Case No: HT-2020-000336
Neutral Citation Number: [2021] EWHC 1829 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Monday, 15 March 2021

BEFORE:

MR JUSTICE WAKSMAN

BETWEEN:

KNOWLES LIMITED

Claimant/Respondent

- and -

CELTIC BIOENERGY LIMITED

Defendant/Applicant

MR S LOFTHOUSE, QC appeared on behalf of the Claimant/Respondent

MR P BURY (instructed by DAC Beachcroft LLP) appeared on behalf of the Defendant/Applicant

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APPROVED JUDGMENT

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MR JUSTICE WAKSMAN:

Introduction

1. This is an application to set aside an arbitration award for serious irregularity pursuant to section 68(2) of the Arbitration Act 1996 ("the Act"). It is the latest episode in a longstanding dispute between the parties going back as far as 2010.

2. The defendant to the underlying matter but the applicant under this application, Celtic BioEnergy Limited ("Celtic") was engaged by Devon County Council ("DCC") for the design and construction of a composting facility. Disputes arose between those parties and Celtic claimed for loss and expense and DCC claimed liquidated damages. Those disputes themselves involved a number of adjudications and an arbitration.

3. In late 2010, Celtic retained the present defendant, Knowles Limited ("Knowles"), to advise and represent it in connection with those disputes. Adjudication number 8 within those disputes resulted in sums being awarded against DCC in favour of Celtic of £16,255.37 and £170,727.30. Thereafter, Celtic and Knowles fell into a dispute as to the fees being claimed by the latter for its professional services to Celtic. Fortunately, it is not necessary for me to recite the lengthy and somewhat tortuous procedural history of much of this dispute, but instead I can move to the immediate background to the arbitration now impugned by Celtic.

4. The arbitrator is Mr Terence Vaughan and the relevant award, which deals only with the question of costs between the parties, is dated 17 August 2020 ("the Award"). The underlying arbitration was an **ad hoc** arbitration undertaken pursuant to the 2011 edition of the Construction Industry Model Arbitration Rules ("CIMAR"). There were a number of stages in this arbitration, which was commenced by Knowles. The particulars of claim dated 1 September 2014 sought a little under £700,000 by way of fees.

5. The principal elements of Celtic's defence to that claim were as follows. First, Knowles's fees were capped at £178,000 and then only payable from any proceeds that

there were from a successful claim against DCC. Paragraph 75 of its defence summarises its position in this way:

> "Each of the adjudication fees was expressed to be subject to a capital fixed sum. Celtic did not subsequently agree to the increase in the maximum sums save as indicated above. Whether or not they were fixed, the time for payment of any sums had not crystallised prior to the commencement of these proceedings ... Knowles is not therefore entitled to any of the fees claimed herein."

Paragraph 84 (headed "Set-off") says:

> "In the event it is established that Knowles is now entitled to the alleged or any fees, Celtic will seek to set off a like sum by way of damages arising out of breaches of contract and/or negligence as set out in appendix A."

Then, finally, under the heading "Conclusion", in the premises it is denied that Knowles is entitled to the alleged or any sums referred to in the claim and/or the declarations referred to in the prayer.

6. It is not necessary for me to set out the details of the extensive cross-claim. I shall make reference to it further in this judgment.

7. There was no separate counterclaim seeking sums beyond the set-off, and that is because the relevant arbitral matters were limited to disputes over the fees being claimed by Knowles.

8. On 11 March 2015, the arbitrator ordered that the issue of Knowles's alleged fee cap and the conditions of payment ("the Initial Issues") should be dealt with first. Having done so, he issued an award on 22 August 2015 essentially in Celtic's favour. On 5 August 2015, he issued a further award finding that Knowles was liable for the costs of the determination of the Initial Issues.

9. On or around 2 November 2015, Knowles applied for permission to appeal the arbitrator's ruling on costs following determination of the Initial Issues pursuant to section 69 of the Act.

10. For its part, Celtic sought an immediate assessment of the costs that Knowles had been ordered to pay and pending that provisional relief pursuant to section 47 of the Act and rule 10 of CIMAR (ie for interim awards of costs). By his award and directions given on 20 November 2015, the arbitrator declined to do anything more until the appeal had been dealt with, but he went on to make the following directions under the rubric of a final hearing. He said:

> "The proceedings will continue to determine the issues identified by the claimant, namely the quantum of fees payable under each of the orders, determining the responding party's cross-claims, determination on whether the circumstances and requirements of payment of fees had been met and determination of an issue over a waiver and an indemnity."

Paragraph 6 then said, "Costs of this order are costs in the reference."

11. The application for permission to appeal made by Knowles under section 69 was refused on 16 February 2016. There was then a hiatus because Celtic applied to the High Court to set aside a further award of the arbitrator made on 6 September 2016 on the grounds of serious irregularity. The irregularity was not because of anything done by the arbitrator but because Knowles had in effect knowingly misled him.

12. By her judgment of 16 March 2017, Jefford J agreed and set aside the Award. In her judgment, she was highly critical of Knowles's conduct. That episode is not of any direct relevance to the issues before me but I should note that the Award set aside concerned applications for certain relief made by Knowles pursuant to sections 39 and 47 of the Act.

13. The arbitrator subsequently found that, subject to the cross-claim, Knowles was entitled to a total of £184,011.37 in respect of its capped fees. On 17 May 2019, Celtic applied to set off against that sum its cross-claim. There was a trial of the cross-claim on 17 December 2019. By an award dated 2 March 2020, the arbitrator dismissed most of the cross-claims but found that Celtic was entitled to set off the sum of £57,372.

14. Just to expand on that a little, the principal part of the cross-claim, which was in section A, was in misrepresentation or negligence on the part of Knowles in its handling of Celtic's dispute with DCC. Here, Celtic had claimed loss of chance of a far

more favourable outcome as against DCC of £1.6 million and relief from the liquidated damages claim of £144,000, so around £1.8 million. There were then a number of alternative or further claims. One was for a core sum of £50,000, being the difference between a proposed original settlement with DCC and a later actual one. This later claim was the one which the arbitrator agreed with and upheld and he then added the further sum of £7,000-odd for wasted legal costs (see pages 617 to 644 of the bundle).

15. By a further award dated 14 May 2020, the arbitrator dealt with the costs of the determination of the cross-claims. He found in favour of Celtic and refused to make an issue-based costs order. He noted that Celtic had obtained a significant award on its cross-claim which had now been, in reality, limited to something under £200,000 because of the limited matters which could be arbitrated.

16. It is important to note that, in his award, the arbitrator refused to award costs in favour of Celtic on an indemnity basis. One of the reasons why Celtic had sought an assessment on that basis was because, it is said, Knowles had failed to beat a *Calderbank* offer to pay £200,000 by way of fees.

17. In relation to that particular matter, the arbitrator said this at paragraph 13:

> "I note the reference to clause 13.3 of CIMAR ... come to the view, in view of the manner in which the set-off has been conducted as an issue separately from and distinct to the main items of claim, I should consider this award as distinct from the others arising. Accordingly, it seems to me, the application for the cross-claim is separate from and not directly relevant to the matter of the *Calderbank* offer, which applies to the overall arbitration.
>
> Further, the fraudulent act of Mr Rainsberry [that is a reference to the matter which went before Jefford J] is not, in my view, relevant to the allocation of costs in the cross-claim but I do take account of other complaints made against Knowles."

As will also be seen from paragraph 13, while Celtic had also invoked the acts of Mr Rainsberry, the arbitrator said they were not relevant to that matter.

18. The resolution of the substantive issues now meant that Knowles's entitlement to its fees had been reduced by the amount of the cross-claim. After some adjustments, the

net sum due to Knowles was now £127,451. Subject to costs, that was effectively the end of the arbitration.

19. It is common ground that, apart from the two costs orders in favour of Celtic in relation to the Initial Issues and the cross-claims, there were various other costs orders made in respect of numerous applications in the course of the arbitration, along with other costs orders that related to court proceedings. In some cases, they had not been assessed, but there is no dispute that, in such cases where they had been ordered but not assessed in Celtic's favour, Celtic was and is still able to seek assessment of those costs.

The Award Now in Question

20. Following the various awards referred to above, the arbitrator asked the parties whether there was anything left to be determined in the arbitration. By its letter dated 12 June 2020, Celtic identified three issues as outstanding. As summarised by the arbitrator in his subsequent letter of 26 June, they were:

> (1) the assessment of costs arising from the determination of the initial issues;
>
> (2) the assessment of costs arising from the cross-claim; and
>
> (3) the determination of liability for, and assessment of, the costs of the arbitration.

Those matters were subsequently recited at paragraph 2 of the award in question.

21. I should just say a little bit more about the letter of 12 June. Paragraph 7 is where Celtic sets out the three issues. The third issue is there described at paragraph 7(3) as:

> "Determination of liability, then assessment of the costs of the arbitration (costs in the case)."

At paragraph 25, that letter said:

> "Given the substantive issues in this reference have now been finally determined, Celtic asserts that liability for costs in the case should now be determined. As the tribunal is aware from its previous submission, particularly in relation to the cross-claim, Celtic considers there is no doubt that it has won this arbitration."

22. On 22 June, Knowles responded as follows. At paragraph 3 at the top of page 670B, it says:

> "Lastly, we do not accept Celtic is the clear winner of the arbitration. This will no doubt be a matter to be argued over later. In reality, neither party has achieved anything close to its initial demands."

Then, on the issues:

> "We agree with DAC Beachcroft the following costs issues remain to be decided:
>
> (1) costs of the initial issue award;
>
> (2) costs of the recently decided counterclaim ..."

Then it adds this:

> "In our understanding, all other costs claims have both been dealt with and paid as the arbitration reference has proceeded."

23. Celtic wrote a further letter on 25 June and then, as I mentioned earlier, the arbitrator then wrote to both parties on 26 June. He recited the three issues, as I have already mentioned. He then goes on to say:

> "By a letter of 23 June [it should be 22 June], Knowles served its response confirming issues 1 and 2 but rejecting the proposal of an assessor, further denying there were any outstanding costs of the arbitration to determine or to assess because, save for 1 and 2, the costs have been determined on discrete issues during the progress of this reference."

Then, at page 673B, towards the end of his letter, the arbitrator says this:

> "As regards the costs of the arbitration, as the parties request this tribunal to determine whether there are any remaining costs to recover that this tribunal shall determine liability for and quantum of recoverable costs under the costs of the arbitration, in the

> absence of agreement of the parties, the tribunal shall determine the procedure to adopt in the resolution of those issues."

Then he said he would make further directions.

24. Then, by a letter of 7 July and its enclosures, the arbitrator made directions for the resolution of the costs in the arbitration matter, among other things. First, he says:

> "Since the parties are not in agreement on the principle of the recovery of costs of the arbitration, I am minded to treat it as a claim, seek submissions in the usual way to establish the principle of this item."

In his directions, he said:

> "On the matter of the costs of the arbitration, Celtic shall file and serve its submissions by 17 July, Knowles replies on 31 July. Celtic may reply by 7 August. The tribunal will determine principle and liability by 21 August and, if required, costs assessments and so on."

25. That then set the scene for the making of submissions that preceded the Award. It is important to see what those submissions said and did not say.

26. First of all, there was Celtic's submissions. Under the principle of the costs of the arbitration, among other things, Celtic said:

> "In the letter dated 20 June, Knowles asserts there are only two outstanding matters and entirely discounts the costs of the arbitration. It is incorrect to say all other costs claims have been dealt with. It was a fact that the costs of the arbitrations have not yet been considered by the tribunal and could not be until final determination of the substantive issues. Now it has been finally determined, it is appropriate for liability to be assessed.
>
> Costs of the arbitration are, in the usual way, those which fell outside the initial issues in Celtic's cross-claims and have not yet been determined, examples of which are detailed below. Accordingly, these costs should follow the event."

Then it says this:

> "The principle that there will be costs in the arbitration which fall to be determined was recognised by the arbitrator on

> 20 November 2015 when the arbitrator issued directions in respect of the remaining proceedings [and it referred to paragraph 6, which I have already set out]."

It is important, in my judgment, to note that that is the only order containing costs in the reference which was put forward before the arbitrator.

27. The letter went on to say that it gave three examples of costs which were outside the Initial Issues and cross-claims, which therefore fall to be determined, and costs in the arbitration. It is not necessary for me to recount those at this stage.

28. Then it went on to say that those matters were examples of situations where Celtic had incurred costs as a result of Knowles's actions, whether specifically or generally, and it goes on to say:

> "In addition, it was notable that, in the arbitrator's assessment of respondent's costs of the original section 39/47, the arbitrator referred to costs falling outside the period of recovery."

Then the tribunal said in paragraph 13 that those costs "may more be properly included elsewhere".

29. Then, on the separate matter of liability for costs of the arbitration, Celtic said there was no doubt that it was the winner and then gave details about that.

30. I meant to add that, in the letter of 17 July, Celtic also asked for indemnity costs and referred again to the *Calderbank* letter.

31. In its response dated 31 July, on the question of who is the winner, Knowles referred to the various awards netted off which led to the net balance in Knowles's favour of £127,451 and it noted that, in the cross-claim awards, the arbitrator had ruled that, notwithstanding that the cross-claim was very much larger than the amount recovered, Celtic was the winner on the basis that the sum awarded was not **de minimis**. By the same reasoning, Knowles invited the arbitrator to conclude that the net balance in Knowles's favour (being considerably more than £57,000) should also not be regarded as **de minimis**.

32. It then dealt with the *Calderbank* offer as a general point rather than simply being a matter for indemnity costs.

33. It went on to talk then about the three examples that had been set out by Celtic in relation to the costs of the arbitration point and it said:

> "Without seeing a detailed breakdown, it is not possible to express any comment. We note they are only examples. We observe that past costs claims submitted by DAC have been significantly reduced and found to be overstated. Obviously this will not be relevant to the incident matter if Knowles is the winner."

Then, in the conclusion, it said:

> "Knowles has recovered the net sum of £127,000 and, accordingly is the winner. In the alternative, it is open to make no order as to costs."

34. In its response, dated 7 August, Celtic stated:

> "We note that Knowles accepts the arbitrator's jurisdiction to award costs and further accepts the principle costs of the arbitration are to be decided. Knowles also proposes the arbitrator adopts a consistent approach to order that the losing party pay the costs of the winning party. On the basis that Celtic also accepts the principle there are costs of the arbitration outside the costs of the initial issues and cross-claims to be determined, it is clear the parties are now in agreement as to the principle of the recovery of the costs of the arbitration."

35. It then proceeded to do detailed reply submissions on who is the winner and dealing with the *Calderbank* offer. As to the latter, Celtic agreed with Knowles that, if it was a proper offer, it could be considered by the arbitrator as part of his general discretion on costs. By now, as it seems to me, the *Calderbank* letter was being invoked and dealt with by both parties as a matter going to discretion on costs generally and not merely to any application for indemnity costs.

36. I turn then to the Award. At this stage, I can move directly to the discussion of the competing arguments which the arbitrator had, in my judgment, faithfully set out in paragraphs 4 to 12 of the Award.

37. At paragraph 13, he noted the tribunal's discretion on the question of costs and how it should be exercised according to rule 13 of CIMAR and sections 59 and 63 of the Act.

38. At paragraph 14, he noted the multiple applications which have been made in the course of the arbitration where applications were then made for costs and he gave details of those applications. He then noted that Celtic had maintained that there were other extant costs yet to be determined.

39. He analysed Celtic's examples of such costs at paragraphs 15 to 18. In 15, he said:

> "The costs were incurred in relation to an application for an enforcement of the award subsequently withdrawn by consent. If the application was an application to court, such costs are the costs of proceedings and not costs of this arbitration. If the application referred to was made within this reference and withdrawn by consent, the terms of that agreement should have addressed the issue of costs if the parties thought they were relevant."

40. On example 2, he said:

> "It amounts to an assertion that there was an outstanding detailed assessment of costs relating to an order already made but, if that was the case, Celtic can submit its detailed schedule for that specific assessment in the normal way, as indeed could Knowles if there is a similar situation."

41. On example 3, referring to the Award of 15 May, he said:

> "Celtic succeeded in its application and was awarded costs by the tribunal but it now asserts it incurred significant costs in attempting to get Knowles to comply with paragraphs 3 and 4 of the arbitration agreement. Since the Award of 15 May awarded Celtic its reasonable costs of the application, that issue has already been determined. If a detailed assessment is required, Celtic can submit its detailed schedule of costs in the usual way, otherwise it has been determined."

He went on to say:

> "None of the examples cited provided support for the assertion there remain general costs outstanding which are not already accounted for in existing costs orders save as noted above."

42. The arbitrator then went on to deal with the other points which had been made, principally 20 November 2015, in his paragraphs 19 and 20:

> "As to the other references ... the reference in my directions of 20 November to costs in the reference is a recognition that those directions addressed a number of issues. Some of those issues were pursued, some not, some were redrafted, incorporated in later applications. The issue of Merrill's transcript was not pursued. Items under paragraph 3 of the directions were addressed either in the section 39/47 application or in the cross-claim save there was no express award to date of sums that had been admitted by Knowles being due. Costs of these directions would therefore be recovered in costs for either the section 39/47 or the cross-claim. The reference in my assessment to costs of the referred matters of section 39/47 outwith the period of recovery reflects the test of the consent order and properly limits the recovery of costs to the dates when Knowles withdrew its opposition to Celtic's application."

43. Reference to costs which may more properly be included elsewhere arose from his finding that some of the costs in the schedule for section 39/47 were not related to that application. If they related to court proceedings, they might be recovered in those costs. If they related to other applications in this reference, they might be recovered accordingly. He said that the references relied upon provide no support for a general claim for outstanding recoverable costs.

44. He went on to say in paragraph 20:

> "Since the parties have claimed costs arising from each application as the arbitration has proceeded, it is difficult to see that any costs or significant costs have not yet been addressed which should have been addressed."

He ends that paragraph by saying:

> "It may be that the parties have omitted to claim specific items of costs in schedules of costs submitted to date but, if so, if that is what is being alluded to by Celtic, then what it seeks is an opportunity to reopen the assessment of costs already determined. Any such reopening of previous determinations would be entirely improper."

45. He made again reference to the long list of awards and orders in which Celtic had already been awarded costs apart from the Initial Issues and the cross-claim determination. He then said:

> "I accept that, if liability for costs of an application has been determined by this tribunal but not yet agreed or assessed, then they can be. I am not, however, persuaded that, after pursuing a policy of seeking discrete orders for costs on specific applications for around the last five years, parties may now properly seek to gather up some generalised costs which have not been allocated to specific applications."

46. He then went on to deal with the position which would have pertained if he was wrong and there were further costs of the arbitration which now had to be allocated between the parties. Strictly speaking, therefore, what followed was obiter.

47. In paragraph 22, he noted that it was agreed that, so far as this exercise was concerned, what he had to decide was who the overall winner was. Each side had said that they were, for reasons which the parties had earlier on contended for and which I have summarised above.

48. His paragraphs 22 and 23 dealt in detail with Celtic's submissions that it had beaten its *Calderbank* offer of the net payment of £200,000 because, in the event, Celtic had only recovered £127,000. He also did so in the context of, at the end of paragraph 22, making reference to its costs and to those costs on an indemnity basis. In my judgment, that accurately reflected the role the *Calderbank* offer was now playing so far as costs were concerned.

49. Then, as to the *Calderbank* offer, he said:

> "The payment of £200,000 was expressed to be conditional on good receipt of the proceeds from adjudication, from DCC and into the agreed stakeholder account."

He said it was clear from the matters which actually unfolded between Celtic and DCC and, knowing that Celtic's offer was in truth between Celtic, DCC and Knowles, the arbitrator said that Celtic's offer was in truth dependent on negotiations with third parties, ie DCC. Put in another way, the offer contemplated further attempts to

negotiate. He referred to the decision of Davies J in the *Hugh Cartwright & Amin v Devoy-Williams & Anor* [2018] EWHC 1692 (QB), which he referred to in paragraph 24 of the Award. Accordingly, for the reasons he gave, the arbitrator concluded that the purported *Calderbank* offer was not such and was to be disregarded for costs purposes.

50. He then concluded that Knowles was in fact the overall winner because it was the net payee of £127,000. Accordingly, if he had been wrong to hold that there were further costs to be allocated, it would be Knowles who would be entitled to them. He added this at paragraph 26:

> "The unusual position arises that, because the parties have adopted a procedure of having split hearings and referring specific issues to be determined with costs being assessed under the individual applications, Knowles has had the majority of costs being awarded against it notwithstanding that I find it is the winner overall."

He then refers to the limitations imposed on awarding costs of discrete applications.

51. He then said this in paragraph 27:

> "In conclusion, I dismiss the claim of Celtic for a general claim for costs of the arbitration save only if the tribunal made an order for costs and they have not yet been assessed, then they can be. If I am wrong and a general claim for costs of the arbitration remains to be determined, I find Celtic is liable for those costs."

He ordered accordingly and, of course, in the event, his formal decision was simply to refuse to make any further costs orders.

Celtic's Challenge to the Award

52. Celtic challenged the Award under section 68 and also sought permission to appeal from Pepperall J pursuant to section 9 of the Act on a question of law, namely the strictly obiter decision that Knowles was the overall winner.

53. By his order made on 14 December 2020, Pepperall J refused permission to appeal and he added this:

> "An appeal under section 69 can only be taken on a point of law but the point of law has not been identified.
>
> Secondly, permission to appeal can only be given where, among other matters, the decision is obviously wrong on the basis of findings of fact and award. Here, the arbitrator found there were no residual costs to be dealt with. Such a finding is not and could not be challenged pursuant to section 69.
>
> The appeal seeks to seek appeal as to who was the successful party and the relevance of the claimant's offer. Such issues did not arise upon the finding there were no residual costs ... consequential decision to make no further order of costs. In any event, it is doubtful the claimant would be able to establish that such further findings involve any obvious errors of law."

54. At paragraph 5, he said:

> "While leave was not required for a section 68 challenge, it is inappropriate for the court to express any concluded view. It is doubtful there is any merit in the challenge on the ground of serious irregularity. The parties are reminded that standard directions in PD62 apply.
>
> In addition, it is appropriate for the claimant now to clarify how the challenge is framed within the closed categories of challenge allowed pursuant to section 68(2)."

I am going to return to that a little later.

55. On this application before me, the principal challenge made by Celtic is based on serious irregularity under section 68(2)(a), ie that the arbitrator failed to comply with his section 33 general duty, which has caused substantial injustice. This allegation is made first in respect of the decision that there were no further costs to be allocated as opposed, for example, to costs which had been allocated but not yet assessed ("the Costs in the Reference Issue") and second, if this was wrong, his decision that Knowles and not Celtic was the overall winner was also subject to challenge.

56. Let me just set out here the relevant provisions. Section 68(2) says:

> "Serious irregularity means [one of the following]—

(a) failure by the tribunal to comply with section 33;

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties ..."

57. Section 68(3) says that, if serious irregularity is established, the court may remit the award in whole or in part. It is not suggested here that the proper remedy, if the challenge succeeds, is anything other than remission.

58. Section 33 gives the general duty of the tribunal:

"(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case ...

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred upon it."

59. It is trite law that the courts should be careful to ensure that a section 68 application is not in truth anything more than a challenge to the end result. There is, in relation to a section 68 application, involving as it does the allegation of a serious irregularity, a high hurdle to overcome, as Mr Williamson QC accepted (see the observations of Collins and Waller LJJ in *Bandwidth Shipping Corporation v Intaari* [2007] EWCA Civ 998).

60. I should add the further helpful statement of principle set out by Popplewell J in *Terna Bahrain Holding Company WLL v Al Shamsi & Ors* [2013] 1 Lloyd's Rep 86 where he said this at paragraph 85:

"(2) ... The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

(3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration ... Relief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably expected from the arbitral process, that justice calls out for it to be corrected.

(4) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties ...

(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point or his opponent's case and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity.

(6) The requirement of substantial injustice is additional ... the applicant must establish both.

(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that, had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

<u>The Issues Before Me</u>

61. It is important to see how the section 68 challenge was particularised as ordered by Pepperall J. There is a summary at paragraph 3(a). So far as the winner point is concerned, it refers to paragraph 25. It says that that decision was directly contrary to, and irreconcilable with, the arbitrator's previous decision to award costs in favour of Celtic in the Initial Issues costs award and that that was contradictory and irreconcilable, which amounted to a failure to adopt procedures so as fairly to decide the issues to be determined under section 68(2)(a) and section 33.

62. Paragraph 3(b) summarises the claim in respect of costs of the reference to say:

> "The decision was contrary to the approach taken by the parties and the arbitrator throughout the arbitration, which commenced in 2014. Fundamental change to approach to costs at the end of the reference is a further failure to adopt procedures to fairly decide the issues under section 68(2)(a) and section 33 again."

63. On the winner point, they recited that Celtic had received the costs order in the Initial Issues and that Celtic had been significantly the more successful party. But then, when it came to the Award, it said:

> "It follows that the winner in this matter is clearly Knowles because the outcome of the arbitration is it is entitled to £127,000. That was a serious irregularity [again referring to the fair means of the resolution to the matters to be determined] but, reaching a contradictory and irreconcilable position, the procedure was and has led to unfairness. That means something has plainly seriously gone wrong."

They then said:

> "The section 33 duty was broken because of the contradictory decisions. Alternatively, by adopting a procedure whereby earlier orders could be contradicted by subsequent orders, the arbitrator had failed to act in accordance with the procedure impliedly agreed by the parties under section 68(2)(c). Specifically, the arbitrator's awards over the course of the reference will be consistent and not contradictory."

64. On the costs of the reference point, it is said:

> "From the start, the arbitrators made reference to costs of the arbitration. A clip of documents containing such references is appended."

They have been put before me. None of them had been put before the arbitrator apart from the order made on 20 November 2015, which he specifically dealt with.

65. Celtic then said it did not apply for all the costs on reliance on that because it relied on the costs in the arbitration so it would have an opportunity or an entitlement to recover costs later. The total amount of costs which have not been recovered one way or another is put at £163,000. It is said:

> "Although the costs associated with certain matters were dealt with as discrete issues, many were not. Both parties proceeded on that basis. Adopting a procedure whereby it is understood there will be costs of the arbitration to be addressed at the end so the party doesn't make applications for the costs at all times but then contradicting this at the end of the reference by saying there are no costs in the reference is failing to adopt a suitable procedure [then it is said that the costs in the reference have not been dealt with].
>
> Alternatively, again on the basis that both parties said there would be costs in the reference, it is a failure by the tribunal to conduct proceedings in accordance with the procedure impliedly agreed by the parties, contrary to section 68(2)(c).

66. I interpose to add that, at this point in these particulars, there was no allegation of excess of powers pursuant to section 68(2)(b). I further note that Celtic is not pursuing as costs of the arbitration costs which are referable to an order saying costs in the reference. It is not limiting its complaint to those matters. It is seeking to pick up all of the costs of the references not otherwise allocated to one party or another, whether the subject of a costs in the reference order or not, and that was its position before the arbitrator. This is important because, if one adopts the High Court position as being analogous, if the relevant costs are not the subject of any costs order, then the default position is no order for costs, ie they lie where they fall. Those were the overall points that were being made or not made in the further and better particulars.

67. In the written and oral submissions before me, the points made by Celtic narrowed somewhat. On the costs in the reference point, the focus was now on paragraph 21 of the Award. It was said that the section 33 unfairness arose because in truth both parties had agreed that there were costs included in the arbitration that had not been allocated to one side or other and the only real question now was who the winner was. Further or alternatively, the arbitrator acted unfairly because he was in effect ignoring his own earlier orders where they had said "costs in the reference" and it was said that that caused or would cause substantial injustice to Celtic.

68. As to the winner point, Celtic recognised that it could not, on a section 68 challenge, impugn the arbitrator's decision on the basis that the *Calderbank* offer should be disregarded. Instead, it focussed on paragraph 25. Just to set that relevant passage out again, it said that it follows from the finding that the winner is clearly Knowles because

of the outcome (it has £127,000) whereas, "In its defence, Celtic asserted that Knowles was entitled to nothing." It is said that that was a new point being taken by the arbitrator, that it was not a point taken by Knowles and it was not one on which the arbitrator, if it occurred to him that it was a new point, had asked for further submissions from the parties.

69. Having described the issues in the core submissions, I then turn to my analysis.

The Costs of the Reference Point

70. It is not said that the Award was procedurally unfair because the arbitrator did not deal with each of Celtic's key points. He did so in full and with reasons and, as already noted, no orders other than the 20 November 2015 order referring to costs of the reference were in fact put before him. For the reasons which he gave, he discounted all three examples as not supporting the general contention that all the irrecoverable costs of the arbitration were now to be the subject of a further order. He explained why the reference to costs of the reference in the 20 November order did not take the matter any further because in fact they would be allocated elsewhere. There cannot be any unfairness in the way in which the arbitrator dealt with the specific points addressed to him.

71. Paragraph 21 is the subject of focus by Celtic at this point saying:

> "I am not, however, persuaded that, after pursuing a policy of seeking discrete orders for costs and specific applications ... the parties may now properly seek to gather up some generalised costs which have not been allocated."

72. The first objection to this is that this ignored the fact that the parties had themselves agreed to the contrary for the purpose of this award. I do not accept that. While Knowles contended that Celtic was the clear winner, it also said that other costs had already been dealt with in its 22 June letter and to the same effect in paragraph 1 of its letter of 22 June 2020. That position was reflected in the arbitrator's own view of the issues at 26 June 2020 and it was noted by the arbitrator on 7 July that the parties had not agreed on the principle of recovery of the costs of the arbitration. Then, in its first

set of submissions on 17 July, Celtic's position responded to Knowles's position as to whether all the costs had been dealt with.

73. I agree that, in their letter of 31 July, Knowles accepted that the arbitrator had jurisdiction to make a further costs order but that did not mean that he had to if he thought it was not appropriate. It is also true that Knowles concentrated on how it was the winner and said that it could not comment in detail on the validity of the examples of Celtic's remaining costs because there was no detailed breakdown. But that, in my judgment, is not the same as saying that they accept that the arbitrator can determine all costs incurred in the course of the arbitration if not already dealt with and irrespective of whether they were subject to a costs in the reference order or not.

74. Knowles also say that this matter will be irrelevant if it is found to be the winner. That is true but it does not take the supposed party agreement any further. I agree that the main focus of Knowles was on the winner point because it said at the end of the letter that costs should follow the event or there should be no order as to costs, but that was simply a matter of the main focus.

75. I also agree that, in its reply letter of 7 August, Celtic certainly presented the position as if it was all agreed, so the only question was who won, but I do not think that was accurate or that the arbitrator was bound in fairness to agree with that view. Furthermore, as already noted, the arbitrator dealt with every specific point put to him on Celtic's costs reference point. Celtic might not agree with his rejection of the sole example of the costs in the reference point put to him in paragraph 19 but that is a pure results point; it is not a fairness point.

76. Nor can there be any unfairness point taken on the relevance of paragraph 21 on the basis that it somehow went against the parties' agreed position for that issue, not least because, on any view, Knowles's position had been that it could not see that there were any unallocated costs. Equally, it cannot be said that the parties had always proceeded on that basis. Knowles certainly did not accept that; it said that all the costs were dealt with as they went along.

77. There was then a separate point on unfairness made by Celtic, which was that the arbitrator in effect sought to rescind his own orders, at least where he had made orders, of costs of the reference and whether agreed by reason of the parties or otherwise. The first point is this: that was not a point which was squarely put to the arbitrator anyway. The actual submission did not concentrate on cases where such a provision was made in the order. It was the much broader point that all costs not previously dealt with should now be wrapped up and made the subject of a further order, and that is no doubt why the relevant part of paragraph 21 is expressed as it is.

78. It was then said that the arbitrator was issue-estopped from effectively reversing his earlier order, being the only one referring to costs in the reference. That goes nowhere, in my judgment. First, the further and better particulars did not themselves refer to excess of powers whether under section 67 (as to which there is no challenge made here) or section 68(2)(b) at all. Secondly, it was not even in Celtic's skeleton argument so far as the costs of the reference point was concerned, as opposed to the winner point. Thirdly, the issue of issue estoppel in connection with excess of powers is all about the arbitrator acting inconsistently with an earlier award, but he did not act inconsistently with an earlier award (see *Russell on Arbitration* 6-16).

79. As I have already mentioned, the single case of costs in the reference was one which the arbitrator went on to deal with and explain. Accordingly, for all those reasons, it cannot be said that there was serious irregularity under section 68(2)(a) by reason of a breach of section 33 duty, nor can it be said that there was a breach of section 68(2)(b) for the reasons that I have given.

80. However, even if there was a serious irregularity, the prospect at least of substantial injustice must be shown. The short answer to this is that it cannot be shown because the arbitrator went on to find (if he had to) that Knowles was the winner, not Celtic. I will say more about the question of substantial injustice here once I have dealt with the winner point.

<u>The Winner Point</u>

81. The section 68 challenge here is now exceptionally narrow. That is not surprising because, on the face of it, Celtic's complaint is no more than a disagreement with the result. The limited challenge is that the arbitrator took a new point when he said that, in its defence, Celtic had said that nothing was owed and yet now it had to pay £127,000 to Knowles.

82. First, as a matter of fact, what the arbitrator said was true; it is what Celtic said in its defence, as already pointed out. It is true that, once the Initial Issues had been determined, such fees would fall due for payment if there were the relevant proceeds and the fees could be established within that but, as clearly stated by Celtic, there would still be nothing owed if (as Celtic alleged) the counterclaim was sufficient to extinguish the claim as it said it was. That is clearly spelt out in paragraphs 84 and 87 of the defence, in my judgment.

83. In this regard, Mr Williamson QC referred me to an email from Celtic in response to a query from the arbitrator. The arbitrator had asked, having regard to where everyone had got to by this stage, in a letter of 22 May:

> "Will Celtic confirm that, subject to its claim for set-off, it admits the recoverable fees as £178,000?"

The response came on 23 May:

> "Celtic confirm recoverable fees is £178,000, which are payable subject to Celtic's claim for set-off and Knowles satisfying all the costs awards in Celtic's favour, including but not limited to the costs award of 5 October."

84. I do not see how this exchange helps Celtic on the winner point and the argument that it was maintaining that nothing was owed. It remained its case that, as matters then stood, because of the counterclaim, its position was that nothing was owed to Knowles. The arbitrator, therefore, was perfectly entitled to describe that position in the way that he did in paragraph 25.

85. It was then faintly argued by Mr Williamson QC in reply that the set-off claim was not so clear-cut actually because set-off was invoked (as it normally is) in extinction or

diminution of the claim. There is nothing in that point. Celtic's principal position was clearly that there would be nothing owed once the cross-claim was determined.

