COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Appeals Division
Consolidated Appeals 2020/APP/sts/00013, 2020/APP/sts/00018

IN THE MATTER OF THE WINTER TRUST, THE SUMMER TRUST AND THE SPRING TRUST
AND
IN THE MATTER OF AN ARBITRATION
AND
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 89, 90 AND 91 OF THE ARBITRATION ACT 2009

BETWEEN:
GABRIELE VOLPI

Applicant/Appellant

AND
(1) DELANSON SERVICES LTD.
(2) MATTEO VOLPI
(3) SIMONE VOLPI

Respondents

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2020/CLE/gen/00632

IN THE MATTER OF THE ARBITRATION ACT 2009
AND IN THE MATTER OF AN ARBITRATION

BETWEEN:
DELANSON SERVICES LIMITED

Applicant/Appellant

AND
(1) MATTEO VOLPI
(2) GABRIELE VOLPI
(3) SIMONE VOLPI

Respondents

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	Mr. Michael Black, QC, with Ms. Wynsome Carey for Gabriele Volpi Mr. Brian Simms QC, with Mr. Marco Turnquest and Mr. Wilfred Ferguson for Delanson Services Ltd.

Mr. John Wilson QC, with Ms. Knijah Knowles and Ms. Berchel Wilson for Matteo Volpi
Mrs. Janet L.R. Bostwick-Dean, with Mr. Tavarrie Knowles for Simone Volpi

Hearing dates: 21, 22 December 2020; additional written submissions 12 March, 19 March 2021.

RULING

KLEIN J.

Arbitration – Arbitration Act 2009 – Commercial Arbitration – Arbitration Award – Application to appeal Partial Awards – Bases for Appeal under s. 80 (jurisdiction), s. 90 (serious irregularity), s.91 (point of law) – Stay of Arbitration Pending Appeal – Whether court has power to stay Arbitration pending appeal – Considerations relating to the grant of a stay of arbitral proceedings under the Act – Security for Costs of Appeal, s. 92(6) of Act – Principles relating to security for costs under the Arbitration Act – Leave to serve interrogatories – Interim measures available under the Arbitration Act – Statutory Interpretation – Leave to appeal on points of law – Ability of Court to recall oral ruling before order perfected and reasons given– re Barrell jurisdiction considered—Principles on which judge should determine whether to reconsider orders – Costs – Principles, arbitration proceedings – Whether stay pursuant to appeal should be treated as discrete aspect of litigation for the purposes of costs – Deductions for partial success.

INTRODUCTION AND BACKGROUND

[1] At the root of these proceedings is a bitter dispute between a wealthy international businessman and one of his sons over the distribution of several family trusts governed by the laws of The Bahamas which, according to some accounts, are said to be worth in excess of several billion US dollars. Sadly, it has not only pitted son against father but has forced family members to choose sides in the fight.

[2] That dispute is now the subject of arbitration proceedings being conducted by an arbitral tribunal consisting of three distinguished arbitrators (including a former member of the Privy Council). It has also spawned several rounds of ancillary litigation across several jurisdictions, including The Bahamas. The applications currently before me are the latest foray into this jurisdiction seeking the assistance of the Bahamian court in connection with the dispute, which commenced with litigation before the Supreme Court in 2018.

[3] In these conjoined proceedings, Gabriele Volpi ('Gabriele'), the patriarch of the Volpi family and settlor of the trusts, and Delanson Services Ltd. ('Delanson'), formerly the professional trustee of the Trusts (together the 'appellants'), seek a stay of the arbitration proceedings pending appeal to this court of the partial awards made by the Tribunal dated 13 June 2020 and 26 August 2020. Gabriele and Delanson also seek leave to appeal on points of law "insofar as necessary", which as will be seen, has generated issues of its own. Matteo Volpi ('Matteo'), one of Gabriele's sons and the main respondent in the appeals, makes a cross-application for security for costs against Gabriele and Delanson in respect of the applications for stay and appeal. Gabriele also seeks leave to issue written interrogatories against Matteo to disclose his funding arrangements, partly in response to Matteo's security for costs application.

[4] The central question arising out of these applications is the extent of the power of the Supreme Court to grant interim remedies under the Arbitration Act 2009 ('the Act' or '2009 Act'), in particular, whether the court is empowered to grant a stay of arbitral proceedings during the pendency of an appeal under the Act. Along the way, several subsidiary issues arose, which are also addressed in this Ruling. As is often the case in hard-fought complex commercial matters—and it is by no means an exaggeration to say that these proceedings are fiercely contested—these collateral issues have a way of sometimes upstaging the main issues.

[5] Further, while applications of the kind raised here for interim relief are the standard fare of civil litigation and the principles largely uncontroversial, the issues in this case arise in the context of a fairly new statutory scheme for arbitration, and as such raise important issues of statutory interpretation and matters for first impression. In particular, they bring into sharp focus the lingering ambiguities and tension resulting from the parallel jurisdiction and co-extensive powers given to the arbitral tribunal and the Court under the provisions of the Act to order interim measures in support of arbitration proceedings.

[6] I heard the parties over the 21-22 December 2020 and reserved my decision. However, having regard to the pendency of the applications before the Tribunal and the Court, and the need for the parties to know as a matter of urgency where their applications stood so that they could begin preparation in earnest (if required) for the appeal, on 3 March 2021 I announced my ruling orally in advance of the reasoned decision. In fact, the Court had already fixed dates at the end of April 2021 for the hearing of the substantive appeals if the matters were to proceed.

[7] I ruled that I had jurisdiction under the Act to stay the arbitration proceedings pending appeal and granted the applications by Gabriele and Matteo for a stay. As will be explained below, I also initially granted leave to Gabriele and Delanson to appeal on points of law. Further, in the exercise of my discretion, I granted Matteo's application for security for costs against Gabriele and Matteo in the global amount of $400,000.00—albeit a far lower quantum than claimed by Matteo. I refused Gabriele's application for interrogatories.

[8] Before I turn to the reasons for my decision, there was an important development which led to a qualification being made to the oral ruling. Following the announcement of my oral ruling, Matteo requested clarification as to whether it was the intention of the Court to grant leave in relation to the points of law being challenged by Gabriele and Delanson in the arbitration, or leave to appeal to the Court of Appeal. In subsequent correspondence, I clarified that my oral ruling was intended to relate only to the leave to appeal the points of law, as could only be the case, since there was no other application for leave before the Court. Matteo then politely requested, by written correspondence, that the court consider recalling the part of the ruling granting leave, as the point had not been fully argued, and further indicated that he would be inclined to seek leave to appeal to the Court of Appeal in the alternative. Matteo did eventually file a summons for leave to appeal on 12 March 2021.

[9] I convened a directions hearing on the 16 March 2021 to deal with the matters arising from the oral ruling, and requested the parties to submit short written submissions on the recall

jurisdiction of the Court. Having considered the submissions, I decided to recall my decision granting leave to appeal on points of law and defer the hearing of that application to the rolled-up hearing of the substantive challenges. It is therefore convenient to deal with this issue also in the Ruling, which was circulated to the parties in draft form in July of 2021.

[10] With that brief survey of the landscape, I now turn to the background to these challenges.

Factual and procedural background

[11] I attempt to set out only so much of the background as is necessary for an understanding of the underlying dispute and the applications before this court. I gratefully adopt (with some redactions for brevity and to avoid tendentiousness) the background set out in the affidavits of the parties and the summaries in their respective skeleton submissions.

The protagonists

[12] Gabriele is a highly successful Italian-Nigerian businessman whose main business is in the oil and gas sector in Nigeria. From the 1980s onwards, he amassed considerable wealth through his majority position in Orlean Invest Holding Limited ('Orlean'), the holding company for a group of companies which became the leading provider of logistics services to the oil and gas sector in West Africa (the 'Orlean group'). In addition to the oil and gas interest, Gabriele's business empire included an African energy company, real estate, ships and an investment company, as well as Croatian and Italian football clubs, a stadium and an Italian waterpolo club. But it is the oil and gas wealth which was the jewel in the crown.

[13] There is considerable uncertainty over the current value of the trust assets, or the value at the time of the distribution in 2016, and these are matters that might have to be investigated by the arbitral tribunal at a later stage of the hearings. But it has been alleged that the trust assets were potentially worth billions of US Dollars. According to one of the affidavits filed on behalf of Delanson, the Orlean Group's turnover in the year ending 31 December 2012 was in excess of USD 1.2 billion, although it is alleged by Delanson that the oil price crashes in 2015 drastically reduced the value of the holdings.

[14] Simone Volpi ('Simone') is the other of Gabriele's sons, and he and Matteo are the third and second respondents to the appeals, although Simone only appears in a representative capacity. In better times, both Matteo and Simone were involved in the business enterprise of their father, but relationships apparently started to sour around the end of 2015 between Matteo and Gabriele, and Matteo withdrew from any active role in the businesses. It is alleged that he became increasingly at odds with Gabriele. In one of the affidavits filed on behalf of Gabriele, it is alleged that "…*in spite of the fact that he is Gabriele's son, Matteo has treated Gabriele in all respects as an enemy and has waged, and continues to wage, an extensive campaign of hostile litigation and arbitration against Gabriele*." This allegation has been denied by Matteo.

[15] Matteo is also an international businessman in his own right, and apparently after the split ventured into businesses similar to those in which he was involved with his father in the oil, gas and logistics industry, which, as will emerge, is also a point of contention between the parties.

[16] It is alleged by Gabriele that over the years he has provided generously for his family. Gabriele has offered US$120 million and property interests to settle the respective claims of Matteo and Simone to the trust assets. This offer was rejected by Matteo and accepted by Simone. Gabriele also settled a matrimonial claim by his wife Rosi in 2017, and gave her a package of assets and cash worth some US$100 million, out of which Rosi gave Simone and Matteo US$20 million each. In fact, Matteo claims to have used the financial gift from his mother to fund the arbitration and litigation.

[17] As may be presumed from the above, Simone remains in good standing with his father and in an affidavit filed before the Court he has declared his support for the applications being made by Gabriele and Delanson. He has also been appointed to represent the interests of his mother, Rosi, his minor children and their unborn issue in the proceedings.

[18] The first respondent Delanson Services Ltd. ('Delanson') is a company which provides professional trustee services. It was incorporated in the Republic of Panama in October of 2006, but it is now domiciled in New Zealand and is the former Trustee of the three trusts that are the subject of the arbitration.

The Trusts and earlier litigation

[19] Between 2006 and 2012, Gabriele settled three irrevocable discretionary Bahamian Trusts: the Winter Trust (settled 28 October 2006), the Summer Trust (settled 28 October 2006), and the Spring Trust (settled 27 March 2012) (collectively 'the Trusts'). The beneficiaries of the trusts were Gabriele himself, his wife Rosi and Matteo and Simone and their descendants. The assets and investments of Gabriele's business empire were held via the three trusts. While expressed in Italian, the trusts are governed by Bahamian law and all three are settled in very similar terms.

[20] In October 2016, the vast majority of the assets of the trusts were distributed by Delanson to Gabriele, and the trusts themselves were later dissolved in 2017. It is the 2016 distribution that was the catalyst for the dispute and the fuel for the litigation and arbitration proceedings.

[21] I have mentioned in the introductory section that there has been a previous round of legal skirmishes in The Bahamas in connection with the trusts. The litigation campaign was in fact launched with an *ex parte* application for a freezing injunction against Delanson and Gabriele on 25 April 2018, in support of a writ action filed in the Supreme Court (Action No. 2018/CLE/gen/00474). The injunction was to restrain the defendants from disposing of, dealing with or otherwise diminishing the value of any of the assets distributed by Delanson to Gabriele on 6 October 2016. The without-notice injunction was granted at first instance on the 3 May 2018, but later set aside by Winder J. on an application by Delanson and Gabriele

to stay the writ action and set aside the freezing injunction, on the grounds that the trusts were subject to an exclusive arbitration clause (ruling dated 27 November 2018).

[22] On the 30 November 2018, Matteo made a second pitch for a freezing injunction against Delanson and Gabriele, this time pursuant to s. 55 of the 2009 Arbitration Act, and in support of arbitration proceedings which had been initiated by Matteo against Gabriele and Delanson by letter of that same date. Again, Matteo obtained an *ex parte* freezing injunction against Delanson and Gabriele (on 4 December 2018). Delanson and Gabriele applied to have the injunction and the underlying originating summons set aside. On the return date, Winder J. set aside the injunction on the basis that the court lacked jurisdiction to grant a free-standing injunction in support of arbitral proceedings in respect of foreign *situs* assets (2018/CLE/gen/01404). Matteo's appeal was dismissed by the Court of Appeal.

[23] In tandem with the Bahamian proceedings, Matteo also commenced an action in Malta against Betacorp International Limited ('Betacorp'), to which the vast majority of the trust assets were transferred after the 2016 distribution. Matteo obtained an injunction by the Court in Malta, and the Maltese proceedings remain ongoing. There is also a claim in the High Court in England to recover a debt, in which Gabriele is the claimant against Matteo.

The arbitration proceedings

[24] On 30 November 2018, Matteo initiated arbitration proceedings by letter of even date against Gabriele and Delanson asserting, *inter alia*, that the distribution of the assets of the trusts in 2016 was carried out in breach of trust and for an improper purpose. The arbitral panel was constituted consisting of Dr. Georg von Segesser (Presiding Arbitrator), the Rt. Hon. Lord Neuberger of Abbotsbury and Professor Avv. Alberto Malatesta. The Tribunal decided that the seat of the arbitration was The Bahamas and that the Arbitration Act governed the proceedings as the *lex arbitri*. The arbitration is being conducted pursuant to UNCITRAL (United Nations Commission on International Trade Law) Rules.

[25] In April 2019, the Tribunal ordered that the arbitration be bifurcated: Phase 1 of the proceedings would deal with the claims for breach of trust and the counterclaims by Gabriele relating to rectification and validity of the Trusts (i.e., issues of liability); and Phase II would canvass the issues of quantum and the valuation of the assets and costs.

[26] On 13 June 2020, following a 5-day hearing which featured some 19 witnesses, the tribunal issued its Partial Award with respect to Phase 1, and the majority ruled in favor of the claims by Matteo. Among other findings, the tribunal declared that the dispositions made by Delanson were in breach of trust and for an improper purpose, constituted a fraud on the power and were void. Therefore, the assets distributed to Gabriele were being held on trust for the trustee of the trusts. The Tribunal also ordered that the trust assets distributed by Delanson to Gabriele on 6 October 2016 and the termination of the trusts on 13 January 2017 be set aside.

[27] Professor Malatesta dissented. He found, *inter alia*, that Delanson acted within the scope of its powers as trustee, and for a purpose contemplated by the Trust Deeds and therefore not in

fraud of its distributive powers, and neither was it in breach of its fiduciary duty to take adequate deliberations prior to the distribution.

[28] On 9 June 2020, Gabriele and Delanson challenged the award by originating notices of motion filed in the Supreme Court (see below) and sought various interim remedies from the Tribunal, including a stay pending appeal to this Court. At a hearing on 15 July 2020, the Tribunal considered, *inter alia*, whether the arbitral proceedings ought to be stayed pending either the outcome of the substantive challenges and appeals before the Supreme Court, or the outcome of the application for the stay made to the Bahamian Court.

[29] Concerned that the Tribunal did not deal adequately with all of the claims in the Partial Award, Gabriele submitted a request to the Tribunal pursuant to s. 79 of the Act on 3 July 2020 to correct the Partial Award and/or for the issuance of an additional award to, *inter alia*, clarify its award in respect of the scope of the restrictions, which it had found regulated the Trustee's dispositive power ("scope of powers rectification claim"). He requested that if those restrictions on the trustee's discretionary powers were upheld, the tribunal should rectify the Trust Deeds to accord with the settlor's intentions, as the restrictions found by the tribunal were not consonant with his intentions in settling the trusts.

[30] On 28 July 2020, the Tribunal issued procedural order No. 12, in which it ordered "*a stay of the present proceedings pending the Supreme Court of the Bahamas' decision on the stay application before it*". The Tribunal reasoned as follows:

> "The present stay order is granted on the basis that the Respondents will proceed with the Bahamian application with expedition. Furthermore, any party may apply to the Tribunal for the lifting of the present stay at any time, including in the event of a change in circumstances. The Arbitral Tribunal may also lift the present stay at its own initiative."

The Tribunal also decided that the costs would be dealt with at the end of the arbitration.

[31] The Tribunal issued an Additional Partial Award on 26 August 2020, denying the claim by Gabriele for the scope of powers rectification claim. That award was also appealed by Gabriele, who took the view that the majority's reasoning and conclusions in the second award, far from curing the errors in the first, only compounded them, and that it contained conclusions that were fundamentally inconsistent with the Partial Award with respect to the Trustee's power to make distributions out of the trusts.

The current proceedings

[32] On the 9 July 2020, Gabriele filed an Originating Notice of Motion, *inter alia*, to set aside the Partial Award of 13 June 2020, for leave to appeal to the extent necessary, and for a stay of the arbitration pending the determination of the appeal (Action No. 2020/APP/sts/00013). For convenience, this may be referred to as the "First Action". On 23 September 2020, Gabriele filed another Originating Notice of Motion, *inter alia*, to set aside parts of the Additional Partial Award issued 26 August 2020 (2020/APP/sts/00018) ("the Second Action").

[33] Delanson also filed a Notice of Motion on 9 July 2020, in very similar terms to the First Action, *inter alia*, to set aside the Partial Award of 13 June 2020, for leave to appeal pursuant to 92 (8) of the Act insofar as necessary, and for a stay of the arbitration pending the determination of the action (Action No. 2020/CLE/gen/000632).

Summonses for interim orders

[34] The appellants also filed summonses, *inter alia*, for a stay of the arbitration proceedings pending the hearing of the application/appeals. Delanson filed its summons on 9 July 2020 for a stay of all further proceedings in the arbitration pending the determination of the actions, and for leave to appeal the Partial Award dated 13 June 2020, insofar as necessary on the points of law set out in the Notice of Motion. Delanson filed a number of affidavits in support of the applications: the First Affidavit of Andrea Moja, dated 9 July 2020, the Second Affidavit of Andrea Moja dated 23 November 2020 (stay), and the Third Affidavit of Andrea Moja, dated 23 November 2020 (security for costs).

[35] Gabriele filed a similar summons on the 14 July 2020 seeking a stay of the arbitration proceedings pursuant to the Act and/or under the inherent jurisdiction of the Court pending the determination of the action. The request in the Originating Summons for leave to appeal on points of law was not interpolated into the summons. Gabriele filed five affidavits in support of the applications: First Affidavit of Michael Bray dated 9 July 2020; Second Affidavit of Michael Bray, dated 22 September 2020; Third Affidavit of Michael Bray dated 6 November 2020) (security for costs); Fourth Affidavit of Michael Bray dated 6 November 2020, and Fifth Affidavit of Michael Bray filed 18 December 2020 (stay affidavits).

[36] The material parts of the summonses seeking the stay are similar, although as indicated Delanson also sought leave to appeal. The main relief sought by Delanson and Gabriele in their summonses is as follows:

> <u>Delanson</u>
>
> "LET ALL PARTIES CONCERNED attend […] for the following relief:
>
> 1. An order pursuant to section 98(2) of the Arbitration Act 2009 and/or under the inherent jurisdiction of the Court granting it, if and insofar as necessary, leave to appeal to the Supreme Court against the Partial Award dated 13 June 2020 and made by Dr. Georg von Segesser, The Rt. Hon. Lord Neuberger of Abbotsbury and Professor Avv. Alberto Malatesta (dissenting), the arbitrators, in the abovementioned Arbitration, on the points of law set out in its Originating Notice of Motion filed herein and Affidavit of Andrea Moja sworn on 9th July 2020;
>
> 2. An Order that all further proceedings in the abovementioned Arbitration be stayed pending the determination of this Action."
>
> <u>Gabriele</u>
>
> **"**LET ALL PARTIES CONCERNED attend […] on the hearing of an application on the part of the Applicant/Appellant […] for an order that the arbitration proceedings referred

to in the Originating Notice of Motion filed herein on the 9th day of July, 2020, be stayed pending the determination of this Action."

[37] In addition, Gabriele issued a summons filed 25 November 2020 for leave to serve written interrogatories on Matteo requesting information on the source of his funding for the litigation.

[38] Matteo responded by filing separate summonses on 24 September 2020 for security for costs of the appeal by both Gabriele and Delanson in the amount of $800,000.00 each. His evidence resisting the stay application is contained in the First Affidavit of Matteo Volpi filed 4 November 2020; Affidavit of Matteo Volpi filed 17 November 2020 (stay affidavit); Affidavit of Matteo Volpi filed 17 November 2020; and affidavits of Miguel Darling filed 24 September 2020, one in respect of each appellant but which are in materially similar terms, exhibiting a draft bill of costs (security for costs affidavits).

[39] A summons for directions was filed 7 October 2020 by Matteo, seeking, *inter alia*, directions for the filing of evidence for the various applications, for the hearing of the respective applications and the Originating Summonses, for the consolidation of the proceedings to the extent possible and a conjoined hearing. The summons for directions came before me on 16 December 2020, and I gave procedural directions for the hearing of the applications and ordered that the First Action (the 'leading action') be consolidated with the Second Action, and that the Delanson action be heard together with those actions.

[40] These applications were supported with a mass of documentary material and submissions, running to several thousand pages.

LEGAL DISCUSSION AND ANALYSIS

Arbitration Act 2009

[41] The Arbitration Act 2009 came into force on 20 May 2010. It is a codifying statute and the long title proclaims it to be "*An Act to Restate and Improve the Law Relating to An Arbitration Agreement; To make other provisions Relating to Arbitration and Arbitration Awards; and for Other Matters Related thereto*." It is by no means an exaggeration to say that the Act is an ambitious piece of legislation. For one, it repealed the Arbitration Act which had subsisted since 1889, and its restatement and improvement of the law relating to arbitration was intended to encapsulate over a century of advancements and developments in contemporary practice relating to arbitration.

[42] Although the Act does not specifically make any mention of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (amended in 2006) ('the UNCITRAL Model Law'), it is clear that its provisions are broadly based on those model instruments.

[43] It is also accepted wisdom that the 1996 UK Arbitration Act (the 'English Act') served as the template for the Bahamian Act, as is clearly borne out from many of its provisions, which are either indistinguishable from or materially similar to the terms of the 1996 English Act. As

noted by the Court of Appeal in *Vernes Holding Ltd. v. Lyford Holdings N.V.* (SCCiv App No. 210 of 2018):

> "[51] We start with the observation that as even the most cursory examination of both Acts will confirm, the Bahamas Act, 2009, is modeled to a very large extent on the 1996 UK Act. Indeed, the long title of our Act is virtually identical to that of its English counterpart…".

The position was confirmed in a very recent ruling (handed down 19 April 2021) in a case on appeal from the Court of Appeal of the Bahamas (*Rav Bahamas Ltd. and another v. Therapy Beach Club Incorporated (Bahamas)* [2021] UKPC 8), where the Privy Council noted that:

> "[26] The 2009 Act is similar in structure and content to the 1996 Act and many of its provisions are materially identical. It was common ground that the policy underlying the two Acts was similar and that it was appropriate to have regard to the English law authorities when interpreting materially identical provisions."

[44] Despite the close analogy to the English Act, however, there are significant points of divergence, several of which are important for the applications before the Court. For example, the 2009 Act incorporates a 2006 amendment to the Model Law expanding the powers of the court to provide interim orders, which has not been domesticated into the UK Act. The English Act also applies equally to international and domestic arbitration.

[45] The 2009 Act also contains an admixture of provisions directed to both domestic and international commercial arbitration. But the court can take judicial notice of the fact that there are legislative initiatives afoot to create separate Acts to govern each regime: a 2014 Bill for an International Commercial Arbitration Act has been tabled in Parliament which fully incorporates the Model Law and is made specifically applicable to "*international commercial arbitration*", and there is also a Bill to amend the 2009 Act to rename it "The Domestic Arbitration Act". It is clearly a policy matter for the executive as to whether to have different sets of rules for international and domestic arbitration, as some legal systems have done, or opt for a unitary Act with dual application (as the UK has done with its 1996 Act).

[46] Secondly, it is widely known and accepted that the 2009 Act—like similar Acts in many jurisdictions—was intended to create a modern legal framework for arbitration based on international standards, such as the model laws developed by UNCITRAL. A major objective of these reforms was to grant greater independence to arbitral tribunals to apply their own procedural and substantive law to deal with disputes, with minimal interference from the supervisory court. This is one of three founding principles which govern the Act, and which is expressed at s. 3(c) as follows:*"in matters governed by this Act, the court should not intervene except as provided in this Act*." The others are (i) the fair resolution of disputes without unnecessary expense and delay [3(a)] and (ii) party autonomy [3(b)].

[47] In keeping with the principle of minimum interference, the Act restricts the challenge of arbitral awards to three grounds: substantive jurisdiction (s.89), serious irregularity (s.90) and legal error (s.91). The first two are very narrowly defined and, in the case of legal error, parties can

agree to exclude the right to appeal, or consent to an appeal. It is debatable, and a significant point of dispute in these proceedings, whether the court has power to grant leave in the default position if the parties do not consent to an appeal on a point of law, as s. 91 does not expressly reference the power of the court to grant leave.

Application for stay

Jurisdiction

[48] Against the backdrop of the non-intervention principle, the preliminary issue which arises for the Court's consideration is the jurisdiction of the court to grant a stay. Interestingly, neither of the appellants' summonses identified the specific provision of the 2009 Act pursuant to which the stay was being sought. They were content to simply invoke the "inherent jurisdiction" of the court.

[49] Mr. Simms QC in his written submissions drew to the Court's attention that, in submissions made before the Tribunal in July 2020 for a Case Management Conference, Matteo had conceded that "*the Bahamian court as the supervisory seat has an inherent jurisdiction to stay arbitral proceedings*." There, Matteo's counsel contended that the issue of whether the proceedings ought to be stayed was an issue for the Supreme Court and not the Tribunal: "…*it is for the Supreme Court to decide if further proceedings in the arbitration should be stayed pending resolution of the applications […] the First Respondent's application to the Supreme Court of the Bahamas for a stay—and indeed any application for a stay—is a matter for the Supreme Court of the Bahamas*".

[50] I entertain serious doubts, however, that any recourse can be made to the inherent jurisdiction of the court—wide as that jurisdiction may be—to stay proceedings in light of the objective of the Act, and the clear prohibition against intervention except by specific statutory *imprimatur* (s. 3(c)).

[51] An example of this is provided by the case of *Auto-Guadeloupe Investissement SA v Columbus Acquisitions Inc. and others* [2012] 84 WIR 40. There, the Barbados Court of Appeal held that the general procedural provisions of the Supreme Court (Civil Procedure) Rules 2008 (CPR), did not empower the court to stay an arbitrator in international commercial arbitration from proceeding with an assessment of damages pending a challenge to the court on his determination that he had competence to determine an issue that the parties had previously agreed would be reserved for the second phase of the arbitration.

[52] The Court relied on the maxim *generalia specialibus non derogant* in holding that the general powers of the court did not oust the specific language of section 8 of the International Commercial Arbitration Act (Cap. 110B)—"*in matters governed by this Act, no court shall intervene except where provided in this Act*" [*cf.* s.3(c) of 2009 Act]. Further, the court held that the general provisions did not trump the provisions embodied in the Act providing for the arbitral tribunal to determine the limits of its own competence (the *competence-competence* principle). As said by Gibson, CJ [19]:

> "The imposition of a stay precluding an arbitral tribunal from ruling on its own jurisdiction appears to be entirely antithetical to the competence-competence principled embodied in s. 19(1) of the ICCA."

[53] In respect of the applications before me, I therefore considered it a *sine qua non* to identify a specific statutory basis within the Act for a stay. This point appears to be one of first impression in this jurisdiction. Indeed, counsel for Delanson, Mr. Simms QC, indicated that their research had not yielded any Bahamian authority which directly addresses the court's power to stay arbitral proceedings pending the determination of a challenge to the award. Most of the cases concern the powers of the court to stay legal proceedings in deference to arbitration, the expressed powers of the court under s. 55 of the 2009 Act to grant interim relief, mainly injunctive relief, in aid of arbitration proceedings, or deal with challenges to awards based on serious irregularity: (see *Matteo Volpi v Delanson and Gabriele Volpi* (2018/CLE/gen/00474), Winder, J.; *Summit Insurance Company Ltd. v. Heritage Insurance Co. Ltd. and Taino Beach Ltd.* (2007/APP/sts/00001) Charles, J*; Lyford Holdings NV v. Vernes Holding Ltd.* (2018/CLE/gen/0150), Charles J.; *Therapy Beach v. Rav Bahamas* (SCCiv App. No 23 of 2018), Court of Appeal); *Rav Bahamas Ltd. and another v. Therapy Beach Club Incorporated (Bahamas)* [2021] UKPC 8)

Powers of the court in relation to arbitration proceedings.

[54] Part IX of the Act sets out the powers of the court exercisable in relation to arbitration proceedings. These include powers exercisable in connection with the following: (i) the enforcement of peremptory orders of the tribunal (s. 53); (ii) securing the attendance of witnesses (s. 54); (iii) powers relating to the following matters (s. 55)—(a) taking of evidence; (b) preservation of evidence; (c) orders relating to property which is the subject of the proceedings (inspection, preservation and custody, as well as the taking of samples, etc.); (d) the sale of any goods which are the subject of the proceedings; (e) the granting of an interim injunction or the appointment of a receiver; and (iv) determination of any preliminary point of law. Incidentally, other than the powers mentioned at (iii) (d) and (e) above, the arbitral Tribunal is invested with similar procedural powers under s. 49.

[55] It is useful to set out the operative parts of s. 55:

> "55. Court powers exercisable in support of arbitral proceedings.
>
> (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
>
> (2) Those matters are—
>
> (a) the taking of the evidence of witnesses;
> (b) the preservation of evidence;
> (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—

(i) for the inspection, photographing. preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property, and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section."

[56] There is no specific mention of the power of the Court to grant a stay under Part IX. Part X of the Act provides for the Tribunal to order interim and preliminary measures, the conditions for the grant of such orders, and for such orders to be binding and recognized and enforced by the Court (ss. 57-66). I set out the provisions of ss. 57 and 58 below.

"57. Power of arbitral tribunal to order interim measures.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to –

(a) maintain or restore the status quo pending determination of the dispute;

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) preserve evidence that may be relevant and material to the resolution of the dispute.

58. Conditions for granting interim measures.

(1) The party requesting an interim measure under section 57 (2) (a), (b) and (c) shall satisfy the arbitral tribunal that –

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under section S7(2)(d), the requirements in subsection (1)(a) and (b) of this section shall apply only to the extent the arbitral tribunal considers appropriate."

[57] At the end of that Part, however, is to be found this provision under the rubric "Court-ordered interim measures": (s. 67):

> "67. The Court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether the place is in The Bahamas, as it has in relation to proceedings in the court. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

[58] This provision is modelled on article 17J of the 2006 amendments to the 1985 Model Law, and as made clear by the explanatory note by the UNCITRAL Secretariat,

> "That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the court to issue interim measures and that the parties to such an arbitration agreement are free to approach the court with a request to order interim measures."

The *travaux preparatoires* of the Model Law reveal that the balance between the co-extensive powers of the supervisory court and those of the tribunal were struck after careful deliberations and negotiations by representatives attending the working group sessions on Arbitration.

[59] Thus, there appears to be two sources of power in the Act for the court to issue interim orders, and at first blush they are not easy to reconcile. For example, under Part IX, s. 55 sets out what might be thought to be an exhaustive list of powers exercisable in support of arbitral proceedings, subject to the qualification that the court should act only in the case of urgency or if the tribunal has no power or is unable at that time to act effectively. By contrast, under s. 67 of Part IX, the court is given the full armoury of procedural powers that would normally be available in domestic proceedings, and seemingly exercisable on the same principles, subject to the caveat that the court should consider "*the specific features of international arbitration*". It is not qualified by the requirement of urgency or any incapacity in the Tribunal. So, on the one hand, s. 55 restricts the available interim remedies to those specified in the Act, unless otherwise agreed by the parties and subject to the conditions contained therein, but on the other hand s. 67 purports to retain the full plenitude of powers to grant interim relief normally available in civil proceedings. Mr. Black QC suggested, and I agree,

that a way of reconciling the apparent textual inconsistency might be to assume that the draftsman intended that for those kinds of interim reliefs not specified under s.55, the court must look to the provisions of s. 67.

[60] It is important to note, however, that both s. 55 (subject to the matters specified therein) and s. 67 are enabling and not empowering sections. They provide for the court to have the same powers to grant interim measures in relation to arbitration proceedings "*as it has in relation to proceedings in the court*". Thus, the source of the power under s. 67 has to reside in the statutes or Rules which govern the powers of the court to grant interim measures in ordinary actions before it (see, further, in this regard, the decision of the Court of Appeal of Hong Kong in *Swift-Fortune Ltd. v. Magnifica Marine SA* [2006] SGCA 42, where the Court held that the powers of the court under s. 12(7) of the International Arbitration Act [*cf.* s. 67 of the 2009 Act] derived from the statutory powers under s. 4(10) of the Hong Kong Civil Law Ordinance and s. 18 of the Supreme Court of Judicature Act).

[61] In this regard, s. 16(3) of the Supreme Court Act provides as follows:

> "Nothing in this Act shall affect the power of the Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person whether or not a party to the proceedings."

[62] Along the same lines, Order 31A, r.18 (d) of the Rules of the Supreme Court 1978 (*R.S.C.*) provides that the Court may "…*stay the whole or part of any proceedings generally or until a specified date or event*".

[63] More specifically to the point of appeals to the Supreme Court from tribunals or courts, O. 55. r. 3 of the *RSC* provides as follows:

> "(3) The bringing of such an appeal shall not operate as a stay of proceedings on the judgment, determination or other decision against which the appeal is brought unless the court by which the appeal is to be heard or the court tribunal or person by which or by whom the decision was given so orders."

[64] Having satisfied myself that the Court does possess specific statutory jurisdiction to grant a stay under the Act, I now turn to look at the principles governing the exercise of that jurisdiction.

Principles governing the grant of a stay

[65] The arguments in support of the applications for a stay by Gabriele and Delanson are materially similar, and in his oral submissions Mr. Simms QC adopted the points which Mr. Black QC made on behalf of Gabriele.

Gabriele's and Delanson's position

[66] Mr. Black QC argued that the Court should approach the stay application on conventional principles, starting from the position that an appeal does not automatically entitle an appellant to a stay of the judgment under appeal (see *RSC* Order 55, r. 3, *supra*). He cited a number of UK Court of Appeal cases which are considered the leading authorities (and which have been routinely applied in this jurisdiction), some decided under the old English Rules of the Supreme Court and post the introduction of the English Civil Procedure Rules ("CPR"): *Winchester Cigarette Machinery Ltd. v. Payne* (The Times, December 15, 1993); *Hammond Suddard Solicitors v Agrichem International Holdings Ltd.* [2001] EWCA Civ. 2065; *Leicester Circuits Ltd. v Coates Brother Plc.* [2002] EWCA Civ 474; *DEFRA v Downs* [2009] EWCA. 257.

[67] In *Winchester*, a case for the stay of enforcement of a money judgment, Ralph Gibson LJ stated that the Court's approach to the matter should be based on "*common sense and balance of advantage*". Hobhouse LJ added that the court or a single judge has an "*unfettered discretion to order a stay*" and as such "*no authority can lay down rules for its exercise; all that can be done is to say that it must be exercised judicially and to provide guidance*."

[68] In *Hammond*, the English Court of Appeal held:

> "…the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all of the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay."

[69] In the *Leicester Circuits* case the Court of Appeal said:

> "12. […] the principles to be applied in relation to the [stay] application are that, while the general rule is that a stay of judgment will not be granted, the court has an unfettered discretion and no authority can lay down rules for its exercise. [….]
> 13. The proper approach is to make an order which best accords with the interest of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."

[70] In *DEFRA v. Downs*, the court emphasized that solid grounds were required for a stay, and if present, the court should carry out a balancing exercise. That required the court to be satisfied that there was "*…some form of irremediable harm if no stay is granted… It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal*."

[71] Mr. Simms QC for Delanson in his written submission similarly indicated that "*it is helpful to consider by analogy the established principles which apply to the stay of execution of court judgments pending an appeal, although the legislative framework is different*." He started with the Court of Appeal's endorsement in *Hanna v. Hanna* (Civ. App. No. 182 of 2017) of the approach set out in the 1999 edition of the English Supreme Court Practice, which may be summarized as follows: (i) a stay will not be granted unless there are good reasons for doing

so; (ii) however, the court is likely to grant a stay where the appeal would otherwise be rendered nugatory, or the appellant would suffer loss which cannot be compensated in damages; and (iii) the question whether or not to grant a stay is entirely in the court's discretion, and the court will grant a stay where the special circumstances of the case requires it.

[72] He also referred the court to several cases setting out principles which the court will take into consideration in deciding whether to stay execution, or a subsequent stage of the same proceedings (such as an account or inquiry). These were as follows: *Simmonds v. Williams* (1999) 57 WIR 90 at 92 (the discretion to grant a stay is wide and unfettered, and the court should try to maintain a fair and proper balance between the needs of the parties); *Strix Ltd. v. Otter Controls Ltd.* [1995] RPC 675 at 579 (no need to demonstrate some "exceptional" feature of the case before a stay is granted; the combined effect of all the circumstances might justify a stay, such as to avoid the costs and expense which might result from an inquiry for damages where liability is overturned on appeal—"*the inquiry must make way for a stay if, in all the circumstances, greater justice or, perhaps less injustice, requires it*"); and (iii) *Lucas (Batteries) Ltd. v. Gaedor Ltd.* [1978] RPC 389 (EWCA) at 392.

[73] The thrust of Mr. Simms QC's submissions was that a party seeking a stay did not need to show exceptional circumstances to justify it, and that the modern authorities tended towards considering the matter in the round as to what course would cause the least prejudice to one or other of the parties.

[74] There is no gulf between the parties as to the applicable legal principles. But Matteo's counsel, Mr. Wilson QC, argued that the jurisdiction is not as uncircumscribed as counsel for Gabriele and Delanson would make it out to be, relying for support for this proposition on the observations of Sullivan LJ in *DEFRA v Downs* [8]:

> "A stay is the exception rather than the rule. Solid grounds have to be put forward by the parties seeking a stay and if such grounds are established, then the court will undertake a balancing exercise weighing the risk of injustice to each side if a stay is or is not granted."

[75] He also cited the decision of the Court of Appeal in *Bahamas Real Estate Association v. George Smith* (SCCivApp No. 109 of 2015) where, the Court of Appeal summarized the main principles as follows:

> "14. Further guidance as to matters the Court must take into account may be derived from the authorities. Some have been helpfully set out in the appellant's submissions, for example, (a) whether the appellant is entitled to appeal as of right; see also *Wilson v. Church* (No.2) (1879) 12 Ch 454; (b) whether the appellant has an arguable case; see *Mandeer Holidays Ltd v Civil Aviation Authority Official Transcripts* (1980-1989); (c) whether the absence of the stay would render a successful appeal nugatory; See *City Services Limited v. AES Ocean Cay Limited* [2012] 1 BHS J. No. 85 at para. 15 at TAB 8; see also *Wilson v. Church supra*; (d) whether there is a risk of injustice to one or other of the parties if it grants or refuses a stay; see *Hammond Suddards Solicitors v Agrichem Holdings Ltd* [2001] EWCA Civ 2065; and (e) whether the appellant has given sufficient evidence by affidavit as to why a successful appeal could be rendered nugatory; see *City Services supra* at para. 16."

[76] I agree that the principles governing the grant of a stay of arbitration proceedings pending appeal are the conventional common law principles, but these old principles must now be poured into the new wineskin of a modern arbitration artifice. At the risk of seeking to gild the lily, I would venture that the main principles, irradiated against the context of international commercial arbitration, may be distilled as follows:

(i) A stay pending appeal is not automatic; it has to be justified, and it is often said to be the exception rather than the rule;
(ii) The court, however, has a wide if not unfettered discretion to grant a stay, and must take into account all the circumstances of the case;
(iii) A party contending that his appeal will be rendered nugatory failing a stay must produce cogent evidence of the reasons why a stay should be given;
(iv) A hopeless or weak appeal will never justify a stay, and a party seeking a stay should adduce strong grounds of appeal, as the prospect of the appeal succeeding may be a determining factor where the balance of harm appears to be even;
(v) Fifthly, and perhaps most importantly, the court should conduct a balancing exercise to determine which party would be irremediably harmed by the grant or refusal of a stay; and
(vi) Sixthly, in the application of the above principles, the court has to take into consideration the specific features of international arbitration.

[77] In this regard, it is noted that the conditions listed for the granting of interim measures by the tribunal under s. 58 include satisfying the tribunal that:

> "(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed; and
> (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim."

Thus, the salient features of the common law test are encapsulated in the statutory test for the grant of interim relief in arbitration. In addition to this, the court may also take into consideration the guiding principles expressed in the Act, namely (i) fairness and expedition; (ii) non-intervention; and (iii) party autonomy. I should also add that any views or positions expressed by the arbitral tribunal are also important considerations for the Court.

Application of the principles to the facts of this case

Gabriele's perspective

[78] Among the main contentions made in support of his application for a stay, Gabriele argued that: (i) he would suffer irremediable harm if the stay were to be refused and the challenge were to succeed, while by contrast there would be no irremediable harm to Matteo; (ii) that there are important reasons of principle why the stay should be granted, having regard to the procedural conduct of the arbitration; and (iii) that the appeals have a real prospect of success.

Wasted costs

[79] As to harm, Gabriele says in his affidavit evidence that to refuse the stay would lead to substantial wasted costs which appear unlikely to be recoverable from Matteo if the challenge succeeds. He argued that Phase 2 of the arbitration, if it goes ahead, will likely be a very expensive process, and will involve the valuation of a number of complex businesses operating over different time periods, and trust assets spread across various jurisdictions and industries (ranging from the oil and gas sector in West Africa to real estate and Italian sports club.) These costs will be front-loaded and incurred as soon as Phase 2 commences, with an extensive disclosure process related to the businesses and assets, and the commission of wide-ranging factual and expert evidence.

[80] Matters are made worse, Gabriele asserted, because there are good reasons to believe that the wasted costs cannot be reimbursed, as there are serious doubts that Matteo, as indicated by his own evidence, has the means or willingness to honour an adverse costs order. He points to Matteo's affidavit resisting the stay where he claims that he has "*limited resources*" and is "*currently in a very difficult liquidity position*" to continue funding the litigation. In fact, it was this concern which led Gabriele to make the application for interrogatories for Matteo to explain or elaborate his funding arrangements.

Disclosure of sensitive commercial information

[81] Further, Gabriele asserted that there is a real risk that owing to the disclosure process highly sensitive commercial information may be obtained by Matteo, whom Gabriele regards as a commercial competitor. Matteo is the CEO of Interoils Materials Services Ltd. ("IOMS") and International Container Terminal Services Nigeria Ltd. ("ICTSI"), businesses which are said to compete directly with Gabriele's primary business Itels, in the same industry and location.

[82] He contended that the risk of disclosure is very real, as Matteo has already sought extensive disclosure of business plans, financial forecasts and/or detailed cash flow for Orlean Invest Holding Ltd., the holding company for Intels, during Phase 1, and this will likely be intensified in Phase 2, when the Tribunal is dealing with the issue of quantum. He further alleges in his evidence that the risk of prejudice to Gabriele is enhanced by Matteo's past conduct in the arbitration, in particular his willingness to disregard the confidentiality requirements. This, he says, is evidenced by the fact that in June of 2020, Matteo filed a witness statement in the arbitration apologizing for passing on details of the arbitral proceedings to a third party, in which he acknowledged that "*in doing so I did breach the confidentiality of the arbitration*."

No irremediable harm to Matteo

[83] In contradistinction to the harm that he would suffer, Gabriele argued that Matteo will suffer no real prejudice if the stay is continued pending the determination of the challenges and appeals in the Spring of this year, and certainly none that cannot be compensated in costs. He advanced the following reasons:

(i) Even if Matteo is ultimately successful in his primary claim for reconstitution of the Trust assets or equitable compensation in the alternative, his entitlement to relief will be again "*to become a discretionary beneficiary under the reconstituted trusts. He has no fixed entitlement to any part of the Trust fund, and any money award will not be paid to him. Therefore, a stay would, if Matteo was completely successful, deal on the hypothetical possibility of being considered for a financial distribution from a discretionary trust*."

(ii) Secondly, as the Tribunal has ordered that the costs be dealt with at the end of Phase 2, Matteo may not be the successful party for costs purposes, even if the challenges and appeals are ultimately dismissed. In particular, it is indicated that one of the factors militating against the award of costs might be the fact that Gabriele made an open offer to him of family support in the amount of $US120 million (a similar offer having been accepted by Simone), and if any possible entitlement falls below this, it may be a basis for denying costs.

(iii) Thirdly, the Court is only being asked to extend the stay, which has already been in place for five months, for a relatively short period, and there is no basis for thinking (as Matteo alleges) that a stay may "*be in place for a number of years*".

Merits of the appeal

[84] Quite properly, Gabriele does not delve deeply into the merits of the appeal and defers this for elaboration at the hearing. But in the Bray affidavits, he set out his position on the appeal and contended that there is a real prospect of success, which it is submitted has only been enhanced by the inconsistencies revealed between the Additional Partial Award and the Partial Award.

Points of principle

[85] Mr. Black QC (in reply submissions) also rejected a contention by Matteo that a stay would be disruptive to the Tribunal's procedural approach to hearing the arbitration in two phases, the intention of which it was asserted was that one should follow the other without interruption (the 'normal procedure'). Mr. Black QC contended that the bifurcation was adopted by the Tribunal simply for "*costs and efficiency*", which remain the very reasons that the stay should be continued, and that Matteo's assertion that the Tribunal's procedural timetable was adopted "purely for procedural convenience rather that with a view to providing a break for appeals" is unsustainable. Further, any suggestion that the 'normal procedure' precluded any challenges before Phase 2 would be contrary to the provisions of the Act, which provides for a party's right to challenge on grounds indicated in the Act and provides for such challenges to be made within a certain time period (28 days). Gabriele was therefore bound to challenge the partial award at this stage, and the stay application was a necessary consequence of that challenge.

Delanson's perspective

[86] Mr. Simms QC adopted the submissions of Mr. Black QC, on behalf of Delanson. In addition, he made two principal arguments in support of Delanson's claim for a stay, which are summarized in his written submission as follows:

> "In Delanson's submissions, refusing a stay will (i) force Delanson to incur significant costs in defending the proceedings, which as a matter of practicality it is unlikely to recover from Matteo in the event the challenge succeeds; and (ii) place extremely sensitive commercial information in the hands of a party (Matteo) who is a known competitor of the Trusts principal assets (the Orlean Group) and who has admitted to breaching the confidentiality of the arbitration proceedings."

[87] In support of these contentions, and similar to the position taken by Gabriele, the First Affidavit of Moja explains that the costs of preparation for Phase 2 will be very significant and expressed similar concerns as Gabriele that it will be unable to recover significant costs from Matteo in the event the challenge succeeds, for the reasons already given. He also contended that a stay will cause minimal prejudice to Matteo. This is because there will be limited delay (the substantive challenge is due to be heard at the end of April) and in any event the tribunal granted the stay on the basis that Delanson and Gabriele would "*proceed with the Bahamian application with expedition*." However, even if there were some delay, Matteo would not suffer any financial prejudice either from being kept out of any Trust assets (as he alleges) or costs.

[88] In this regard, Mr. Simms QC concentrated much of his fire on the speculative nature of Matteo's expectation or hope to receive any benefits from the Trust Assets. He contended that "*this is not a case where the tribunal has determined that one party is entitled to a large liquidated sum, and Delanson is seeking a stay of enforcement. Rather the tribunal has determined that the Trust ought to be reconstituted or equitable compensation paid to the Trust*."

[89] He asserted that this is significant for three reasons: (1) it is unclear how much, if anything, any compensation will be worth, as the evidence of Gabriele and Delanson before the Court was that the Trust assets faced a "deep financial crisis" at the time of the distribution; (2) even if the Trust were constituted with significant value, Matteo is merely a discretionary beneficiary with only a hope of receiving distributions, and an entitlement to be considered periodically as a possible object of distributions; and (3) even if a new trustee were minded and able to make distributions to Matteo as soon as possible, the earliest that could occur would be a couple of years into the future.

[90] Delanson also submitted that its challenge meets the arguability threshold, and this is supported by the facts set out in the First Affidavit of Moja. That is also as far as they are willing to go on the merits of the challenge, lest it shades into the hearing of the proper challenge. However, they do condescend to the statement that "*Delanson considers that the reasoning in the Additional Partial Award amounts to a concession that the Tribunal's reasoning in the Partial Award was fundamentally flawed*."

Matteo's counterpoints

[91] As indicated, Matteo does not take any serious issues with the principles regulating a stay, although he argued that the discretion should be exercised more restrictively than contended for by the appellants. He argued strongly, however, that the application of the principles to the facts should augur against the grant of a stay, and offers up by way of counterpoint some seven propositions as to why the balance of harm favours Matteo.

[92] First, that the normal procedure envisaged by the Tribunal when it made its procedural order bifurcating the proceedings and setting its timetable was that the parties should proceed directly to Phase 2 and that this timetable "*does not allow for any period of delay for the parties to reflect or challenge any partial award*". (I have already made reference to Mr. Black QC's reply to this argument.)

[93] Second, it is posited that a stay would be inconsistent with the express terms of the arbitration clause in each Deed (cl. 27) which provides that "*The panel shall render judgment in the customary manner within 180 days*." Somewhat inconsistently with this argument, it was conceded that this timeline was not capable of being achieved in any event by the tribunal as there was insufficient time to deal with all the matters within the 180-day period. But it is said that *Cl*. 27 signalled a clear intention for expedition in the process of the arbitration and in the provision of the award.

[94] As to the third point, Matteo argued that as a matter of principle the starting point is that a stay should normally be refused, and that an award carries a presumption of validity. For this proposition, he referred to the observations of Hamblen J. in *Sovarex SA v Romero Alvarez SA* [2001] EWHC 1661 [43] where it was observed: "…*the party who has obtained an award has the benefit of a presumption of validity and it is for the party resisting recognition or enforcement to prove otherwise*." Therefore, a party seeking a stay pending leave to appeal would need to adduce special grounds (as per *DEFRA v Downs*, *supra*).

[95] Fourth, he argued that a stay would be procedurally inefficient, as it is likely that the process could be extended by an appeal to the Court of Appeal and beyond, which may have the effect of stopping the arbitration for "*an indefinite period, so as to resume it months and likely years later*".

[96] The fifth point is that any stay which would delay the completion of the Phase 2 would operate to the substantive prejudice of Matteo, based on the following reasons. Firstly, the longer the trust assets remain in structures outside of the Trust Deeds, the greater the accumulated prejudice as Matteo is kept out of his rights as beneficiary. Secondly, the distribution of what were "asset protection Trusts" was done deliberately to put them out of the reach of the intended beneficiaries and provide them with little visibility over the trust assets. Thirdly, even though the Tribunal rejected Matteo's claim for an interim injunction on the basis that Gabriele would (or could) dissipate trust funds, his actions in (i) moving the Trust assets into an offshore foundation; (ii) repeated assertions that he considered the Trust assets to be his to control; (iii) the multiple challenges to the award; and (iv) failure to provide visibility over the Trust assets and to give any assurance that he will abide by any order to re-constitute the Trust assets are

tantamount to a risk of dissipation. Fourthly, that the stay is an attempt to exploit the known disparity in the resources of Gabriele and Matteo, and further erode the financial security of Matteo by depriving him of any distributions through the Trust.

[97] Sixth, Matteo argued that there would be something fundamentally wrong with granting a stay as a matter of principle, as this would effectively grant Delanson and Gabriele control over the arbitration. Thus, as long as Delanson and Gabriele are able to keep the challenges on foot, the arbitration will remain suspended and the assets under the control of Betacorp.

[98] The seventh point is directed to the merits of the appeal. While accepting that it is inappropriate to examine the merits at this stage, Matteo contended that "*the scope for a successful challenge is vanishingly small with the consequence that any challenge faces, at its lowest, an uphill struggle. Th(e) substance of the 2009 Act, modelled to the extent relevant on the UK Arbitration Act 1996 (the UK Act) accords overriding autonomy to the arbitral process, with only a residual light touch supervisory role of the Court in the event of a fundamental error*." He stressed that with respect to both an appeal under s. 89 (lack of substantive jurisdiction) and under s.90(1) (serious irregularity) the threshold is very high. In respect of a s.89 appeal, it only encompasses the matters specified in s. 41(1) (a-c), namely whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters were submitted to arbitration in accordance with the arbitration agreement. As to serious irregularity, he referred to the Court of Appeal's decision in *Therapy Beach Club Incorporated v. Rav Bahamas Ltd.* (SCCiv App. No. 23 of 2018) where the Court, after reviewing the English authorities, held *inter alia*, that a high threshold must be satisfied, and that an appeal is only available under this section "…*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*." With respect to an appeal on a point of law, Matteo contends that on his construction of s. 91(2) an appeal may only be brought with the consent of the parties, and as there is no such agreement, there is simply no scope for an appeal on those grounds. Thus, Matteo concludes that for the purposes of the balancing exercise the court should take into consideration the following: (i) the limited scope for any challenge under the Act; (ii) the fact that the tribunal consisted of three eminent legal practitioners and arbitrators; and (iii) that the awards are contained in extensive documents with detailed consideration of the issues and reasoning.

Conclusions on the stay

[99] I have examined all of the circumstances of this case and I have come to the view that on a balance of the harm that would be suffered by the respective parties, I should exercise my discretion to grant the stay sought by Gabriele and Delanson. I do not intend to deal with all of the arguments and considerations that have been fulsomely developed by the parties for and against the stay, but I set out the main reasons that have influenced my conclusion in this regard.

[100] I start from the proposition that a stay is not automatic and has always to be justified. I agree with Mr. Simms QC, however, that while the party seeking a stay should adduce good grounds, the requirement for special or exceptional grounds must depend on the circumstances of the

individual case; it cannot be superimposed as a procrustean rule in all cases. It might well be apposite those cases involving a money judgment, where a stay might keep the winning party out of the fruits of his judgment. But, as even Matteo was forced to concede, this is not a money judgment. And, as the appellants have pointed out, there is no direct financial or pecuniary benefit to which Matteo would be entitled under the awards, as even costs have been deferred to Phase 2. Therefore, the interregnum of a short stay does not keep him out of any benefit to which he might ultimately be entitled.

[101] By contrast, I am persuaded that Gabriele and Delanson have much more to lose if a stay is not granted. There can be no gainsaying that Phase 2 of the Tribunal's hearing will entail a massive and hugely expensive exercise in the evaluation of assets of multiple underlying trading companies in far-flung jurisdictions over different time periods, a substantial discovery exercise in respect of these assets (in which the appellants will be on the receiving end), expert evidence on complex assets and transactions, and factual evidence as to financial performance. Faced with the risks that drilling down into Gabriele's and Delanson's activities in connection with the assets of the trusts are bound to yield commercially sensitive information that might be vulnerable to exploitation, and Matteo's declared scarcity of funds and its implications for meeting any adverse costs orders, I am of the view that the appellants have provided sufficient reasons to justify the grant of a stay.

[102] As to the point taken by Matteo that a stay would interrupt and be disruptive of the hearing by the tribunal, I agree that this is not a seriously arguable point. It was colourfully put down by Mr. Black QC as follows: "*No court or Tribunal ever schedules in its procedural directions the possibility of appeals, but on the other hand, if the Tribunal had seriously taken the view that it was going to blast on regardless, then it wouldn't have granted the stay five months ago.*" More substantively, the Tribunal's procedural approach to a hearing cannot straight-jacket the ability of a party to arbitration to challenge or appeal an award. The Act is clear that an appeal or challenge has to be commenced within 28 days of the award. It cannot sensibly be contended that Gabriele or Delanson should have held their fire until the end of the arbitration, as at that point they would be precluded from appealing the issues already decided by the Tribunal. So the question is, if not now, when?

[103] As I have determined that the balance of harm favours Gabriele and Delanson, I do not need to weigh the prospects of the appeal into the balance in any substantive way, and the parties have also not seriously trespassed into the merits at this stage. But I do think it is a significant factor in assessing the arguability criterion that one of the members of the Tribunal disagreed with the majority, and this dissent in large measure is the premise for some of the points being taken on appeal. As pointed out by both appellants, the Tribunal itself agreed to issue an additional award to clarify issues arising in the Partial Award, which the parties contend only provided further grounds for challenge. Therefore, and obviously without expressing any views one way or another on the awards, in light of the dissent and the agreement of the Tribunal to clarify the first award, it cannot be contended that there is not some merit in the grounds which have been staked.

[104] In having regard to the specific features of arbitration that may have a bearing on the matter, I accept Matteo's contentions that the scheme and philosophy behind the 2009 Act was to limit the court's intervention, and to permit an appeal only on the limited ss. 89, 90 and 91 grounds, which require a high threshold to substantiate. But whatever legal hurdles the appellants have to mount at the substantive hearing to make good their claims, Parliament clearly provided for appeals under s. 89 and s.90—in the first two cases without a requirement for leave, and which is one of the factors the court traditionally considers in granting a stay—and arguably under s. 91 with the leave of the court. Thus, Parliament must have intended that the right to appeal should be more than illusory and that protective measures (such as a stay) as may be justified in a particular case, and as provided for under s. 67, would be available. In this regard, it is also notable that s. 43 (determination of a preliminary point of jurisdiction) and s. 63 (determination of a preliminary point of law) provide for the arbitral panel (unless otherwise agreed by the parties) to continue the arbitral proceedings and make an award while an application to the court is pending under those sections. Section 89 also provides for the arbitral tribunal to make a further award while an application is pending to the court under s. 89, no doubt in deference to the *kompetenze de la kompetenze* principle (see the *Auto-Guadeloupe* case, *supra*). But neither s. 90 nor s. 91 specifically empowers the Tribunal to continue with the process pending a challenge under those provisions.

[105] I also found it very compelling that the tribunal itself granted "*a stay of the present proceedings pending the Supreme Court of the Bahamas' decision on the stay application before it*", thereby deferring to the views of this court as to the continuation of the stay on the condition that the appeal was expeditiously pursued. In some respects, then, this is not the grant of a new stay, but the continuation of a *pro-tem* stay granted by the tribunal, and which, in a spirit of comity, it deferred to the domestic court for final decision.

[106] For all the above reasons, I ruled that in the circumstances it would be just, on a balance of the harm that would be caused by its refusal, to grant the stay sought by Delanson and Gabriele pending the hearing of their challenges/appeals, subject to the similar condition imposed by the arbitral tribunal that such appeals are to be pursued on an expedited basis.

<u>Application for security for costs under s. 92(6)</u>

[107] As indicated, Matteo applied for security for costs against both appellants. The schedules attached to the affidavits of Miguel Darling contain Matteo's estimates of the costs claimed for the hearing for interim relief and the substantive appeal, which amount to over some $800,000.00 as against each appellant. Gabriele and Delanson oppose the security for costs applications, firstly on the grounds of principle and alternatively, on the grounds of quantum.

[108] The Court has a discretion to order an applicant or appellant to provide security for the costs of an appeal under s. 92 (6), which in material part states:

> "(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with; the power to order security for costs shall not be exercised on the ground only that the applicant or appellant is—

(a) an individual ordinarily resident outside The Bahamas; or
(b) a corporation or association incorporated or formed under the law of a country outside The Bahamas or whose central management and control is exercised outside the Bahamas."

