendant objected that there could be no application under Article 27 unless there was an objective ambiguity in the award.

55. Jacobs J held that there was no such limitation. He said, at paragraph 34:

> "I do not think that is a necessary or appropriate requirement. In the present case … any English lawyer looking at the award would understand that Prince Hussam was required to make payment. If the matter had been tested before the English court,

> the court would likely have concluded that what was said was not objectively ambiguous and that everyone looking at it should understand what it meant. But subsequent events have shown that the language is capable of being misunderstood, and in those circumstances a correction to make sure that infelicitous language is corrected is appropriate."

56. While Jacobs J was concerned with Article 27, I consider that his reasoning is applicable to section 68(2)(f) of the Arbitration Act. An award may be uncertain or ambiguous, notwithstanding that English lawyers would agree as to its meaning and effect, if it is capable of being misunderstood by an enforcing court. That the Award in this case was so capable is demonstrated by what occurred before the Shenyang court.

57. As to Mr Gunning QC's argument that a finding that there was ambiguity or uncertainty falling within section 68(2)(f) of the Arbitration Act in the present case would open the door to unmeritorious applications under that section – including by parties seeking to delay the arbitral process – I do not consider that this is a real danger. An award debtor will ordinarily not be able to rely on section 68 by pointing to potential difficulties in enforcing an award against itself which might arise from the enforcing court misunderstanding the award, if only because such a debtor will not be able to point to any substantial injustice to it which might result. An award creditor will equally not be able properly to put forward a section 68 application on the basis of uncertainty or ambiguity in the effect of the award unless, again, it can show that that uncertainty or ambiguity has caused, or will cause, substantial injustice. That would be likely to require, at least in the type of case being considered here, a clear demonstration that the ambiguity or uncertainty has caused, or will cause, an enforcing court to fail to enforce the award in accordance with what would be regarded by the English court as its true meaning and effect.

58. Furthermore, if, as a matter of English law, the obligations of the parties are apparent from the award, and it is accordingly not regarded as too uncertain to be enforced as a matter of English law, then neither the award creditor nor the award debtor could rely on potential misunderstanding of the award by an enforcing court to seek that the arbitrators change the effect of the award, as opposed to eliminating ambiguity or uncertainty in the way in which that effect is expressed.

59. The remaining question is whether the Claimants can show that the serious irregularity affecting the Award, namely the uncertainty or ambiguity of its effect which I have found, has caused, or will cause substantial injustice to them. In my judgment, it has caused substantial injustice, in that it has led to the refusal of the Shenyang court to enforce the Award, and it will continue to cause substantial injustice, by reason of the real risk that other courts will refuse enforcement on a similar basis. I note that Knowles J considered the present to be a clear case in which there would be substantial injustice done, if he had not extended time for the application then before him, which was itself designed to provide clarity and remove the ambiguity in the Award – see paragraph 38 of his judgment. For these reasons, I will remit the Award pursuant to section 68(2)(f) of the Arbitration Act. I will hear

the parties in relation to the exact form of the order which should be made embodying that remission.

Section 68(2)(c)

60. In these circumstances I do not need to consider the Claimants' subsidiary challenge under section 68(2)(c). Mr Lewis QC accepted that the Arbitrator had indicated that even if he had adopted Knowles J's wider approach to Article 27, he would have refused the application. It is not a free-standing basis on which there can be remission.

The application to amend the Claim Form

61. Finally, I turn to the separate application which the Claimants make to re-re-amend the Claim Form, and concurrent Claim Forms, by amending the name of the First Claimant from Xstrata Coal Queensland Pty Ltd to Xstrata Coal Queensland Pty Ltd now known as Rolleston Coal Holdings Pty Limited and formerly known as Glencore Queensland Pty Limited of Level 44, Gateway, 1 Macquarie Place, Sydney, N.S.W. 2000, Australia. I grant that application; the evidence before me establishes that the First Claimant changed its name from Glencore Coal Queensland Pty Ltd to Rolleston Coal Holdings Pty Limited, and has changed its address from Level 38 to Level 44, Gateway, 1 Macquarie Place, and it is appropriate that the Claim Form and the concurrent Claim Forms be amended to reflect that.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge