Neutral Citation Number: [2017] EWHC 472 (TCC)

Case No: HT-2016-000314

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2017

Before :

MRS JUSTICE JEFFORD

- -

Between :

CELTIC BIOENERGY LIMITED	**Claimant**
- and -	
KNOWLES LIMITED	**Defendant**

- -
- -

Mr Vincent Moran QC (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Mr Jonathan Acton Davis QC (instructed by **Isca Legal LLP**) for the **Defendant**

Hearing dates: 9th February 2017

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JUDGMENT

1. This is an application to set aside/vary or remit the award of the arbitrator, Mr Vaughan, made on 6 September 2016 on the grounds of serious irregularity in that it was obtained by fraud or in a manner contrary to public policy.

2. In short, the Award made various declarations to the effect that the Respondent to this application ("Knowles") had complied with certain provisions of an ad hoc arbitration agreement between the Applicant ("CBL") and Knowles. Since the publication of the award, correspondence has come to light which CBL says shows that Knowles had not done so and that the evidence they presented to the arbitrator was incomplete, misleading and fraudulent. The timing of this discovery by CBL has meant that they have also made an application for an extension of time to make this application. I deal with this at the conclusion of this judgment.

The background to the arbitration

3. The hearing of this application occupied a lengthy court day and was preceded by detailed and helpful written submissions in which the parties properly and effectively focussed on the specific issues that arose. However, CBL also relies on the context in which this arbitration and the making of this award have taken place and I certainly consider it to be relevant. It is a complex and convoluted story but I set it out as briefly as possible below.

Events up to March 2016

4. CBL were engaged by Devon County Council ("DCC") on a project for the design and construction of a composting facility.

5. Disputes arose between CBL and DCC about payment including claims for loss and expense and the deduction of liquidated damages. Some of those disputes were dealt with in adjudication and at some point an arbitration was also commenced.

6. Knowles entered into a series of agreements with CBL to provide advice and representation in the adjudications and the arbitration.

7. A Deed of Assignment dated 19 November 2010 was executed between Knowles and CBL under which CBL assigned to Knowles its rights against DCC. The Deed, however, at the same time reserved to CBL, the assignor, the right to enforce payment or claim damages. There was also a side letter of the same date which provided that sums obtained by Knowles would be held in a client account for CBL's benefit less sums due to Knowles as fees.

8. This rather curious set of documents has already been the subject of comment by this Court in *Devon County Council v Celtic Composting Systems* [2014] EWHC 552 (TCC) at [11] and [12], proceedings in which DCC sought to restrain CBL from taking further steps in an adjudication it had commenced against DCC. Stuart-Smith J noted that DCC was concerned about the making of payments to Knowles against whom they may have no recourse for repayment. These comments encapsulated DCC's concerns about the assignment.

9. That adjudication no. 8 proceeded and resulted in decisions that sums were due to CBL. On 7 February 2014, Knowles issued invoices to DCC in respect of the sums awarded in the adjudication (£16,255.37 and £170,727.33 plus VAT). The invoices were addressed to DCC's Chief Executive, the Executive Director of Environment, Economy and Culture and Mr Whitton of Waste, Engineering and Transport Services and were sent by special delivery. These sums were not paid by DCC.

10. In the meantime, it appears that disputes arose between CBL and Knowles as to Knowles' entitlement to payment for the services it had provided in adjudications nos.

6 to 8 and the quality of the services provided. One of the agreements for services contained an arbitration clause and an arbitration was commenced.

11. The parties agreed to enter into an ad hoc arbitration agreement ("the ad hoc agreement") dated 8 July 2014 to expand the scope of the arbitration so that all these disputes could be resolved in arbitration.

12. The ad hoc agreement also provided that the parties agreed:

"3. THAT Knowles will withdraw and extinguish it (sic) invoices served on Devon County Council.

4. THAT Knowles will provide an indemnity in favour of Devon County Council in the matter of the Celtic BioEnergy assignment in favour of Knowles and that it will not pursue Devon County Council for such sums as are owed by Devon County Council to Celtic BioEnergy Limited."

13. There was, therefore, a trade-off between CBL and Knowles in which CBL agreed to all Knowles' adjudication fee claims being dealt with in one arbitration and Knowles agreed to give up any direct claims against DCC which represented a concern to DCC in paying any amounts found due in the adjudications.

14. Around the same time, and reflecting the conditions of ad hoc agreement, a Deed of Waiver and Indemnity dated 18 July 2014 (which I shall refer to as the first Deed of Waiver) was executed by CBL and Knowles. The Deed recited, at paragraphs A to H, the construction contract and its performance, the rights to payment which CBL had acquired or might acquire against DCC, and the Deed of Assignment. It then provided:

(i) that Knowles waived all its right to payment under the construction contract and the assignment; and

(ii) that "[Knowles] will indemnify and save harmless the Council against all claims, legal and equitable and actions in contract or howsoever arising pursuant to the Deed of Assignment dated 19 November 2010 or payments made pursuant to the Construction Contract to any party whomsoever."

15. By letter dated 18 July 2014 from Wheelers (solicitors acting for CBL) a copy of the first Deed of Waiver and credit notes from Knowles for each of the invoices referred to at paragraph 9 above were sent to DCC.

16. There were issues raised about the signatories of the Deed of Waiver which Knowles sought to address. On 13 November 2014, DCC wrote to Knowles asking whether there was any other reason DCC might not rely on the documentation. Knowles replied on 27 November 2014:

"Knowles answer is "yes", there are other reasons, which are that Knowles to paraphrase [DCC], is not fully appraised of the circumstances under which it entered into the purported waiver and indemnity."

17. Returning to the arbitration, the arbitrator initially appointed resigned and Mr Vaughan was appointed in his place in January 2015. The parties agreed that there should be a split hearing. The initial hearing would consider (i) whether Knowles' fees for adjudications nos. 6, 7 and 8 were fixed or capped and (ii) when and under what terms those fees became payable. A further hearing would consider Knowles' entitlement to payment including CBL's claim to be entitled to set-off damages for breach.

18. At some point CBL had commenced an arbitration against DCC and CBL and DCC reached what Mr Moran QC, on behalf of CBL, referred to as a "settlement that they had agreed in principle". The stumbling block to that settlement "in principle" being finalised was DCC's continued concern about Knowles' claims against it.

19. It appears that that led to CBL and DCC agreeing a form of the Deed of Waiver. I shall refer to this as the second Deed of Waiver. It was sent to Knowles by CBL's current solicitors by a letter dated 5 June 2015 asking Knowles to execute this Deed.

20. There was, so far as I am aware, no response to this letter.

21. At the same time, the arbitration between Knowles and CBL proceeded and on 22 August 2015 the arbitrator made his award ("the Partial Award") on what were referred to as the initial issues:

    (i) The arbitrator decided that the fees that would be due to Knowles for their services in respect of adjudications nos. 6 to 8 were fixed or capped.

    (ii) The arbitrator decided that the fees would be payable from the proceeds of adjudication no. 8, 14 days after receipt of those sums or, if the proceeds were insufficient, on the publishing of an award in or the settlement of the arbitration between CBL and DCC.

22. The arbitrator was not asked to decide whether any sums were actually payable and he did not do so.

23. In October 2015, the arbitrator made an award determining that Knowles was liable for the costs of determining the initial issues. Knowles sought to appeal this costs award and made an application in the Commercial Court under s. 69(2)(b) of the Arbitration Act for leave to appeal. Leave to appeal was refused on paper on 16 February 2016.

24. On 1 March 2016 Knowles wrote to CBL's solicitors enclosing a draft Request for Arbitration to the LCIA. The proposed arbitration related to Knowles' claim for £2 million in fees relating to services provided to CBL in the arbitration between CBL and DCC. CBL's solicitors responded to the LCIA pointing out under the terms of

Knowles' appointment payment disputes were to be dealt with by litigation and "any other disputes" were to be referred to arbitration.

The March Correspondence

25. On 16 March 2016, however, Knowles also wrote to DCC demanding payment – this is the beginning of the so-called March correspondence to which it is necessary to refer in some detail.

26. The letter dated 16 March 2016 was sent to DCC's Chief Executive and Executive Director of Environment, Economy and Culture and to Mr Whitton of Waste, Engineering and Transport Services, in each case by "Special Delivery Guaranteed". It was signed by Mr Andrew Rainsberry, managing director of Knowles.

27. The letter referred to a letter dated 13 May 2011 which gave notice of the assignment and to that notice of assignment of rights from CBL to Knowles and continued:

"3. On recently reviewing the situation it remains the case that DCC has not paid to us the sums awarded by Mr Michael Twine in this Decision dated 7 February 2014. The total sum to be paid with accrued interest on that Decision to the date of this letter is £197,980.50 with VAT in addition.

4. Also an additional sum which DCC plans to or has paid to Celtic which we understand to be in the sum of £180,000 has not been paid to us.

5. Would you please make full payment of £377,980.50 with VAT in addition to [account details] within 7 days of the date of this letter, or otherwise say by that time your reasons for not complying with the terms of the Deed of Assignment dated 19 November 2010 of which you have been given notice.

6. We confirm we can and will give good receipt for these monies and remind you to avoid any doubts you may have that all sums decided to be paid to Celtic in

adjudication proceedings, sums awarded in arbitration proceedings and sums ordered paid by any court pursuant to the Construction Contract and all payments thereunder are sums assigned and to be paid to Knowles Limited and no other party.

7. Absent any payment or response and following the expiry of the 7 days period set out in paragraph 5 above, we reserve the right to seek the court's assistance in securing payment of these sums assigned to us."

I note that the sums referred to in paragraph 3 were those awarded in adjudication no. 8 which were the subject of the earlier invoices and that the letter was addressed to the same parties to whom those invoices had been sent.

28. Mr Whitton replied on 22 March 2016, saying that the letter did not follow the pre-action protocol and that it ignored the exchanges that had taken place after the letter referred to.

29. Mr Rainsberry replied on 23 March 2016 asking *"what it is in "the exchanges" that you believe have any relevance to the liability of [DCC] to Knowles under the Deed of Assignment notified on 13 May 2011?"*

30. Mr Whitton's reply on 24 March 2016 referred to *"the contents of your previous correspondence and conflicting documentation produced by you from time to time since 2013."*

31. Mr Rainsberry replied the same day, saying that DCC was avoiding the question and asking them to state by return what document or document DCC was relying on to avoid liability under the Deed of Assignment.

32. Mr Whitton responded on 31 March 2016 as follows:

"I feel it is for you to make yourself aware of the exchanges and to take these into account in considering how you wish to proceed. I do not feel this is a task for me to take on except to alert you to my recollection of the exchanges."

33. Mr Rainsberry replied the same day saying that Knowles had been through the documentation produced by Knowles and sent to DCC since 2013 and had identified only 3 items. These were the two invoices and Wheelers' letter dated 18 July 2014 enclosing the credit notes and the first Deed of Waiver and Indemnity. He suggested that the answer to the question of what document DCC was relying on was the Deed of Waiver and Indemnity and he enclosed a copy. He asked DCC to confirm.

34. On 4 April 2016, Mr Whitton wrote as follows:

"... There is relevant correspondence not only with DCC but also its advisers. In addition there are the representations made to Celtic and the court and the record of the Judges findings (on the assignment document).

It is not for DCC to either list documents or confirm any list.

If Knowles are considering seeking the assistance of the court then Knowles will have to clearly set out its position taking into account the full history including Knowles' dealings with [CBL].

Subject to Knowles' compliance with the pre-action protocol, DCC will respond as it sees fit. Until then DCC's position is fully reserved.

If you decide to submit information in accordance with the pre-action protocol, I will instruct solicitors to respond. Otherwise, I will not be responding to further demands for information or payment from Knowles."

35. That e-mail was the last shot in the March correspondence.

Events from March 2016

36. Going back in the chronology, it appears that on 18 March 2016, Knowles asked the arbitrator to make declarations as to the fees payable and as to whether the circumstances for payment had been met. I take this from CBL's application for interim relief made on 24 March 2016. On 21 March 2016, CBL had obtained permission from the Court to enforce the costs award in respect of the arbitrator's fees and, as I have mentioned, on 24 March 2016, CBL made a further application to the arbitrator for interim relief in the form of a further payment on account of costs.

37. On 1 April 2016, Knowles made a further attempt to request an LCIA arbitration. This time, and presumably taking account of the fact that a fee dispute was not arbitrable, the claim was framed as one for damages for breach of contract, alleging that CBL had acted in such a way as to prevent Knowles recovering its fees.

38. Then on 11 April 2016, Knowles issued a claim form ex parte seeking permission to enforce what it said was an award made on 22 August 2015 of certain sums. Those sums were in fact the amounts that the arbitrator had found to be the fixed or capped amounts.

39. I pause there to observe that the almost inescapable conclusion from this history of events is that Knowles were attempting by any means possible, and however inappropriate or unsustainable, to obtain payment of fees, whilst at the same time seeking to avoid payment of costs.

40. The application to enforce the award was supported by a statement of Mr Rainsberry. In that statement Mr Rainsberry said the arbitrator had decided that Knowles was entitled to the sums set out, that they were payable on settlement of the arbitration between DCC and CBL, and that the arbitrator had also made a finding that a

settlement had been reached. It is unnecessary for me to go into the detail of that matter but Mr Rainsberry must have been aware that whether there was a concluded settlement was contentious; that, in any case, the arbitrator had not awarded any sum of money to Knowles; and that CBL had an outstanding counterclaim which it would seek to set-off against any sums due to Knowles.

41. Doubtless unaware of the full facts, the Court made the order sought ex parte on 13 April 2016. On 20 April 2016, CBL made an application to set the order aside supported by a witness statement of Warren Kemp of CBL's solicitors, which set out in detail the matters I have referred to briefly above.

42. Meanwhile, on 13 May 2016, the arbitrator gave CBL provisional relief and ordered Knowles to pay CBL £200,000 on account of costs. In the light of the fact that that sum exceeded the amount of the award Knowles was claiming to be entitled to enforce against CBL, Knowles agreed to concede its application. At CBL's insistence, the consent order recited that the Partial Award did not contain any decision or findings entitling Knowles to be paid the sum claimed.

Knowles' applications under s. 39 and/or 47 Arbitration Act 1996

43. Knowles then made the applications which have led to a further award and this application. Knowles' applications were made under ss. 39 and/or 47 of the Arbitration Act 1996 (no issue being taken as to the appropriateness of either course) and were for declarations including the following:

"(1) A declaration that Knowles had complied with paragraph 3 of the Arbitration Agreement [ie the ad hoc agreement] *as it has withdrawn its invoices served on [DCC].*

(2) A declaration that Knowles has complied with paragraph 4 of the Arbitration Agreement in that it has provided an indemnity in favour of DCC indemnifying the

latter against Knowles pursuing sums owed by DCC to [CBL] under an assignment in favour of Knowles dated 19.11.10."

44. This application was again supported by a statement of Mr Rainsberry dated 7 June 2016. In respect of paragraph 3 he said that Knowles had complied by the issuing of 2 credit notes. In respect of paragraph 4 he relied on the first Deed of Waiver. The statement made no reference at all to the March correspondence.

45. In the witness statements and correspondence that followed, CBL expressly made the point that paragraph 3 required the invoices to be extinguished so that they could never be re-issued.

46. The arbitrator's award was made on 6 September 2016. Amongst other things, he declared that:

"....the Claimant has complied with paragraph 3 of the Arbitration Agreement as it has withdrawn its invoices served on [DCC]

".... The Claimant has complied with paragraph 4 of the Arbitration Agreement in that it has provided an indemnity in favour of [DCC] indemnifying the latter against the Claimant pursuing sums owed by [DCC] to the Respondent under an assignment in favour of Knowles dated 19.11.10."

I will refer to the arbitrator's reasoning further below.

Following the Award

47. In the light of this award, CBL approached DCC by letter dated 22 September asking whether DCC would now pay the monies due from adjudication no. 8 into a stakeholder account. DCC did not reply until 11 October 2016: Mr Whitton said that it appeared that Knowles were not willing to enter into any agreement and he provided copies of the letters dated 16 March 2016 and 22 March 2016. CBL thus became aware of the

March correspondence. They proposed that the arbitrator should rehear the application and, if not, that the arbitrator should consider either correcting the award under s.57 of the Arbitration Act 1996 or declaring that there had been serious irregularity in the proceedings.

48. I shall refer below to some of the matters that were then raised with the arbitrator. In summary, he decided, correctly in my view, that the matters did not fall within s. 57 and any application was, in any case, outside the time limit, and that the issue of serious irregularity was a matter for the Court.

CBL's argument on declaration no. 1

49. Paragraph 3 of the ad hoc agreement is set out above. The declaration sought by Knowles did not precisely mirror its terms in that the paragraph refers not only to the withdrawal of invoices but also to the extinguishing of the invoices.

50. As I have said above, that difference was relied upon by CBL in the arbitration, who argued that something more than withdrawing invoices was required to "extinguish" the invoices so that they could not be re-issued. It seems to me clear that extinguishing an invoice must mean that the claim on which the invoice was based is extinguished. The arbitrator concluded that it was clear to him that *"K has withdrawn and extinguished those invoices which it has previously issued against DCC by the issue of credit notes. Those invoices are thereby now entirely ineffective <u>and extinguished</u> in my view and paragraph 3 is therefore satisfied."* (my emphasis)

51. I note that this was not a case of the arbitrator deciding, as between Knowles and DCC, that any claims were extinguished but rather a case of him deciding what Knowles had done to comply with the terms of the ad hoc agreement. It is self-evident from this passage of his decision that he equated the withdrawing of the invoices and issue of

credit notes with extinguishing the claim. That was not because withdrawing of an invoice has some particular legal effect but simply because he assumed that the withdrawn invoices would not be re-presented or new invoices for the same amounts presented.

52. In fact, what had happened already was that Knowles had demanded payment of the same amounts in the March correspondence. Although that correspondence initially made no references to the invoices themselves, the sums claimed were those invoiced. At the conclusion of Knowles's exchanges with DCC, the claims had not been withdrawn and were still extant.

53. The omission of any reference to the March correspondence by Knowles was, therefore, utterly misleading. It created the impression that by issuing the credit notes in 2014, the claims had been extinguished when Knowles had, just months earlier in 2016, been making the same claims.

CBL's argument on declaration no. 2

54. Again the declaration sought by Knowles did not exactly mirror the terms of paragraph 4 of the arbitration agreement in that it omitted any reference to Knowles not pursuing DCC for such sums as were owed by DCC to CBL.

55. As recited by the Arbitrator, CBL's argument in the arbitration was to the effect that the premise of the condition was that the waiver would satisfy DCC and it did not.

56. In this context, the arbitrator said this:

"51. However, I also remind myself that despite preparing its own version of the waiver and indemnity [the DCC Waiver], DCC were willing to accept the terms of the Knowles Waiver providing only that Knowles notify DCC if it considered the terms of the Waiver were not binding on it. This must indicate that the terms agreed by the

parties in the Knowles Waiver were acceptable to DCC per se, even though perhaps not in the form preferred by DCC.

52. As to the Knowles response to the DCC query as to whether there were any reason why DCC may not rely on the Knowles Waiver, Mr Rainsberry denies that Knowles retracted the terms of the Waiver. He asserts that in the letter of 27 November Knowles was merely seeking information further to the DCC letter of 13 November 2014.

…

55. Considering all the evidence presented to me, I come to the view that the terms of the Arbitration Agreement require that Knowles provide an indemnity in favour of DCC and that Knowles did provide this by the deed dated 18 July 2014. At that date it clearly considered itself bound by the terms agreed. As to the Knowles letter of 27 November 2014, in my view it goes beyond merely seeking further information, although it does require that information. In my view it raises the potential that Knowles may consider it possible to repudiate the Waiver. On balance, however, notwithstanding that Knowles asserted that DCC could not rely on the terms of the Waiver, I accept Mr Rainsberry's assertion that it does not provide the express terms needed to retract or repudiate the Waiver. ….."

57. In coming to his conclusion as to whether Knowles had given a waiver as required under paragraph 4, the arbitrator considered that he had to take into account whether Knowles had retracted its agreement to the waiver. He did so and concluded that they had not and that, therefore, the condition in paragraph 4 had been complied with.

58. In fact, Knowles' demand for payment from DCC was completely inconsistent with acceptance that the first Deed of Waiver was valid and, on its face, only consistent with Knowles adopting a position that it was for some reason not valid (as DCC had feared).

59. In any event, the March correspondence was also on its face inconsistent with that part of the paragraph that required Knowles not to pursue DCC for payment.

CBL's application

60. It is therefore hardly surprising that CBL's case on this application is that the failure to tell the arbitrator about this correspondence was completely misleading and amounted to fraud. CBL's primary case was that Knowles' misled the arbitrator deliberately; its alternative position was that Knowles did so recklessly.

61. In respect of the failure to put the March correspondence before the arbitrator, Knowles' case is that this was neither misleading nor fraudulent. Mr Rainsberry gave a further statement in these proceedings which addressed this issue. In the light of the nature of the application and the allegation of fraud, I gave CBL permission to cross-examine Mr Rainsberry so I have also had the benefit of his oral evidence on this issue.

The legal principles

62. Before I turn to the evidence, I deal with the legal principles.

63. The application is made expressly under s. 68(2)(g) of the Arbitration Act 1996. s. 68 provides as follows:

"(1) A party to arbitral proceedings may … apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one of more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

…

(g) the award being obtained by fraud or the way in which it was procured being contrary to public policy

…"

64. s.68(2) requires an applicant to establish a "serious irregularity". The irregularity must be of the nature falling within subsections (a) to (i), which is a closed list, and it must have caused substantial injustice. ***Lesotho Highlands Development Authority v Impreglio SpA*** [2005] UKHL 43 at [28].

65. The threshold for any challenge under s. 68 is high. The 1996 Departmental Advisory Committee Report, para. 280, is often and properly relied upon for this proposition: s.68 *"is really designed as a long stop, available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."* At paragraph 282 of the same report the Committee recommended that the law should adopt *"the internationally recognised view that the court should be able to correct serious failure to comply with the "due process" of the arbitral proceedings"*. Whilst paragraph 280 is focussed on the categories of irregularity that arise from the tribunal's conduct, where the sub-paragraph relied upon is that relating to fraud, the focus is on the conduct of party and the threshold is necessarily high. That is consistent with the view that the Court should only be able to correct serious failure to comply with due process.

66. Consistent with that high threshold, under s. 68(2)(g) it is not sufficient to show that one party inadvertently misled the other, however carelessly: ***Double K Products 1996 Ltd. v Neste Oil OYJ*** [2009] EWHC 3380 (Comm) at [33]; ***Cuflet Chartering v Carousel Shipping Co. Ltd.*** [2001] 1 All ER (Comm) 398 at [12]; ***Profilati Italia Srl v Paine Webber Inc*** [2001] 1 All ER (Comm) 1065; ***Elektrim SA v Vivendi Universal SA*** [2007] EWHC 11 (Comm).

67. There must be some form of dishonest, reprehensible or unconscionable conduct that has contributed in a substantial way to obtaining the award. The authorities are unclear as to whether these adjectives are all disjunctive or whether reprehensible or unconscionable conduct is more accurately seen as another way of describing dishonest conduct:

(i) For example, in relation to the public policy limb of s.68(2)(g), in ***Gater Assets v Nak Naftogas Ukrainiy (No.2)*** [2008] EWHC 237 at [41], Tomlinson J. said:

"... it is never wise to attempt an exhaustive definition of its content. For present purposes however I am satisfied that nothing short of reprehensible or unconscionable conduct will suffice to invest the court with a discretion to consider denying to the award the recognition of enforcement. That means conduct which we would be comfortable in describing as fraud, conduct dishonestly intended to mislead."

(ii) In ***Double K***, at paragraph 33, Blair J added that:

"Where, as in this case, the allegation is fraud in the production of evidence, the onus is on the Applicant to make good the allegation by cogent evidence."

(iii) In ***Cuflet Chartering***, Moore-Bick J. had similarly said that: *"... once it is recognised that the allegation is one of serious impropriety, it must also be recognised that cogent evidence will be required to satisfy the court that the owners did behave in such a manner."*

68. Mr Davis QC placed reliance on these passages and their references to cogent evidence as support for the proposition that it was not enough for the court to surmise that there had been fraud. I agree but that does not mean that anything short of an admission of fraud will do. The court is entitled, in the normal way, to reach a conclusion on all of

the evidence available to it. In this context, I note that in the ***Elektrim*** case, in a paragraph cited in ***Double K***, Aikens J. found that there was no direct evidence that someone connected with Vivendi had deliberately withheld the memorandum in issue from ***Elektrim*** or the tribunal and that was not an inference that he was prepared to draw from the evidence before him. In the ***Double K*** case itself, the challenge turned on the content of a letter from a third party. Blair J. said that there was no direct evidence that Neste knew the information in the letter to be false, nor could that be inferred from the evidence available. In neither case, however, did the court go so far to suggest that a finding of fraud could not be made on the basis of inferences from the evidence if that evidence were strong enough.

69. In approaching this issue of whether the allegation has been made good by cogent evidence the Court will also bear in mind what it sometimes referred to as the higher standard of proof on an allegation of fraud. By this what is meant is not that the standard is something different from the balance of probabilities but rather that the explanation is more likely to be human error than dishonesty. Flaux J. summarised the principle in ***Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS*** [2011] EWHC 3383 (Comm) at [56] as follows;

"... fraud (that is dishonest, reprehensible or unconscionable conduct) must be distinctly pleaded and proved, to the heightened burden of proof as discussed in Hornal v Neuberger Products Ltd. [1954] 1 QB 247 and re H (minors) [1996] AC 563. This was emphasised by Rix LJ in The Kriti Palm, at paragraphs 256-259, a case which provides a salutary reminder to any judge of the importance of being satisfied to the necessary heightened standard of proof that what is involved is dishonesty and of the fact that the explanation for something is much more likely to be human error than dishonesty."

70. In any event, the applicant must also establish that there has been a substantial injustice. Amongst other things, the applicant must show that the true position or the absence of the fraud would probably have affected the outcome of the arbitration in a significant respect.

Knowles' position on this application

71. As I first read Mr Rainsberry's statement, it appeared to recognise the obvious inconsistency between what was said to the arbitrator and the March correspondence. He was at pains to point out that the exchanges were not relevant because the terms of the declarations sought did not refer to Knowles pursuing DCC for payment but he recognised that, in retrospect, they could be "misconstrued". He said, and I am paraphrasing, that Knowles did not in truth intend to make any claim against DCC and they did not withdraw the first Deed of Waiver or the credit notes. What they were seeking to do was to get DCC to respond in terms that would show that they relied on the first Deed of Waiver. I infer that the purpose of this would be to pave the way for Knowles to argue that there was no reason for DCC not to have reached a concluded settlement with CBL or not to pay monies due to CBL so leading to an argument that monies were now payable to Knowles by CBL.

72. The first question that needs to be asked is what the relevance was of Mr Rainsberry's intentions in writing this correspondence. CBL's primary position is that they are, in fact, irrelevant: Knowles clearly took a deliberate decision not to disclose to the arbitrator evidence which was plainly relevant to the issues that Knowles had put before him and, in failing to do so, created a misleading impression. That, Mr Moran QC submits, is fraud.

73. Knowles, however, argue that the evidence is relevant for two reasons. The first, which appeared to emerge in Mr Rainsberry's cross examination was that the demand for payment was not a "letter of claim" and the claim against DCC had not been pursued. So, it was argued, nothing that was said to the arbitrator was, in fact, inaccurate or misleading.

74. That argument is simply unsustainable and I reject it. The letter dated 16 March 2016 claimed payment of the same sums as had been invoiced, together with a further sum, with the threat of legal proceedings if the sums were not paid. Thus Knowles had pursued DCC for payment after the date of the first Deed of Waiver and, even if the claim and the threat were not pursued, they were never withdrawn. It is no answer to say that the letter did not say what it said because Mr Rainsberry did not really mean what he said.

75. It is also no answer to say that Knowles did not ask the arbitrator to address the issue of whether Knowles had pursued DCC for payment since that was inherent in asking the arbitrator to decide that they had complied with paragraph 4. If anything, the careful wording of the declaration sought, which avoided reference to not pursuing DCC for payment, itself suggests that Knowles knew that that issue had to be avoided because they had pursued DCC for payment just a few months earlier.

76. The second reason is that it is argued that the failure to tell the arbitrator about this was not deliberate but inadvertent. That, it is said, is because, having sent the correspondence only in the hope of extracting from DCC their reliance on the first Deed of Waiver, Mr Rainsberry simply did not think it was relevant to the issues in the arbitration. However misguided Mr Rainsberry's view might have been, that was an

innocent failure of judgment or an inadvertent failure to disclose matters to the arbitrator and cannot, Mr Davis QC argues, amount to fraud.

77. For this reason Mr Moran QC adopts the fall back position that recklessness is sufficient to found fraud in the civil context (which Knowles dispute) but he emphasises that that his primary case is that the failure was deliberate. I deal with this alternative argument below.

The motivation for the March correspondence and its non-disclosure

78. I turn, therefore, to the second limb of Knowles' argument.

79. The March correspondence on its face started with an aggressive demand for payment that flew in the face of the first Deed of Waiver. In his examination in chief, Mr Rainsberry said that the correspondence was all "born out of the Arbitrator's award dated 22 August 2015". This was, however, some 7 months after the Award and some 9 months after DCC had provided the form of waiver it would accept, which Knowles had refused to sign. To now seek, out of the blue, to tease out of DCC a concession that it would rely on the earlier version of the waiver at best makes no sense and at worst was itself disingenuous.

80. It is fair to say that Mr Rainsberry later drew the first Deed of Waiver to DCC's attention but not in terms that recognised that it precluded Knowles' claim. If his intention was to induce DCC to say that they accepted the first Deed of Waiver as valid without expressing their reservations about it, once that strategy failed, there could be no reason not to ask outright if DCC accepted the validity or effectiveness of the first Deed of Waiver, other than that Knowles did not want to say that they accepted its validity or effectiveness (and therefore had no claim against DCC). In fact, at the end

of the exchange of correspondence, as I have said, the claim and the threat of legal proceedings remained.

81. Thus, on the face of it, Mr Rainsberry's explanation is at very best unlikely. But it becomes more unlikely when one considers the context.

82. By this time, as Mr Moran QC put to Mr Rainsberry in cross-examination, Knowles was about £1 million worse off than it had been at the start of the arbitration: its fees had been capped (reducing the claimed fees by around £400,000); it was the subject of an adverse costs award which (on Mr Rainsberry's figures) was worth around £350,000 and its appeal against this award had failed; and it had itself incurred a similar level of costs. Knowles embarked on what looks like a series of attempts to recover monies including starting further arbitral proceedings and making an application to enforce the Partial Award (in the face of that award not having awarded Knowles any sum of money).

83. It was put to Mr Rainsberry in cross-examination that part of the motivation for this was to improve Knowles' financial position in the light of the impending sale of its holding company, Hill International, to a US company. Mr Rainsberry did not accept that pointing out that Knowles was a small part of Hill's business.

84. I accept that evidence – the sale simply did not seem to be of any great concern to Knowles. But it does not seem to me to matter. The key point is that the demand for payment from DCC fell in the midst of a series of activities designed to generate either claims or income and Mr Rainsberry's evidence that he was, at the same time, playing some subtle game with DCC simply does not ring true. I am clear that it was not the reason the demand for payment was sent. It may be that, once DCC had referred to

earlier correspondence, Mr Rainsberry changed tack but that does not change the position.

85. In this context, I take into account three further aspects of the evidence, namely (i) what happened when the correspondence first came to light; (ii) how Mr Rainsberry now characterises the correspondence; and (iii) Mr Rainsberry's credibility generally.

What happened when the correspondence came to light

86. As I have set out above, in September 2016, CBL became aware of the March correspondence and, as a result, Mr Kemp wrote to the arbitrator on 14 October 2016 suggesting that his findings had been based on "apparently inaccurate and possibly deceitful misrepresentations". Mr Rainsberry responded by e-mail saying that there was *"a perfectly simple explanation regarding the correspondence between Knowles and DCC (not all of which Beachcroft has disclosed)"* and asking the arbitrator if he would like a response to Mr Kemp's "frankly ludicrous" suggestions. The arbitrator asked for a response and said that it should include all further relevant correspondence between Knowles and DCC *"and an explanation as to why any such documentation has not previously been disclosed."*

87. Mr Rainsberry, on behalf of Knowles, responded by letter dated 24 October 2016. He started by criticising CBL and its solicitors for not having obtained the full run of the correspondence before making any accusations and accusing them of incompetence and of allowing themselves to be deceived. This seems to me an extraordinary response in circumstances where Knowles had clearly failed to put before the arbitrator relevant material concerning a third party.

88. Mr Rainsberry said that his attached witness statement demonstrated that there had been no possible deceitful misrepresentation. The statement exhibited the full run of

the March correspondence. It offered the explanation which Mr Rainsberry now offers of trying to get DCC to say that that they relied on the first Deed of Waiver without leading them. He said that since he asserted the existence of the waiver "it cannot be said that Knowles was seeking to avoid the operation of the Deed of Waiver". But that was exactly what they were doing in demanding payment.

89. He offered no explanation for why the correspondence had not been disclosed. The nearest he got to an explanation was that because the correspondence was not a departure from the operation of the Deed of Waiver, and because it was inconclusive, it was not relevant to the proceedings. He then expressed surprise that DCC had not provided to CBL the whole of the run of correspondence and said that that appeared to be "a deceitful act by a person in a public office".

90. In my judgment, the combination of Mr Rainsberry's complete lack of engagement with the relevance of correspondence, the failure to provide a meaningful explanation for its non-disclosure and the unwarranted and intemperate attacks on others all indicate that he did not have a good explanation, let alone a perfectly simple one, for the correspondence and his failure to disclose it.

91. I should note that I have repeatedly used, for convenience, the verb "disclose" and the noun "disclosure". There was no order for disclosure in the procedural sense. I do not regard that as relevant on this application and I do not intend this verb/noun to be construed in that way. What I mean is that matters were not disclosed in the sense that matters were not put before the arbitrator which on their face contradicted the version of the facts that was advanced before him. I mention this in part because Mr Rainsberry himself said on a number of occasions that there had been no order for disclosure in the arbitration. That was an attempt to avoid the issue. The March

correspondence was contrary to Knowles' case in the arbitration and failing to refer to it was misleading. That Mr Rainsberry should hide behind the absence of an order for disclosure merely reinforces the impression that his failure to refer to the March correspondence was deliberate.

The "letter of claim" point

92. As Mr Moran QC rightly submitted, Knowles' and Mr Rainsberry's position has developed over time. What Mr Rainsberry said to the Arbitrator was that the letter of 16 March 2016, which at that time he referred to as a demand for payment, was a ruse to get DCC to rely on the first Deed of Waiver and Indemnity. The point was put to Mr Rainsberry in cross-examination that the letter of 16 March 2016 made no reference to any documents (which DCC might rely on). His response, and a point I have mentioned above, was that he was not going to lead the Council and just wanted the Council to "pick up" the (first) Deed of Waiver and Indemnity: he said that, in a letter of claim, he would not say "Please can you tell me why you shouldn't pay this". Having introduced this term "letter of claim", he then focussed on why this was not a letter of claim relying on the points that (i) it invited the Council to pick up a reason they should not pay and that (ii) it did not withdraw the Deed of Waiver. He also made much of the fact that it had not been preceded by any invoices; what Knowles' invoicing practice was; and that no Council would pay without a VAT invoice. He confirmed that this was not a claim because before demanding payment and threatening to sue, Knowles had not issued an invoice.

93. He was asked by Mr Moran QC to agree that, if this was a letter of claim, then it would represent a failure by Knowles to comply with paragraph 3 of the ad hoc arbitration agreement because Knowles would have resurrected the claim that it had promised to withdraw and extinguish. I quote the answer and the exchange that followed:

"A: Well, the arbitration agreement says nothing about the assignment, about operating the assignment, so …

Q: … we don't need to go into an analysis of what that agreement meant. If this is a letter of claim for the adjudication 8 sum, if that is what that letter was doing, that would represent, wouldn't it, a clear breach of paragraph 3 of the ad hoc arbitration agreement, where Knowles promised in effect to withdraw and extinguish the invoice and not make a further claim for that money?

A: Well, no, because this says nothing about reinvoicing. So it cannot be a breach. When this was written the invoices had been extinguished in a way in which Celtic agreed, their solicitor sent credit notes to Devon County Council. Devon County Council had two credit notes extinguishing both invoices, so there is no "if" this was a claim and therefore it was a breach of the arbitration agreement; that just cannot be the case.

Q: Are you suggesting that reinvoicing for the adjudication no 8 sums… wouldn't in your mind have been a breach of the agreement? Yes or no?

A: Yes that would have been.

Q: If this is a letter of claim, that is what you are doing isn't it?

A: No, it isn't what I'm doing, because I have not issued any invoices beforehand, so this cannot be considered as a letter of claim."

94. Mr Moran QC posed the same question in relation to paragraph 4 of the arbitration agreement (which provided that Knowles would not pursue DCC):

"Q: If it were a letter of claim, it would be a breach, wouldn't it?

A: No

Q: Well, can you just explain that? If [it] were claiming the adjudication 8 sums and pursuing DCC direct, how would that not be a breach of paragraph 4 of the ad hoc arbitration agreement?

A: This letter is not a letter of claim. If a different letter existed which was a letter of claim, that could be a breach of 4. But a different letter doesn't exist."

95. This evidence or argument had not been mentioned in Mr Rainsberry's witness statement. It evaded the issue and had all the hallmarks of having been concocted to advance a case that a letter that claimed money and threatened legal proceedings if that money was not paid was not, in fact, a claim, because Mr Rainsberry knew full well, and knew at the time of the application to the arbitrator, that a letter that made a claim against DCC was inconsistent with Knowles having extinguished its claims against DCC and inconsistent with its not pursuing DCC for payment, and ought to have featured in the arbitration.

96. In cross-examination, Mr Rainsberry also suggested both that the letter of 16 March 2016 was one "seeking information" and that DCC knew the game he was playing in this respect. For this he relied on the last e-mail from DCC in this sequence which I have quoted above. He sought to characterise this as DCC themselves saying that the 16 March letter was one pursuing them for information. That ignored both the terms of that letter and the terms of DCC's e-mail which both referred expressly to claims for payment. This similarly demonstrated Mr Rainsberry's willingness to give correspondence an unsustainable meaning and supports my view that he was doing so because he knew all along that this correspondence was completely inconsistent with his stance and evidence in the arbitration.

Credibility generally

97. I have referred in some detail above to the evidence that Mr Rainsberry had previously given on Knowles' application to enforce the arbitrator's award which itself misstated the effect of the award. Generally I formed the view, when Mr Rainsberry gave his oral evidence, that he was far too ready with a "clever" answer to explain or excuse Knowles' conduct.

Conclusions on the evidence

98. Against this background I have no hesitation in concluding that the failure to draw this correspondence to the attention of the arbitrator was deliberate. I cannot accept that Mr Rainsberry did not recognise that it was relevant to the issues of whether the claims had been extinguished or whether Knowles had not pursued DCC for payment. Nor can I accept that Mr Rainsberry did not know that these were relevant issues. The failure to disclose the March correspondence created a wholly misleading impression.

99. I have already said that I do not find his explanation for the March correspondence credible but, even if I had accepted it, I would still have been unable to accept that Mr Rainsberry thought the correspondence irrelevant.

Recklessness

100. In the circumstances, it is not necessary for me to decide whether or not Mr Rainsberry was reckless in failing to draw the March correspondence to the attention of the arbitrator in the sense that he did not care whether the statements made to the arbitrator that paragraphs 3 and 4 had been complied with were true or not.

101. Neither party was able to identify any case in which a court had decided one way or the other whether recklessness as to the truth of a statement could amount to fraud within the meaning of s.68(2)(g).

102. Mr Moran QC's position was simple. In the civil context, fraud can be equated with or could require no more than the tort of deceit. The elements of the tort of deceit are (a) a representation which is (b) false and (c) dishonestly made and (d) intended to be relied upon and in fact relied upon. As Rix LJ put it in ***The Kriti Palm [2006] EWCA Civ 1601*** at [256]:

"As for the element of dishonesty, the leading cases are replete with statements of its vital importance and of warnings against watering down this ingredient into something akin to negligence, however gross. The standard direction is still that of Lord Herschell in Derry v Peek (1889) 14 App Case 337 at 374:"First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proven when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless of whether it be true or false.""

103. Accordingly, a false statement recklessly made would be a dishonest statement in the civil context (if not the criminal). As a matter of legal analysis, there is considerable force in that submission. It does not, however, sit entirely easily with the references in the authorities to "reprehensible and unconscionable" conduct. As I said above the authorities are unclear as to whether dishonest conduct and reprehensible or unconscionable conduct are to be regarded as distinct types of conduct or whether they are synonymous. If they are synonymous, that tends to suggest that "dishonesty" in this particular context involves something more than recklessness.

104. These comments – and they are no more than that – are more consistent with what I have called the synonymous reading of the different types of conduct. It seems to me, without deciding the point, because it is unnecessary for me to do so, that there may be cases in which recklessness as to whether a statement was true or false might amount to

fraud within the meaning of s.68(2)(g) if there is some other element of unconscionable conduct.

Conclusions

105. I find, therefore, that the award was obtained by fraud in that matters that were completely inconsistent with key issues in Knowles' case were deliberately withheld from the arbitrator.

106. I would have reached that conclusion whether or not I accepted Knowles' explanation for the March correspondence but I do not accept that explanation and that reinforces my conclusion that the withholding of this material was the result of a deliberate decision to withhold information that was known to be relevant.

107. It seems to me highly likely that this correspondence would have been material to the outcome of the arbitration since it is contrary to Knowles' case on its compliance with paragraphs 3 and 4.

108. Knowles' argument is that CBL has suffered no substantial injustice because the declarations are of no relevance to CBL. That is a curious submission which begs the question as to why Knowles sought these declarations in the first place.

109. The requirement that an applicant establish that it has suffered substantial injustice is intended to address the situation in which something has gone badly wrong in an arbitration (for example the tribunal has failed to deal with an issue) but that would make no substantial difference to the outcome. It seems to me that where the key issue is one that would potentially be affected by the material not put before the arbitrator it must follow that CBL have suffered a substantial injustice – namely the wrong result. In any event, the arbitrator made a costs order against CBL which must have been affected by the outcome of the application.

Extension of time

110. As I mentioned above, this application was made out of time. That was because it was not made until CBL had become aware of the March correspondence and had, first, attempted to get Knowles' agreement to have the matter reconsidered by the arbitrator.

111. Contrary to the submission in Mr Moran QC's written submissions, s. 73(1) does not give the arbitrator power to extend time to make an application under s.68. Rather it allows the tribunal to extend the time during which a party may continue to participate in the proceedings without losing its right to object. I do not read the arbitrator's "Determination of s.57 Applications arising from the Order of 6 September 2016" made on 8 November 2016 as either purporting to extend time or, so to speak, starting time running again. Therefore, an application to extend time was both necessary and appropriate.

112. Both parties have drawn my attention to the principles on which an application for an extension of time should be considered as set out in the ***Chantiers*** case at [64] relying on the decision of Colman J in ***Kalmneft v Glencore*** [2002] 1 Lloyd's Rep 128. The factors to be considered are:

"(i) the length of the delay;

(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the termination of the application by the court might now have;

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity to having the application determined."

113. Here the delay was short and was the consequence of the time at which CBL became aware of the March correspondence and the steps it took to have this dealt with without the need for an application to the Court. There is no prejudice to Knowles in the delay. CBL's application is well made and it would be unfair for it not to be determined.

114. I therefore give the extension of time necessary.

Remedy

115. I will, therefore, remit the parts of the award that are challenged to the arbitrator so that he can consider his award in possession of the full facts.