86. The reason for the arbitrator making the point was obvious. It was that, at the end of the day, the cross-claim failed by a long shot to extinguish the claim and it was therefore the case that Knowles was the net winner at the end of everything. There is no inconsistency, in any possible unfairness sense, in that conclusion with the earlier award of costs to Celtic after the hearing of the cross-claim. There, Celtic was the winner of that particular issue and it won enough to merit the costs. The issue of how that would then play out in reducing Knowles's claim for fees thereafter was simply not relevant at that stage but it was relevant in the award with which I am concerned where the arbitrator had to consider who was the overall winner.

87. In truth, there was no new point taken by the arbitrator at all, nor for that matter could Celtic seriously argue that its position was otherwise than as stated by the arbitrator in the way that he did in paragraph 25.

88. Issue estoppel was also raised here via section 68(2)(b), although again not put in the further and better particulars, but here it was invoked in the skeleton argument. This was on the basis that the decision that Knowles was the winner somehow contradicted an earlier finding, ie the award of costs to Celtic after determination of the cross-claim or the Initial Issues for that matter. That point is wholly misconceived because these were two separate matters, as explained above. There was no inconsistency, in an issue estoppel sense, with any prior awards.

89. The final point that the arbitrator had violated the impliedly agreed procedure under section 68(2)(c) because arbitral awards should be consistent and not contradictory is hopeless, in my view. It follows from all the reasoning that I have already given that it is. This was in truth never more than a challenge to the result.

90. Although not necessary for my decision, I should add that, had there been serious irregularity on the very limited basis contended for, which is effectively that the argument that Celtic had said there was nothing owing, that was a point that should have been put to Celtic for comment prior to the Award. I cannot see how the outcome

would possibly have been different, even arguably. That is because, in my judgment, there was nothing to answer that point.

91. Furthermore, all the other points that had been made by Celtic on the winner issue had been made, recited by the arbitrator, dealt with by him and rejected, so I cannot see what basis there is to suppose that the arbitrator would or even might have come to a different conclusion if the matter was remitted for that reason.

92. There is a further point which I ought to recite for the record. It was said that before me there was no clear evidence that, if Celtic did not obtain a costs order against Knowles concerning the costs of the arbitration, then Celtic would have to bear its own costs and pay its solicitors. Here, there is a CFA in place. Knowles's solicitors raised this query by its letter dated 23 February 2021 and, as I understand it, there was no reply to it and no actual evidence about the scope and effect of the CFA as to any liability there might otherwise be for Celtic to pay to its solicitors the unrecovered costs.

93. However, following the hearing, I received a letter from DAC Beachcroft (Celtic's solicitors) on 11 March saying that a box which had to be ticked in one of the referable proceedings which had not been ticked, which confirms that the costs claimed do not exceed those for which the client is liable, was an error. They confirmed that:

> "The costs claimed by Celtic in relation to both issues and cross-claims do not exceed the costs for which Celtic is liable. We confirm that Celtic therefore has a significant liability for costs to DAC Beachcroft."

I have not had anything back commenting on that on behalf of Knowles and, in the light of that, for present purposes, I am not taking that particular matter any further.

94. It was also said that Celtic would suffer serious reputational damage if the finding of Knowles being the winner was not set aside. This seemed to be principally a matter of assertion by Mr Walsh. It was not a point which was really relied upon in argument before me but anyone who read the Award would understand how the arbitrator came to the conclusion on costs here that Knowles was the winner. It does not discredit Celtic. If Celtic's real point is that Knowles might misrepresent the result to the world

at large, that seems to me to be too remote. On the basis there was otherwise no self-substantial injustice on the winner point, even if there was serious irregularity, this further point would not rescue the position so far as Celtic is concerned.

95. I now return to the question of substantial injustice in relation to the costs of the reference point. Since that part of the Award dealing with the winner must stand, there is no basis for any substantial injustice on the costs of the reference point. That is because the arbitrator has already decided that, if he had to consider the costs of the reference, they would have to be paid to Knowles by Celtic, not the other way round.

96. In that sense, Celtic is actually better off in the present position; it has avoided a worse outcome. Accordingly, to remit the Award would only make matters worse for Celtic. Accordingly, there is no substantial injustice even if Celtic was correct that the costs of reference point was a serious irregularity, and that is essentially because the winner point has been established and there is no serious irregularity there.

97. However, Mr Williamson QC also argued that he did not actually need to show serious irregularity on the winner point, though this was part of the claim, in order to establish substantial injustice on the costs of the reference point if there had been serious irregularity there contrary to my decision. This is because, if the Award was remitted, the winner point would become open again and, if so, even if not found to be a serious irregularity, the winner point would fall for reconsideration and there was at least a reasonable prospect (or a "respectable argument" as Mr Williamson QC put it) that Celtic could persuade the arbitrator, second time round as it were, that it was the winner. That seems to me to be completely unrealistic. I see no prospect at all of the arbitrator changing his mind and I have already explained why above, so that part of the argument takes the matter no further.

98. For all those reasons, therefore, this claim under section 68 must fail in its entirety and I will now deal with costs.

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

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This transcript has been approved by the Judge