(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The court may grant leave to appeal subject to conditions as to the same or similar effect as an order under subsection (6) or (7) but this does not affect the general discretion of the court to grant leave subject to conditions."

Legal principles

General considerations

[109] While s.92 (6) empowers the court to grant security for costs, it does not set out the grounds or principles on which the court should exercise its discretion. The only requirement is a negative one, namely, that under that section the court may *not* order security for costs on the basis that an individual is not ordinarily resident, or that the company is incorporated outside the Bahamas. It will be immediately apparent that the condition stated at s. 92(6)(a) is a reversal of one of the main grounds on which the court would normally exercise its discretion to grant security for costs against an individual plaintiff under *RSC* Order 23, r. (1)—i.e., "*that the plaintiff is ordinarily resident out of the jurisdiction*".

[110] In the leading text "*Butterworths Challenges in Arbitration*—Challenges against Arbitrators, Awards and Enforcement in England and Wales" (2019, Lexis-Nexis) [2.10, Security for Costs, fn., 6] it is explained that the reason proffered for this reversal by the UK Departmental Advisory Committee on the Arbitration Bill, whose recommendations became the UK Act, was to protect the UK's position as a leading arbitration centre, so that it "…*would not appear to those abroad who are minded to arbitrate their claims here that foreigners were being singled out for special and undeserved treatment*." It might be surmised that this same philosophy underlies the provision in the 2009 Act.

[111] To be sure, the overarching principle set out in the *RSC* which provides for the court to have regard to all the circumstances of the case and order security for costs where "*the Court thinks it just to do so*" and the case law which developed in a non-arbitration setting are relevant. But it is clear from the preclusive conditions that the normal principles governing security in regular commercial litigation as against individual claimants might be of limited applicability in an arbitration context. There are also provisions in the Companies Act (Ch. 308) (s. 285) governing security for costs against companies, but again these are not applicable to foreign companies. However, Order 23, r. 3 of the *RSC* is specifically said to be without prejudice to the power of the court to order security for costs conferred by any enactment, which would

include the 2009 Act. The court also retains a general power under Order 31A, Rule 18 of the *RSC* to require a party to give security as part of its case management powers.

[112] Mr. Black QC commenced his submissions on this point by pointing out that the formulation used at 92(6) is almost identical to its counterpart section 70(6) of the 1996 English Act, and therefore invited the Court to consider the relevant English authorities in approaching the exercise of the discretion (an approach which has subsequently been confirmed by the Privy Council, see *Rav Bahamas Ltd. and another, supra*). It appears to be common ground between the parties that the following are several of the leading authorities: *Azov Shipping Ltd. v. Baltic Shipping Co.* [1999] 2 Lloyd's Rep. 39; *X v Y* [2013] Lloyd's Rep. 230, *Progas Energy Ltd. v Pakistan* [2018] EWHC 209.

[113] In the *Azov* case, Longmore J. was considering an application for security under s. 70(6) of the 1996 UK Act. His Lordship held that save for the fact that he could not order security on the ground that the applicant was a corporation incorporated outside of the UK, there were no fetters on the court's discretion in relation to security for costs. He also held that the court should be guided by one of the founding principles of arbitration proceedings expressed at s.1(a) of the Act, which provides that: "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*." As previously noted, a similar provision also appears in the 2009 Act.

[114] The principles from several of the leading cases concerning an application for security under s. 70(6) of the UK Act were usefully pulled together by Mr. Justice Picken in the *Progas* case, which bears quoting at some length (although elliptically for the purposes of economy):

> "18. Coming on, then, to the security for costs application, section 70(6) of the 1996 Act provides as follows:
>
> 'The court may order the application or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal is dismissed if the order is not complied with.'
>
> 19. The relevant principle which governs the decision by a court whether to order security for costs is whether it is just to do so in accordance with the overriding objective of CPR Part 1. […]
>
> 20. For his part, Mr. Foxton QC, uncontroversially as I understood it, described the key question as being whether the party bringing the challenge under section 68 has sufficient assets and whether those assets are available to meet any order for costs. That is how the matter was put by Longmore J (as he then was) in *Azov Shipping Co. v Baltic Shipping Co. (No. 2)* [1999] 2 Lloyd's Rep 39 at page 41 col. 2 in a passage relied on also by Professor Sarooshi:
>
> 'It seems to me…cases will be rare in which a court or indeed an arbitrator would think it right to order security for costs if an applicant for relief has sufficient assets to meet any order for costs and if those assets are readily available for satisfaction of any such order for costs.'

21. Mr. Foxton QC also relied upon *X v Y* [2013] 2 Lloyd's Rep 230, a decision in which at para. 15 Teare J followed the guidance given by Longmore J and described the question, therefore, as being 'whether X has assets which are available for the purposes of execution." […]

22. *X v Y* was a case in which, Teare J went on to explain at para. 17, the claimant company was a substantial concern in India with considerable assets in Australia which had 'plainly set its mind against honouring any of the awards made against it, including the orders for costs made against it'. He went on:

> 'The substantial sums due under the now unappealable third award remain unpaid. That award was issued over a year ago. The costs payable by X pursuant to the second award, issue about 18 months ago, also remain unpaid. Had X any intention to pay the sums awarded against it under those awards they would have been paid some time ago. In those circumstances, it is to be expected that X will seek to resist any attempts to enforce the awards which have been issued against it. Moreover, since the major asset relied on by X is a shareholding in a subsidiary company there must be doubt as to whether such asset is liquid, that is, readily realizable. Whilst X could probably be made to pay in the end, it probably could not be made to pay with any high degree of promptness….There is no witness statement on behalf of X expressing either a willingness to pay such costs as may be ordered against it or explaining how such a liability could readily be enforced by Y."
>
> He then concluded at para. 18:
>
> In those circumstances I have reached the conclusion that there is a real risk that the assets of X are not readily available for the satisfaction of any order for costs which may be made by the courts against X. It follows, in my judgment that the expense of complying with an order for security for costs is an expense which is necessary to ensure the fair resolution of the dispute between X and Y regarding the former's challenges to the fourth award. In the absence of security, there is a very real risk that any cost order made in favour of Y would not be enforced without considerable delay and further expense. I have therefore concluded that X should provide security for Y's costs resisting X's challenges to the award…'."

[115] To this pantheon of authorities Mr. Simms QC contributed the case of *A v B (Arbitration: Security)* [2010] EWHC (Comm), where Flaux J noted in relation to the English equivalent of section 92(6) [s. 70(6)] that:

> "50. Thus, whilst it would not be advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under section 70(7), it seems to me that as a general principle the court should not order security unless the applicant can demonstrate that the challenge to the award (whether under section 67 or, indeed, either of the other sections) will prejudice its ability to enforce the award. Often this will entail the applicant demonstrating dissipation of assets, although there may be other ways in which enforcement could be prejudiced."

Matteo's claim

[116] Mr. Wilson QC for Matteo argues two main grounds for the grant of the security: (i) firstly, that Gabriele nor Delanson has any assets within The Bahamas against which he can enforce a costs order; and (ii) that with respect to Gabriele, there is a risk of him dissipating assets and evading any enforcement.

[117] This is what Matteo says as to the appellants' lack of available assets in his affidavit submitted under cover of the affidavit of Miguel Darling filed 24 September 2020:

> "16. To my knowledge, neither GV nor Delanson are in possession of assets within this jurisdiction upon which a cost order can be enforced. In particular, in previous Bahamian proceedings GV swore an Affidavit and stated at paragraph 39 'personally none of my assets is located in the Bahamas nor I have (sic) any other connection with the Bahamas. […]
>
> 17. In respect of the Trust Assets, following the distribution by Delanson to GV, he then caused the assets to move subsequently. In December 2016, GV transferred the vast majority of Trust Assets to Betacorp International Limited (Betacorp), a Maltese company of which GV was the sole shareholder. Betacorp itself was then subsequently transferred into a Maltese Foundation, the Sera Foundation in July 2017. Very little is known currently by me of the structure of the Sera Foundation save that GV is the founder. It is understood through GV's own representations that he is the ultimate beneficial owner of the Sera Foundation.
>
> 18. These steps demonstrate GV's willingness to take all possible steps to move assets in order to provide asset protection from his creditors and indeed in this case from the other beneficiaries of the Trusts. It is also of significance that a number of entities forming part of the Trust Assets are incorporated or registered in jurisdictions such as Nigeria, Panama and Switzerland, all of which cause significant difficulty for enforcement upon those particular assets.
>
> 19. I am not aware of what assets GV owns in his own name as I have never received disclosure of his personal assets. I have no reason to believe that any assets would be owned in GV's personal name given the steps he has taken to put those assets out of the reach of creditors and the other beneficiaries of the Trust so that he had full control and benefit of them.
>
> 20. With regards to Delanson, it is also common ground that they do not have possession or control of the Trust Assets (save for bare legal title of one asset, Venturegold Investment West Africa Limited, a Nigerian company which they say hold as bare trustee for GV.) I have no reason to believe that Delanson is anything more than a shell trust company and furthermore there has been no suggestion that Delanson owns any assets in its own right."

[118] Significantly, Matteo apprehends that there is a real risk of the dissipation of assets that Gabriele may have available to satisfy any costs order. As stated in his written submission:

> "There is a clear and obvious risk that, if and when the challenges are dismissed, Matteo will face obstacles in seeking to enforce his costs orders in whatever foreign jurisdiction he may or may not manage to locate his assets. The conduct of Delanson and Gabriele to

> date, in acting in breach of trust and/or in unconscionable receipt and in placing the Trust Assets in a foreign jurisdiction within layers of opague ownership, the sadly acrimonious nature of this dispute, and the absence of any visibility or assurances on the part of Gabriele make such risks real and tangible."

Gabriele's response

[119] In reply to the claim that they lack assets in the jurisdiction, both Gabriele and Delanson assert that they are the beneficiaries of significant costs orders against Matteo arising out of the earlier Bahamian proceedings (the two actions before the Supreme Court [Action No. 2018/CLE/gen/00474], [Action No. 2018/CLE/gen/01404], and the appeal [SCCivAppNo. 145 of 2019]). Gabriele points out that the affidavit in 2019 in which Matteo invokes his (Gabriele's) self-confessed lack of assets in the jurisdiction must now be considered as overtaken by time. Gabriele therefore relies on the bill of costs submitted in the earlier Bahamian actions which are said to total some B$1.48 million, and which he submits are "final costs orders", although he accepts that these are currently subject to ongoing taxation proceedings. He therefore asserts in the Third Affidavit of Bray (para. 14, and 30):

> "14. Matteo's application for security for costs is therefore misconceived because Gabriele does have an asset in The Bahamas in the form of three very substantial final costs orders against Matteo. Indeed the Bills of Costs that have been presented for taxation of the existing costs orders in Gabriele's favour are larger than the total amount of security for costs now being claimed by Matteo. […]
>
> "30. This application should be dismissed as unnecessary and unsupported by evidence. The present position is that Gabriele has the benefit of existing final costs orders made by the Supreme Court and the Court of Appeal which far outweigh Matteo's excessive costs estimates."

[120] The claim as to the possibility of assets being dissipated by Gabriele was vigorously disputed by Mr. Black QC, both in his written and oral submissions. He asserted that the inference that Matteo seeks to draw merely from the fact that Gabriele uses offshore structures is impermissible having regard to the authorities. He stressed that Gabriele is an international businessman and the use of offshore entities, without more, is a legitimate business practice which does not in and of itself give rise to any inference of a risk of dissipation. In oral submissions, Mr. Black QC contended that there is an obvious irony in Matteo's contentions, since Matteo himself uses such entities as an international businessman.

[121] Mr. Black QC drew on several authorities in support of this proposition, most notably the observations of Freedman J. in *Les Ambassadeurs Club Ltd. v Albluewi* [2020] EWHC 1313 (QB) at [30]:

> "(2) The risk of dissipation must be established by solid evidence; mere inference or generalized assertion is not sufficient. […]
>
> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their

> assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures."

Reference was also made to the decision of Arnold J. in *VTB Capital plc v Nutritek International Corpn*. [2012] 2 BCLC 437, where it was said:

> '[it] is not uncommon for international businessmen, and indeed quoted UK companies, to use offshore vehicles for their operations, particular for tax reasons. This may make it difficult to enforce a judgment….More is required before the courts will conclude that there is a risk of dissipation."

[122] The opening salvo by Mr. Black QC on the quantum of the claimed security was that the Courts have always viewed costs estimates put forward by applicants for security with a healthy degree of skepticism, as was famously memorialized by Fox LJ in *Cheffick Limited v JDM Associates* [1988] 43 BLR 52 at 59:

> "It seems to me that the exhibited costings cannot be regarded as anything more than estimates. The judge was, it seems to me, entitled to look at those estimates critically and, in doing so, to make [allowance for] what the Vice-Chancellor in the case of *Chandless v Whittome* (unreported) 10th December 1986 called 'the exaggerations in which in all good faith everybody is inclined to make in estimating the expenses which they can recoup from somebody else.' "

[123] In the Third Bray affidavit and in submissions, Gabriele sets out several reasons why the amount sought for security is excessive. Firstly, Matteo's estimates includes provision for the costs of a number of UK solicitors, costs which Matteo himself has conceded (in the earlier taxation proceedings) would be irrecoverable, and which are in the region of B$300,000. Secondly, counsel's fees is greatly increased as result of instructing a leading UK silk, whose claimed costs alone amount to nearly B$227,000.00. This cost is said to be unreasonable, as Matteo already has engaged local Queen's Counsel. Thirdly, the size of Matteo's legal team is said to be disproportionate, as it included five legal representatives from the UK solicitors (Taylor Wessing LLP), two Queen's counsel, as well as three Bahamian juniors. There is said to be no prospect of recovering for so many legal representatives on taxation. Fourthly, it is said that the number of hours allocated to work done by these representatives is disproportionate, unexplained and clearly duplicative. Fifthly, the rates for these individuals are too high (B$ 953.00 for partner, B$703.00 for senior associates, and B$633.00 for an associate) and would be unreasonable, even if such fees were recoverable.

Delanson's position

[124] For Delanson, Mr. Simms QC also contends that "*Delanson has substantial assets in the jurisdiction in the form of three outstanding costs orders against Matteo*", and that in any event the claim by Matteo is "manifestly excessive" for reasons set out in the Third Affidavit of Moja.

[125] While also conceding that its costs orders from the two Supreme Court actions referred to above and the appeal are awaiting taxation, Moja asserts that "*the bills of costs together*

amount to USD 1.3 million. Even allowing for assessment, that is ample to cover the USD $800,000 in security which Matteo seeks. Matteo has provided no reason why that is not sufficient security." In his oral submissions, Mr. Simms QC went so far as to argue that a cost order is a chose in action which is capable of being assigned, and therefore an asset which can be realized.

[126] The Moja affidavit further states that, for reasons similar to those advanced by Gabriele, even if security were to be granted, the sum is unreasonable. These are: (i) the bulk of Matteo's cost estimates relate to claims for English solicitors who have no standing to practice in the Bahamas, and whose costs are irrecoverable; (ii) costs claimed are on an indemnity basis, when it is likely that costs will be recovered only on the standard basis; (iii) the rates are excessive, and there is insufficient break-out of the costs being claimed; and (iv) that Matteo is charging for two leading silks, costs which he is unlikely to recover on taxation as being unreasonable.

Matteo's riposte

[127] In his reply evidence and submissions, Matteo disputed that these costs orders constitute assets available to satisfy any cost orders, for several reasons. Firstly, he pointed out in his affidavit filed in support of security for costs that as a result of preliminary rulings by the Registrar, the fees claimed by Gabriele in the Supreme Court have been reduced from a total of some $1.12 million ($694,376.45 claimed for the first action and $427,000.00 for the second action) to a total of roughly $411,000.00. Thus, in addition to the fact that these costs have been heavily taxed down, there is yet no final determined costs payable by Matteo to Gabriele or Delanson. Plus, Gabriele's costs for the Court of Appeal hearing have yet to be taxed, and none of the costs relating to Delanson has been taxed. Secondly, he asserted that neither Gabriele nor Delanson has offered any assurances or commitment that any sums in fact paid under any costs orders will be retained in The Bahamas and held as security for adverse costs orders. Finally, he contended that there is no evidence that there will be any sums in the jurisdiction at the time when any costs orders in his favour come to be enforced.

<u>Court's analysis and conclusions on security for costs.</u>

[128] I accept that, subject to the very important qualification under s. 92(6) that security may *not* be ordered on the single basis that the party against whom security is sought (whether individual or corporate) is foreign, the Court has a broad discretion to grant security for costs. I also agree with the proposition, which seems to have been uncontroversial among the parties, that the key question based on the modern arbitration authorities is this: whether there is a real risk that the party against whom security is sought lacks assets that are *readily available* for the satisfaction of any cost order the Court may make—that is, available without involving considerable expense and delay. In this regard, I find very instructive the specific formulation used by Teare J. in *Progas* that the relevant question is "*whether X has assets which <u>are available for the purposes of execution</u>"* (my emphasis). This obviously does not require liquid assets, but to my mind it connotes assets to which the claimant has an entitlement and which can be rendered immediately or mediately available for the payment of any debts.

[129] It is clearly the case that Gabriele is not ordinarily resident in the Bahamas and that Delanson is a company constituted under the laws of another country, in this case a New Zealand company. So the court is statutorily debarred from granting security on any of these grounds. But as the cases make clear, there is an important distinction to be made between the location of the party against whom security is sought—which may not be considered in the granting of security—and the location of his or its assets. The latter is clearly important as it goes to the ready availability of those assets for enforcement.

[130] Despite Mr. Black QC's invocation of the cliched phrase in oral submissions that *"absence of evidence is not evidence of absence",* in response to Matteo's claims that there is no evidence of assets in this jurisdiction, I must agree with Matteo that there is no evidence before the court that either Gabriele or Delanson has any assets that can readily be made available to satisfy any adverse costs orders that might be made against them. I reject Gabriele's and Delanson's submissions that their untaxed costs constitute readily available assets for the following reasons. Firstly, an untaxed cost order is a claim to costs, the amount of which remains unascertained and uncertain, and is not enforceable in the absence of a final tax certificate. Even if it can be viewed broadly as an asset, it is not an asset that is readily available to the costs payee to satisfy a costs order or any debts.

[131] In *Responsible Development for Abaco (RDA) Ltd., (ex parte The Queen) v. The Rt. Hon. Perry G. Christie and others* (SCCivApp.No. 248 of 2017), which was an appeal from security for costs awarded in judicial review proceedings, counsel for the applicants had argued that the representative company had assets in the way of an untaxed claim for costs against the same Respondents. Isaacs, JA, delivering the decision of the Court dealt with that assertion as follows:

> "The applicant is a non-profit company which relies upon donations from third persons. The only asset the applicant has revealed that it has is an untaxed claim for costs in excess of $1million. Presumably that receivable when crystallized after taxation will be matched by a payable to the applicant's lawyers. Taxed cost represents costs that the applicant has incurred."

Therefore, the Court of Appeal plainly considered that untaxed costs were not "crystallized" assets available to the claimant.

[132] In *Progas,* one of the arguments advanced in opposition to the claim for security for costs which was being claimed by the defendants in the amount of £482,029.19, was that the claim was being financed by external litigation funders (Burford Capital Ltd.), and Burford had issued a letter to the claimant that it would ensure the payment of any future adverse cost order made against the claimant up to the maximum amount of £428,029.19. In light of this, it was argued that the court should therefore treat the claimants as having assets which were available to them and should decline to order security for costs.

[133] Picken J. dismissed this submission and indicated as follows at [36]:

> "36. Secondly, it is impossible to see how Professor Sarooshi can be right that the Burford letters mean than the claimants have 'available' to them assets which mean that no order for security for costs is necessary or appropriate. Since Burford is under no contractual (or other) obligation to the claimants to do what Burford says it would do in the letters, namely meet any costs order in favour of the defendant, it simply makes no sense to regard the letters as somehow making 'available' to the claimant's assets which would make a security for costs order unnecessary or inappropriate. There is nothing 'available' to the claimants, and still less can it be said that the claimants have assets in any relevant sense."

[134] While I do not intend to suggest for a minute that the appellants' costs orders are on the same footing as the claimants in *Progas,* who had only the benefit of a mere commitment of third party funding, I do think the observations by Picken J. might be extrapolated by analogy to the instant case. I am not therefore persuaded that a claim to untaxed costs constitutes assets that are 'available' to meet costs, and even a certificate of taxed costs, while an asset, is not one that is readily available to pay costs. Also, as Matteo correctly points out, there is no guarantee that even if taxed costs are paid over to the appellants, such assets will be retained within the jurisdiction.

[135] Although the parties did not deal with the issue of the difficulties that might arise with the enforcement of any costs orders in other jurisdictions—except for an oblique reference in Matteo's affidavit to the multiple jurisdictions in which assets are said to be located and which are said to pose significant obstacles to enforcement—I can take judicial notice of the fact that the *Reciprocal Enforcement of Judgments Act* 1924 (Ch. 77) only applies mainly to the countries in the Commonwealth Caribbean, with the addition of Bermuda, the United Kingdom and Australia. It does not apply to any of the countries with which the appellants are alleged to have any connection, or where assets might be located based on the material before the Court. And while it might conceptually be possible to bring an action at common law to enforce a judgment, at least in the one common law country mentioned (Nigeria), it is perhaps self-evident that there would be significant costs associated with the enforcement of any judgment of this Court, if at all enforceable.

[136] I also reject Mr. Simms QC's suggestion that because security cannot be ordered against a company on the basis that a company is incorporated outside the Bahamas, then the Court is left without any statutory basis on which security can be ordered against it, since s. 285 of the Companies Act would clearly not apply. He approximates the position of Delanson to that of an IBC, against whom he submits that security cannot be ordered (a point that I do not have to decide). As indicated, the 2009 Act creates a separate statutory basis for the grant of security for costs and, as pointed out, Order 23 of the *RSC* is stated to be without prejudice to any other enactment providing for security for costs. Therefore, the court is empowered to order security against a foreign company, not solely on the basis of its legal *situs,* but because it and its assets may be located in a jurisdiction that may be difficult to access for enforcement purposes. For example, in *Azov,* assets were held not to be available because they were located in the Ukraine, in a foreign jurisdiction where it would be difficult to extricate them from; and in *X v Y,* Teare J. found that while the challenger (X) owned considerable assets in several jurisdictions, there was a real risk *"….that the assets of X are not readily available for the satisfaction of any order for costs which may be made against X"*.

[137] Mr. Wilson QC also placed great reliance on the passage in *Azov* where Longmore J. stated that it was appropriate, if the evidence was left uncertain on the question of sufficient available assets, to have regard to the fact in the granting of security that the party against whom the security was sought had lost the arbitration and was therefore seeking to have a "*second bite at the cherry*". I am not left uncertain as to the lack of assets to meet any costs order, and so I do not have to weigh in the balance the fact that Gabriele and Delanson lost the partial awards. But I also find instructive a passage quoted by Elder J. in *Konkola Mines Plc v U&M Mining Zambia Ltd.* [2014] EWHC 2146 (Comm) from the leading textbook "*The Arbitration Act 1996*, Merkin & Flannery (5th Edition, 2014) at pg. 346-348, where they say:

> "If an Applicant is serious about its challenge to an award and confident in its success, it ought not to balk at being asked to 'put up or shut up'."

I am of the view that the grant of security is a useful tool to support the arbitral process and comports fully with the principle enunciated in the Act to promote unnecessary expense and delay in arbitration proceedings. If a party has such confidence in the prospects of its challenges/appeal, and the objective conditions for the grant of security are met, there should be no demurral to giving security.

[138] Thus, for the reasons given above, I am satisfied that it would be proper and just in the exercise of my discretion and having regard to all the circumstances of the case to require that security should be furnished by the appellants pursuant to s. 92(6).

Amount of security

[139] On the issue of quantum, however, I accept in principle the criticisms of the appellants. In this regard, I also bear in mind that the court can order any amount up to the amount of security claimed, provided it is more than a nominal amount: see *Roburn Construction Ltd. v Williams Irwin (South) & Co. Ltd.* [1991] BCC 726.

[140] The calculation of security for costs is somewhat of a rough science. But the court will review the draft bill of costs, which is now submitted *de rigueur*, to start from some estimate of the expected costs of the proceedings. It will not approach the matter with the forensic scrutiny of a taxing master, but in the round to ensure that the party claiming security has some protection in respect of the costs he might incur.

[142] The starting point of that exercise here is the observation that the issuance of separate and identical bills of costs against each of the appellants for the same applications and appeals is clearly duplicative, especially when there is little daylight between the positions of the appellants. I would therefore treat a single estimated bill of costs (e.g., $800,000.00 plus) as intended to cover the proceedings. From that, I would deduct the amounts claimed which are irrecoverable (i.e., costs claimed for leading UK silk who did not actually appear in the matter and UK counsel who attended as observers but who are not admitted to the Bahamas Bar and therefore not entitled to claim any fees before this Court) (see s. 24, Legal Profession Act, and *Gany Holdings (PTC) v Khan* BVIHCMAP 2018/0045, BVI Court of Appeal, interpreting the

corresponding BVI provisions). This amounts to a total deductible of roughly $350,000.00 for the interim applications and substantive hearings. Of the remaining $450,000.00 of potentially recoverable fees, I would deduct another $50,000.00 for the inevitable duplication of hourly rates and discounting of fee rates, leaving approximately $400,000.00 in the round.

[143] All told, I therefore consider that security in the aggregate amount of $400,000.00 would be an appropriate sum, to be apportioned between the appellants as follows: $250,000.00 to be paid by Gabriele, and $150,000.00 to be paid by Delanson. I direct in the first instance that such sums are to be paid within 28 days of the Court's order, and that the parties seek to agree the means by which security is to be provided.

Gabriele's application for leave to serve interrogatories

[144] This is a matter that can be dealt with in a relatively narrow compass. As indicated, it was partly responsive to Matteo's claim in his evidence opposing the stay in which he indicated that he was in a "difficult liquidity position" and had had to seek additional funding to continue with the arbitration. The application was initially made at the directions hearing on 16 November 2020, but I indicated that it would be more appropriate for Gabriele to make a formal application under the Rules, and this was done by interlocutory summons dated the 25 November 2020. (I should also point out for completeness that, at the directions hearing, Gabriele had also sought disclosure under *RSC*, O. 24, rr. (3)(7) for the discovery of the legal advice on the prospects of the likely success of an appeal from an arbitration award referred to in para. 44 of Matteo's stay affidavit. I also refused that application, as I did not find that the advice had been deployed, so as to waive any privilege in it, and neither was there any unfairness to Gabriele from any lack of disclosure.)

[145] The interrogatories sought to be administered were set out in the Schedule to the summons as follows: *"1. Who is/are the person/persons providing you with additional funding? 2. What are the terms on which such additional funding is being provided?"*

[146] The legal framework for the grant of interrogatories is at *RSC*, Order 26, r. 1, which states:

> "(1) A party to any cause or matter may apply to the Court for an order—
> (a) Giving him leave to serve on any party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter; and
> (b) Requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.
> (2) A copy of the proposed interrogatories must be served with the summons, or the notice under Order 25, rule 7, by which the applications for such leave is made.
> (3) On the hearing of an application under this rule, the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the Court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question."

[147] In his short skeleton in support of the application, Mr. Black QC also argued that the ambit of what is a permissible interrogatory is broad: *'the 'right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue'* (per Lord Esher, MR, *Marriott v Chamberlain* [1886] 17 QBD 154 at 163).

[148] In brief reply submissions, Mr. Wilson QC contended that the request for interrogatories was opportunistic, and sought not in reality for the stay application but *"with a view to obtaining some incidental advantage in the litigation as a whole".* Further, he argued that, on no conceivable view, was it necessary for the purpose of the stay application, or the security for costs application, for Gabriele to uncover the details of Matteo's funding arrangements. He emphasized that the *RSC* only provides for the Court to grant leave if it considers it necessary either for disposing fairly of the cause or matter, or for saving cost, and that neither limb was satisfied.

[149] I accept that the court has a wide jurisdiction to grant interrogatories, and that presumably the jurisdiction would also arise under the residual power granted pursuant to s. 67 of the Act. But that power is not without borders. In my view, the request for leave to administer interrogatories, notwithstanding the broad tapestry drawn by Lord Esher in *Marriot*, is an overreach (if not somewhat of a fishing expedition). Neither am I convinced that it is necessary for the fair disposal of the matters or for saving costs. I therefore refused leave to Gabriele to administer the sought interrogatories.

Leave to appeal and recall jurisdiction

[150] It is not necessary for the purposes of this application to set out in substance the specific grounds of appeal being argued by the applicants. Suffice it to say that in its originating notice of motion filed 9 July 2020, Gabriele deployed some nine proposed grounds of appeal, alleging errors of jurisdiction, serious irregularity and law. Delanson's originating notice of motion follows suit, and raises some five grounds with multiple sub-grounds, again citing all three possible heads of challenge under the Act. No leave is required to institute challenges based on jurisdiction or serious irregularity, but the position as to the leave requirement under s. 91, which governs a legal appeal error, is rather opague.

[151] As indicated, the court had initially granted leave to Gabriele and Delanson to appeal on points of law. It is necessary to explain in brief how this came about. Firstly, a prayer for leave to appeal was included in the summons of Delanson for interim relief, and in the originating motions of both Gabriele and Delanson. Further, this submission is to be found in the originating notice of motion of Delanson under the rubric "Leave to Appeal":

> "Should the same be necessary, the Applicant notes that the errors of law identified above are substantial and a failure to grant leave would result in a serious injustice to the Applicant as the Applicant has an arguable appeal. Moreover, the court retains an inherent jurisdiction to review an arbitral award for error on the face of the record and/or the Court may grant leave to appeal in respect of a question of law by reason of section 92(8) of the

> Act. Further, it is submitted that the Parties have implicitly agreed to allow appeals on a point of law."

[152] Secondly, while both Delanson and Gabriele expressed some degree of ambivalence as to whether leave was necessary, both made preliminary arguments to the effect that, if so required, leave was available through the gateway of s. 92(8), even if not expressly stated in s. 91. In support of its contention that leave was not required, Delanson in particular submitted that under the terms of the Trusts, which pre-dated the Act, no requirement for leave would have been necessary. However, Mr. Wilson QC drew the attention of the Court to s. 103 of the Act (transitional provisions), which make it clear that while the Act does not apply to arbitral proceedings commenced before the Act, it does apply to arbitration commenced on or after that date, whenever the agreement was made.

[153] Thirdly, and in connection with s. 98(2), Gabriele and Matteo devoted quite a bit of time to undertaking a comparative analysis between s. 91 and the corresponding provision of the UK Act (s. 69). Gabriele contended that s. 98(2), when read in conjunction with s. 91, disclosed a residual ability in the court to grant leave, which was adopted by Delanson. Matteo contended that the provision relating to leave to appeal in the UK Act (s. 69) seems to have been deliberately omitted from the provisions of s. 91, with the result that no leave was possible without consent. I set out below the material contrasting positions of s. 91, s. 92(8), and s. 69 of the UK Act.

[154] Section 91 provides as follows:

> Appeal on point of law
>
> "91 (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. And an agreement to dispense with the reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except with the agreement of the other parties to the proceedings."

[155] Section 92(1) states that the provisions of the section are to apply to an application for leave to appeal under s. 89, 90 or 91 (although Mr. Black QC contends that the reference to leave to appeal under s. 89 and s.90 are references to leave to appeal to the Court of Appeal, with which I agree). The important section for consideration is sub-paragraph (8), which provides that *"the court may grant leave subject to conditions to the same or similar effect as an order under subsection (6) or (7) but this does not affect the general discretion of the court to grant leave subject to conditions"* (set out in full at para. 108, *supra*).

[156] By contrast, s. 69 of the UK Act provides as follows:

> Appeal on point of law
>
> 69 (1). [**Materially similar to s. 91(1) of 2009 Act**].

(4) An appeal shall not be brought under this section except—
(a) with the agreement of all the other parties to the proceedings, or
(b) with the leave of the court.

The right to appeal is also subject to the restrictions in sections 70(2) and (3).

(5) Leave to appeal shall be given only if the court is satisfied—
(a) that the determination of the question will substantially affect the rights of one or more of the parties,
(b) that the question is one which the tribunal was asked to determine,
(c) that on the basis of the findings of fact in the award—
(i) the decision of the tribunal on the question is obviously wrong, or
(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(d) that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(6) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
(7) The court shall determine an application for leave to appeal under this section without a hearing unless it appears necessary to the court that a hearing is required."

[157] Thus, the UK Act not only expressly states the right of the Court to grant leave to appeal but sets out four cumulative conditions which must be satisfied before leave can be granted.

[158] Fourthly, the UK practice both before the 1996 Act (and post that Act) is to decide the issue of leave to appeal on the papers, unless an oral hearing is requested (see the speech of Lord Diplock in the House of Lords decision in *The Antaios* [1985] AC 191 (205H-206A). In *HMV UK Propinvest Friar Limited Partnership* [20111] EWCA Civ 1708, Arden LJ said that with respect to the question of leave *"it must be rare, that a court finds it necessary to call for further arguments orally".* And in the *Northern Pioneer* [2008] EWHC 426, the UK Court of Appeal observed:

> "The statutory requirement that applications for permission to appeal should be paper applications unless the court directions otherwise must surely have been intended to simplify the procedure and to save the court's time. That requirement reflects the fact that the criteria for the grant of permission to appeal are clear-cut and easy to apply. They do not require the drawing of fine lines, nor will they usually give much scope for the court to require assistance in the form of submissions or advocacy. […] Any written submissions placed before the court in support of an application for permission to appeal from findings in an arbitral award should normally be capable of being read and digested by the judge within the half-hour that, under the old regime, used to be allotted for such applications."

[159] Fifthly, Matteo in his written skeleton seems to have conceded that the appellants' grounds of appeal, or some of them, fell to be classified as legal issues. For example, this is what appears in his skeleton submissions:

> [44] "[…] As understood, the principal purported "jurisdictional" challenge to the Partial Award, at least as regards Matteo's claims, is the finding of the Tribunal that the Trusts were not authorized purpose trusts for the purpose of the Purpose Trust Act 2004. That does not, on its face, fall anywhere close to section 41 and is in any event a question of law."
>
> [45] It frequently occurs that an unsuccessful party seeks to dress up what is in reality a dissatisfaction with the tribunal's findings of fact or law as if it were a matter of jurisdiction or a procedural irregularity. Such attempts receive short shrift because they are simply incompatible with arbitral autonomy and the statutory scheme. At the substantive hearing, Matteo will contend that that is exactly what has happened here. Ultimately, the core of the Tribunal's decision was in the construction of clause 6 of the Trust Deeds, but that was a finding of law not a matter of jurisdiction and not a procedural irregularity. He accepts, however, that that is a matter for the substantive hearing." [Emphasis supplied.]

[160] In fact, Mr. Simms QC challenged Mr. Wilson QC to clarify whether this submission could be reconciled with his statement that there was no ability to grant leave to appeal on points of law, or whether Matteo was tacitly consenting to an appeal on points of law. The transcript does not reflect that Mr. Wilson QC ever substantively responded to this issue. But even if Mr. Wilson QC's submissions were a concession that legal points were properly raised, it does not amount to a concession that leave should be granted, particularly in light of his contention that the Act does not provide for leave to appeal on a point of law.

[161] It was against that backdrop that I formed the preliminary view that the court did have jurisdiction pursuant to s. 92(8) to grant leave to appeal, and leave should be granted as a preliminary matter based on the material before the court.

[162] Mr. Wilson QC took the point, however, that the parties had indicated that they would defer the issue of appeal on a point of law to the substantive hearings, and as a result the parties (and in particular Matteo) did not address any substantive arguments to the leave issue. I now accept this to be the position, although there was some degree of equivocation on the point, as the summons of Delanson and the parties' brief flirtation with the issues bear out.

[163] However, to the extent that my oral decision on this point would have deprived Matteo of his right to make substantive submissions as to whether s. 91 and 92(8), properly construed, provide any jurisdiction to the court to grant leave (in the absence of a consent position), and if so what was the test to be applied, I perhaps prematurely in retrospect, granted leave to appeal. I therefore recalled this, based on a clear determination that I had the jurisdiction to do so, and that this was a proper case in which to do so, for reasons which I shall shortly explain.

Re-call jurisdiction (Re *Barrell* jurisdiction)

[164] Gabriele and Delanson in their submissions argued a number of reasons why the Court should not accede to the request by Matteo to recall leave, based on principles set out in *re Barrell Enterprises* [1973] 1 WLR 19, and which have come to be known as the "*Barrell* jurisdiction". In that case, the UK Court of Appeal refused to allow the re-opening of a dismissed appeal

some months later, for which judgment had been given but no order drawn up. It is not necessary to deal with all of the points raised, but the main ones were as follows:

(i) There was no formal application before the court.
(ii) The court's jurisdiction to recall the order had ended by virtue of Matteo's summons asking for leave to appeal.
(iii) Matteo's application (if properly made) did not meet the test for reconsideration.
(iv) The issue of leave to appeal was before the Court on the papers and it was open to the Court to follow the English practice of determining the application or permission to appeal on a point of law on paper and only to provide reasons where permission is refused.
(v) Matteo's applications run contrary to the principles of expedition and finality in arbitration applications, especially when the arbitration proceedings are still pending.

[165] The first of these arguments is no longer relevant, as Matteo subsequently filed a summons seeking leave to appeal. I shall deal with each of the others in turn.

[166] As to the second reason, I do not accept that the filing of a summons before the Court for leave to appeal, on what is clearly an interlocutory decision which requires the leave of the first instance court and where the application for leave has not been determined, brings to an end the jurisdiction of the first instance court. Firstly, where leave is required, there is no appeal pending until leave is granted, and therefore no extant appeal before the Court of Appeal. Gabriele and Delanson relied on the decision of the Eastern Caribbean Court of Appeal in *Saint Christopher Club Ltd. v Saint Christopher Club Condominiums* (2008) 74 WIR 254, where Rawlins JA held that an appeal terminated the jurisdiction of the court whose order or judgment was appealed even if the order or judgment had not been perfected.

[167] However, this brief encapsulation does not accurately reflect the facts or the context of that case. The true rationale of that case comes out at paragraph 22, where there is to be found this comment:

> "[A] judge may review or vary a judgment or order <u>before it is perfected or before an appeal is filed</u>. An appeal terminates the jurisdiction of the court whose order or judgment is appealed even if the judgment or order has not been perfected."

The appeal in that case concerned the grant of an injunction, which had been appealed to the Court of Appeal on 21 March 2007. The Court of Appeal was therefore seized of the appeal when the judge on 20 April 2007 discharged the injunction, a decision which was not communicated to the Court of Appeal. That was the context in which the statement of principle, which is undoubtedly correct, was made in that case, and it clearly lends no support to the contention by the appellants.

[168] The fourth point, that Matteo's application does not meet the test for reconsideration, is based on the appellants invoking the limited scope of the *re Barrell* jurisdiction, which was said to require "exceptional circumstances" for an order be varied or recalled. They referred to several

cases from this jurisdiction, in particular the decisions of Winder J in *RTL v. ALD (2015)* (2013/CLE/gen/2064) [at 37], and Charles J. in *West Bay Management Ltd. v Registrar of Trade Unions et. al.* (2018) (2012/PUB/jrv/001 [14-16] and *Surf'n 'Turf v. Deltec Bank & Trust Ltd.* (2020) (2017/CLE/gen/00937) [at 11-19].

[169] In *RTL v ALD*, Winder J. stated [17]:

> "The authority advanced by the Respondents does suggest that the rule is no[t] so rigid as to require the exceptional circumstances. Having considered these authorities it appears to me that they are all largely based upon environments which have undergone CPR reforms. The Bahamas, however, has not as yet introduced any CPR changes and therefore I find that the Barrell jurisdiction remains the state of our law. This position has been confirmed by Barnett CJ in the case of *Re: Petition of Henry Armbrister* 2007/CLE/qui/0143. I accept therefore that it is only in the most exceptional circumstances that I ought to revisit a decision made by me. Further, that having reduced it to writing I ought to even raise the threshold to which I consider most exceptional."

[170] In *Surf "N" Turf Ltd.,* Charles J. came to a similar conclusion and distinguished the UK Supreme Court case of *Re L-B (Children)* [2013] UKSC 8, which was relied on by counsel appearing in that matter (Ms. Lockhart-Charles) seeking to have the court reconsider a joinder order. Charles J. said:

> "*Re L v B (Children)* was a case decided in England & Wales where the Civil Procedure Rules ("the CPR") governs civil procedure and practice. The Bahamas does not yet have the CPR and operates under the Rules of the Supreme Court."

Charles J. also endorsed the approach of Winder, J. in *RTL v ALD* affirming the Barrel jurisdiction.

[171] Mr. Wilson QC contended that the court has the jurisdiction to revisit an unperfected order and recall it, and the jurisdiction was not as circumscribed as suggested by the *Barrell* case. In support of this proposition he relied on several authorities: (i) a reference to the UK Court of Appeal case of *Paulin v Paulin* [2009] 3 All ER 88, where that court noted that the *Barrell* jurisdiction had been disapproved of in a number of decisions by senior UK courts; (ii) an October 2012 decision of the Court of Appeal in *Duran Cunningham v. Baha Mar Development Company Ltd.* (SSCivApp. No. 116 of 2010, where the Court of Appeal reversed on its own motion an oral decision made by the panel; and (iii) significantly, and importantly, the UKSC decision *Re L-B* [2013] UKSC 8, which has already been referred to.

[172] While Barnett CJ also affirmed the *Barrell* jurisdiction, the Court was alive to the judicial chipping away at that principle, as noted in the quote from *Paulin*:

> "(f) So the formula in the Barrell case governs. But how far does it help? In *Cie Noga d'Importation et d'Exportation SA v Abacha* 3 All ER 513, paras. 42-43, Rix L.J., still sitting as a judge of the Commercial Court, observed that it was not a statutory definition and should not be turned into a straitjacket at the expense of the interest of justice and that a formula of "strong reasons" was an acceptable alternative to that of "exceptional circumstances". In *Robinson v Fernsby* [2004] WLR 257, para. 94, May LJ observed that

> the formula of "exceptional circumstances" was a relatively uninformative label" and, at para. 96, that he preferred the alternative which Rix LJ had suggested."

[173] Then in *Duran*, the Court of Appeal affirmed the power to reverse/recall an oral ruling as set out in *Re Barrell*, although it seems to have qualified the test. Mr. Wilson QC in his written submissions indicates that the learned President on behalf of the Court said that "*the requirement that reversal should only be done in exceptional cases has been replaced by the requirement that there must be strong reasons for doing so*", although it does not appear that the Court gave a reasoned decision. In fact, the Court of Appeal seems to have endorsed the "strong reasons" formulation used by Rix LJ in *Cie Noga d'Importation et d'Exportation SA v Abacha.*

[174] Based on these authorities, Mr. Wilson QC submitted the following:

> '3.5 Finally, although Winder J. purported to distinguish some of the authorities that had been cited before him on the basis that they originated from jurisdiction which have undergone CPR reforms, it is not obvious that this is a relevant point of distinction. So far as the position in England is concerned, the Supreme Court revisited the Barrell jurisdiction in *Re L-B* [2013] USKC 8, [2013] 1 WLR 634, and reviewed the authorities addressing the *Barrell* jurisdiction from the nineteenth century to the present day in terms that made it clear that the post-CPR jurisdiction to reverse a ruling before an order is perfected originated from the pre-CPR cases, and did not suggest that the introduction of the CPR had effected any fundamental alterations to this jurisdiction. The Supreme Court further confirmed that the power to reverse a decision at any time before the order is sealed is not limited to exceptional circumstances but can be exercised whenever necessary to deal with the case justly. As the Supreme Court held at paragraph 27:
>
> > "27….This court is not bound by *Barrell* or by any of the previous cases to hold that there is any such limitation [ie., a requirement of exceptional circumstances] upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v Engel* [2009] 1 WLR 2268, 2282 that the overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in *In re Blenheim Leisure (Restaurants) Ltd.*, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."

[175] It is never an easy decision to depart from a ruling of a brother or sister judge, and it is made gravely more difficult when that position has been affirmed by decisions from several experienced judges. But a judge must be free to take a divergent path when his conscience and appreciation of the legal position leads him in a different direction. Indeed, the judicial oath requires no less. I therefore must respectfully depart from my brethren and indicate that I agree with the submissions of Mr. Wilson QC at paragraph 3.5 of his written submissions on the point.

[176] For one, in my view the decision in *Re L-B* cannot be explained away as simply arising under the new CPR dispensation. The learned editors of the UK *Civil Procedure Rules* 2002 (London, Sweet & Maxwell) contribute this commentary at 1.3.2 (under the rubric "The overriding objective":

> "[I]n some cases attention has been drawn to the fact that, in certain circumstances, considerations which governed the exercise of particular powers in accordance with the rules of court replaced by the CPR are consistent with considerations encapsulated by the overriding objective as stated in r.1.1: e.g. […]: the power to recall judgments (*Stewart v Engel* [2000] 1 W.L.R. 2268, [2000] 3 All ER 518, CA).

Steward v Engel was a Court of Appeal Case in which the Court by a majority affirmed the *Barrell* limitation, but in which Clarke LJ (dissenting) took the view that the court was not bound to look for exceptional circumstances.

[177] In my view, *Re L-B* represents to some extent the development of the common law with respect to the criteria by which judges should determine whether to reconsider orders. And as to the statement of the common law, the decisions of the apex UK court are very persuasive, even though not binding. This is how the present position in light of *Re L-B* was summarized in a recent authority (*Chandra v Brooke North (A Firm)* [2013] WWHC 417 (QB):

> "Until recently, the first application, concerned with whether the orders should be revoked or withdrawn, would have been governed by the principles identified in *In re Barrell Enterprises* [1973] 1 WLR 19, known by civil practitioners as 'the Barrell jurisdiction'. However, recently, the Supreme Court has overruled the Barrell jurisdiction in the matter of *L-B (Children) Care Proceedings: Power to Revise Judgment), Re* [2013] UKSC, [2013] 1 WLR 634. This decision holds that a judge (including any appeal or first instance judge of whatever status) retains a jurisdiction to change his or her mind after he or she has made an order until the order is sealed. The order that was made takes effect immediately on being made but the power to revisit and confirm it must now be exercise on broad principles. The court must deal with any application to revisit an earlier order by exercising the overriding objective of dealing with the case justly. A relevant principle is whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. Other possible situations where an order could justly be revisited are where a plain mistake has been made by the court, where the parties have failed to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given. Baroness Hale stressed that these are only examples, a carefully considered change of mind could be sufficient. Every case should depend on its own facts."

[178] As indicated, while *Re L-B* is not binding in this jurisdiction, it is clearly now the case that the jurisdiction is not as restrictive as once thought. In *Re L-B*, the UKSC endorsed the comments of Rix J. that "strong reason" should be required (as did our Court of Appeal in *Duran*). This means that the power should not be exercised lightly. As was said in *Re L-B* [38]: *"Clearly, that power does not enable a free-for-all in which previous orders may be revisited at will. It must be exercised "judicially and not capriciously". It must be exercised in accordance with the overriding objective"* (a point to which I shall return).

[179] Central to the distinction drawn between *Re Barrell* and the position expressed in *Re L-B* and several of the other UK cases disapproving the *Barrell* limitation is said to be the effect of the advent and influence of the CPR reforms on the latter decision. This passage in *re L-B* is telling [37]:

> "Both the Civil Procedure Rules and the Family Procedure Rules make it clear that the court's wide case management powers include the power to vary or revoke their previous case management orders: see CPR r.3.1(7) and FPR r. 4.1(6). This may be done either on application or of the court's own motion: CPR r. 3. 3(1), FPR r. 4.3(1). It was the absence of any power in the judge to vary his own (or anyone else's) orders which led to the decisions in *In re St. Nazaire Co.* 12 D 88 and *In re Suffield and Watts*; *Ex Parte Brown* 20 QBD 693. Where there is a power to revoke, there is no magic in the sealing of the order being varied or revoked. The question becomes whether or not it is proper to vary the order."

[180] While it is correct to say that the old *RSC* has been retained in this jurisdiction, it cannot be ignored that the RSC has had grafted onto it (S.I. 44/2004) through the medium of *RSC*, Order 31A, what is essentially Part 3 (Case Management Powers) of the UK CPR. The overriding objective of Order 31A is also to deal with cases justly, and Order 31A, r. 18(2)(s) provides that in addition to the specific case management powers given to the court, it may "*take any other step, give any other directions or make any other order for the purpose of managing the case and ensuring the just resolution of the case."* Further, both CPR r. 3.1(7) and CPR r.3 (1), which together with the overriding objective are said to be the main rules said to be in play in the reform of the *Barrell* limitations, have their *ipsissima verba* in Order 31A:

UK CPR

3.3 (1) Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

3.1(7) A power of the court under these Rules to make an order includes the power to vary or revoke the order.

RSC 1978

O. 31A, r. 19(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

O. 31A, r. 18(7) A power of the Court under these Rules to make an order includes a power to vary or revoke that order.

[181] The Family Procedure Rule referred to (FPR r. 4.1(6) and FPR r. 4.3(1)) are also the mirror-images of CPR r. 3.1(7) and CPR r. 3.3(1), respectively. So, to the extent that the argument goes that *Re-LB* is to be distinguished on the basis that its relaxation of the *Barrell* limitation is anchored on CPR provisions, that turns out to be a narrow plinth on which to reject the persuasive force of *Re-LB*, as the same CPR provisions are embedded in our RSC.

[182] As to the fifth point, Mr. Black QC was right to point out that the issue of leave to appeal was before the Court on the papers and that it was open to the Court to follow the English practice of determining permission without an oral hearing. The summons by Delanson did seek leave

and, as indicated above, the parties all addressed minor arguments to the s. 91 point, although these must now be considered in hindsight to have been by way of introduction. However, while the English practice might ultimately turn out to be an approach that can be adopted, the fundamental difference is that permission to appeal is clearly provided for in the 1996 Act, while s. 91 is not so clear, and the construction point is an antecedent one.

[183] More importantly, on a review of the transcript, Mr. Black QC in his introduction of the applications and issues before the court conceded that the leave issue would be dealt with at the substantive hearing:

> "And so, it will be our submission that, in fact, the Court does have jurisdiction to grant leave to appeal on a point of law. It will not be necessary of course for the Court to decide it today. And indeed, there's a great deal more argument to be brought before the court on the judicial history of the draftsmanship of the two provisions, but we just bring these points to your attention because we do not contend that are straightforward points. They are not for argument today, but what is clear is that the position is not as simple as Matteo would have you believe in his skeleton. And so, it cannot be said that just because Matteo does not consent to leave to appeal on points of law, there can be no leave to appeal. That remains an open question."

[184] The last and final reason taken by Gabriele is that the recall would be contrary to the principles of expedition and finality in arbitration proceedings. I disagree. I reiterate that the decision was not a decision on the merits. But in fact, my view is that it achieves quite the opposite. Again as noted in *Re-LB* [42]: "*One argument for allowing a judicial change of mind in care cases is to avoid the delay inevitably involved if an appeal is the only way to correct what the judge believes to be an error."* Surely this also applies in arbitration proceedings, which like child care matters, require expedition.

[185] I am therefore satisfied, based on the current state of the law, that the decision to recall an oral order is not limited to "*exceptional circumstances*" and there may be other factors which may constitute strong reasons, depending on the circumstances of the case. Even if I were wrong on this, I would be prepared to hold that the facts of this case constituted "*exceptional circumstances*" for the exercise of the recall jurisdiction. In the premises, I found that it was appropriate to exercise my discretion to recall the decision for the following reasons. There were clearly strong reasons for doing so, in that the leave granted by the Court effectively precluded Matteo's arguments as to whether the court was debarred from granting leave under s. 91, and if not, what was the applicable test for the grant of leave. Secondly, this was not a decision on the merits, but the grant of leave. Thirdly, it was an oral decision in advance of reasons, and even the cases which affirm the *Barrell* jurisdiction indicate that the test is less rigidly applied where there is no formal written judgment in final form (see *Stewart v Engel* [2002] 1 WLR 2268, where Sir Christopher Slade said that the *Barrell* limitation *"…must apply a fortiori where the judgment is a formal written judgment in final form, handed down after the parties have been given an opportunity to consider it in draft."*

[186] I also placed some significance, as pointed out in *Re L-B*, on the consideration as to whether a party has acted to his detriment or altered his position irretrievably in consequence of the order being recalled. It is clear here that no significant prejudice whatsoever would be caused to

any of the parties by the recall of my decision. In fact, they will be in the same position they intended to be in: that the issue of leave would be dealt with on a rolled-up hearing with the s. 89 and s. 90 challenges, as several of the UK authorities demonstrate is clearly permissible (see in this regard, the views of Colman J. *in Bulfracht (Cyprus) Ltd. v. Boneset Shipping Co. Ltd.,the MV Pamphilos* [2002] EWHC 2292 (Comm.).

Costs

[187] At the end of the announcement of my oral ruling, I raised the issue of costs with the parties, in particular to determine their views on whether costs should be deferred to the end of the substantive hearings or dealt with following the interim applications. Not surprisingly, again the parties were divided on this issue, and I again requested short skeleton submissions to deal with the matter on the papers.

[188] Gabriele's position is that the court should deal with costs at this juncture, and that it should (i) order that Matteo pay the costs of the applications, Gabriele being the successful party overall; (ii) in the alternative, it should make separate orders awarding Gabriele costs for the stay application and no order as to costs of Matteo's security for costs application or the interrogatories application.

[189] The position of Delanson is similar to that of Gabriele—deal with costs at this point, and award it the costs of its successful application for a stay and the costs of opposing Matteo's application for security for costs, or alternatively make no order for costs.

[190] Matteo's position is that costs of the interim applications should be reserved until the conclusion of the applicants' appeals, but in the alternative, if the court is minded to grant them at this juncture, that Matteo be awarded the costs of (1) his successful application for security for costs and (2) his successful defence of Gabriele's interrogatories application.

Principles

[191] The principles on which the court will award costs are so well trodden as to hardly require any recitation. There are two overarching principles. First, the Court has a broad discretion to determine whether costs are payable by one party to another and, if so, the amount (s. 30 of the *Supreme Court Act* 1996 (SCA):

> "S. 30: (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have the full power to determine by whom and to what extent the costs are to be paid.

In *Bolton MDC v Secretary of State for the Environment* [1995] 1 W.L.R. 1176 (at 1178-f) the House of Lords remarked that "*...in all questions to do with costs, the fundamental rule is that there are no rules. Costs are in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule*."

[192] Second, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, i.e., costs follow the event, although the court may make a different order (*Order* 59(3)(2)):

> "If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other Order should be made as to the whole or any part of the costs."

[193] In considering what order to make, the Court may take into consideration (i) all the circumstances of the case, including the conduct of the parties; and (ii) whether a party has succeeded on part of his case, even if he is not wholly successful.

[194] Gabriele cites the observations of Nugee J (as he then was) in *Merck KGgaA v. Merck Sharp & Dohme Corp.* [2014] EWHC 3920 (Ch)., for dealing with the issue of costs at this stage:

> "It is in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do when they lose them rather than leaving the costs to be swept up at trial."

[195] I have no difficulty with that statement as a general principle. But this is complex litigation taking place in the context of arbitration proceedings and, as has been set out, the court powers to make interim orders should also be guided by any relevant features of international arbitration. In this regard, s. 64 of the Act (Interim Measures and Preliminary Measures), provides as follows:

> Costs and damages
>
> "64. The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted."

[196] It is to be recalled that the Court's power to award interim measures appears in that same section. I would have been inclined in any event to order that the costs of the stay application should abide the hearing of the appeals. But I am even more fortified in this view by s. 64, as it clearly provides some analogical support for the principle that those proceedings which are interconnected (and the stay is obviously ancillary and pursuant to the appeal) should not be treated as discrete matters for costs purposes.

[197] Next, both Gabriele and Delanson contend that because the amount of Matteo's security was significantly reduced, they ought to be seen as the overall winners of the applications. Delanson in particular relies on the Bermudian case of *David R. Whiting v. Torous Insurance (Bermuda) Ltd.* [2015] SC (Bda) 17 Civ. (6 March 2015), where Kawaley CJ. denied costs to a claimant who only received $1,900.00 of a claim for $300,000.00:

> "…having regard to the huge disparity between the amount awarded and the amount originally claimed, in my judgment the Court is bound to find that in 'real world' terms the Plaintiff has not succeeded because this case was quintessentially a claim about money."

[198] I do not think that the principles applicable to commercial claims where the claim itself is the *lis* between the parties can be equated to claims for security for costs, which are only interim measures collateral to a main claim, and which in any event are based on rough estimates that are frequently adjusted by a court. I would be inclined, however, to reduce Matteo's costs by a modest percentage (say, 20%) to reflect the success of the appellants in defending on the ground of quantum.

[199] Gabriele also alleges that Matteo has behaved unreasonably in not acquiescing to the request for the stay before the Tribunal and was allegedly the cause of delays in the proceedings before this court. This conduct, he says, should be taken into account in awarding costs against Matteo. I am not sure I ought to factor into the matrix any conduct that is alleged to have occurred before the Tribunal as a consideration for the grant of costs in applications before this Court. Moreover, while there are always criticisms to be levelled by one party against the other in contentious litigation, I do not find anything in the conduct of the parties in the applications before me to rise to the level that would warrant any sanctions in cost.

[200] Having considered the brief submissions of the parties, my decision on costs are as follows: (i) the costs of the stay application are to abide the outcome of the appeals; (ii) Matteo is awarded 80% of the costs of his security for costs applications against Gabriele and Delanson, to be taxed if not agreed; and (iii) Matteo is awarded the costs of and occasioned by his successful defence of Gabriele's interrogatories application, to be taxed if not agreed.

CONCLUSION & DISPOSITION OF THE APPLICATIONS

[201] For the foregoing reasons, the Order which the Court will make is as follows:

(1) The applications by Gabriele and Delanson for a stay of the arbitral proceedings pending the hearing of their appeals are granted, on the condition that the appeals are to be pursued with expedition.

(2) The leave granted to Gabriele and Delanson to appeal on points of law announced in the oral ruling of 3 March 2021 is recalled.

(3) The application by Matteo for Gabriele and Delanson to give security for costs for the applications and appeals is granted, and the Court orders security to be given in the global amount of $400,000.00, to be apportioned as follows ($250,000.00 by Gabriele, $150,000.00 by Delanson). Such security is to be paid within 28 days of the Court's order, and I direct in the first instance that the parties seek to agree on the means by which security is to be provided.

(4) The application by Gabriele for leave to serve interrogatories as to the sources of Matteo's funding for the challenges/appeals is refused and dismissed.

(5) The costs of the applications are to be awarded as indicated at Paragraph 200.

I invite the parties to submit a draft Minute of Order to reflect the Court's ruling.

Concluding remarks

[202] Even in a judgment of this length, it has not been possible for me to deal fully with the embarrassment of riches that has been presented by distinguished UK and leading local silk in their comprehensive and well-argued written and oral submissions.

[203] I must also record my gratitude to counsel for their able assistance to the court, which included producing skeleton submissions at short notice on the ancillary issues that arose. I wish to thank Mr. Black QC in particular for his assistance in providing some insight into the provenance of several provisions contained in the 2009 Act relating to the court powers to grant interim relief, and the very useful comparative analysis with the UK Act.

KLEIN, J.

13 June 2022.