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Case No: 2014 Folio 105

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

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

Date: 2 July 2014

Before :

MR JUSTICE EDER

- -

Between :

KONKOLA COPPER MINES PLC

Claimant

- and -

U&M MINING ZAMBIA LTD

Defendant

Mr GRAHAM DUNNING QC, Ms REBECCA STRIPE and Mr LOUIS FLANNERY (Solicitor Advocate) (instructed by **Stephenson Harwood**) on behalf of **the Claimant**

Mr DERRICK DALE QC and Mr RAVI ASWANI (instructed by **Clyde & Co**) on behalf of **the Defendant**

Hearing Dates: 20 June 2014

Approved Judgment

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

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MR JUSTICE EDER

Mr Justice Eder:

Introduction

1. On 20 June 2014, I heard two related applications on behalf of the defendant ("U&M") for (i) security for costs pursuant to s70(6) of the Arbitration Act 1996 (the "1996 Act") in relation to challenges made by the claimant ("KCM") to an arbitration award dated 6 January 2014; and (ii) security for certain sums due under such award pursuant to s70(7) of the 1996 Act. At the conclusion of that hearing, I informed the parties that I would order security for costs in the sum of £300,000; but that I refused to make any order for security under s70(7) of the 1996 Act. This judgment sets out my reasons for those decisions.

Background

2. KCM and U&M are both companies incorporated under the laws of the Republic of Zambia. KCM is a subsidiary of Vedanta Resources Plc ("Vedanta") which is listed on the London Stock Exchange. KCM operates a number of copper mines on the Zambian copperbelt. U&M is a subsidiary of a substantial Brazilian mining conglomerate and carries on business as a mining contractor in Zambia. Between April 2007 and December 2011, KCM and U&M entered into a number of contracts which were, in essence, for the provision by U&M of open pit mining and related services at one of KCM's mines in the Nchanga area of Zambia's copperbelt.

3. A number of disputes subsequently arose between the parties in relation to their contractual arrangements. Those disputes culminated in a Settlement Agreement and a Memorandum of Understanding both dated 26 October 2012. Subsequently, KCM purported to terminate one of the mining contracts between the parties and also to rescind the said Settlement Agreement, KCM claiming that it had been induced to enter the Settlement Agreement by a fraudulent misrepresentation made by U&M. This was followed by applications for interim relief by KCM in Zambia and by U&M in the English Courts; and the commencement by U&M of four arbitration references pursuant to the Rules of the London Court of International Arbitration ("LCIA") which were subsequently consolidated. The tribunal - consisting of Mr Edwin Glasgow QC, Mr Stuart Isaacs QC and Mr Michael Lee (Chairman) - also granted further interim relief in favour of U&M.

First Award

4. Following the service of submissions in the arbitration by U&M, a hearing took place in London during the week commencing 30 September 2013 to determine a preliminary issue with regard to the validity of the Settlement Agreement. Pursuant to an award dated 7 November 2013 (the "First Award"), the tribunal found that the Settlement Agreement was binding and ordered KCM to pay U&M US$14,619,900.12 and £15,155.23. However, nothing has been paid. The First Award was not challenged in England although KCM is now resisting its enforcement in Zambia based on a number of allegations – including (i) an allegation that the tribunal was not properly constituted as the Settlement Agreement provided for the arbitral reference to be determined by a sole arbitrator; and (ii) an allegation that enforcement in Zambia would be "contrary to public policy" on the basis that the underlying arbitration agreement was not properly authenticated for use in Zambia. U&M say that such allegations are without merit and a blatant abuse of process. In any event, whatever the outcome of such challenges may be in Zambia, given the terms of the

First Award and absent any challenge before this Court, it seems to me that the First Award is plainly to be regarded as valid and binding as a matter of English law.

Second Award

5. Following publication of the First Award, U&M made a number of applications to the tribunal in the course of November and early December which culminated in a further hearing before the tribunal on 9 December 2013. The correspondence passing between the parties and the tribunal during this period is set out in considerable detail in the first witness statement of Peter Hirst who is a solicitor and partner in Clyde & Co, U&M's solicitors. In summary, U&M say that KCM in effect refused or failed to respond properly to such applications and directions. Rather, late in the evening before the scheduled hearing, Debevoise & Plimpton (KCM's then lawyers) wrote saying they were coming off the record. An e-mail was then sent by KCM on the morning of the hearing seeking a three month adjournment whilst it could consider at a senior management level the various points arising and actively consider changing its legal representation. An application was made at the hearing by Debevoise & Plimpton for the adjournment. The application was refused by the tribunal and the representative from Debevoise & Plimpton then left. The hearing then continued in the absence of any representative of KCM; and Mr Dale QC on behalf of U&M then went through the various claims advanced on behalf of U&M and the orders sought including in relation to what U&M said were sums due under a series of outstanding invoices totalling US$40,205,995.31. As appears from p8 of the transcript of that hearing, Mr Dale submitted that U&M were entitled to an "interim payment" in respect of such outstanding sums pursuant to Article 25.1(c) of the LCIA Rules which provides as follows:

> "*The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:*
>
> …..
>
> *(c) to order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property between the parties…*"

Thereafter, Mr Dale reverted to this topic at p42 lines 17-21 of the transcript suggesting:

> "*… a procedure going forward that the determination of that being, turning that interim order into a final order, along the lines of giving [KCM] a certain time period in which to respond and ask to respond and for then that to be determined by the tribunal …*"

The transcript then continues as follows:

> "*The CHAIRMAN: Can -- would it be possible to do this by way of effectively a conditional award? An interim award plus directions for responding by the respondent. If [KCM] does not*

> *respond in whatever time we direct, that is converted into a final award.*
>
> *MR DALE: That –*
>
> *THE CHAIRMAN: And if they do respond, then –*
>
> *MR DALE: Then we have a right of reply. That sets a very fair mechanism for both sides to deal with any points that arise ...*"

A full transcript of the hearing which took place on 9 December 2013 was immediately sent to KCM on that very day.

6. Thereafter, the tribunal issued its Second Award dated 6 January 2014 (the "Second Award") containing in paragraph 75 a series of various declarations and orders. For present purposes, I would note, in particular, that in paragraph 75(i), the tribunal ordered that: "*KCM shall make an interim payment of £1,096,876.01 on account of U&M's legal costs*"*;* that in paragraph 75(iv), the tribunal ordered KCM to pay to U&M £15,000 in respect of the deposit paid (to the LCIA) by U&M on KCM's behalf; and that with regard to the claims in respect of alleged outstanding invoices the tribunal ordered at paragraph 47 and repeated at paragraph 75(viii):

> "*Unless KCM shows cause, supported by evidence within 14 days, why the invoices ... should not be immediately payable, KCM is ordered to pay those invoices totalling US$40,205,995.31 forthwith. If KCM does file a submission within the time directed U&M shall reply thereto within 14 days after receipt of KCM's submissions*."

The "show cause" formula was also adopted by the tribunal in respect of certain of the other claims advanced by U&M.

7. A copy of the Second Award was apparently received by KCM on 10 January 2014.

8. Meanwhile, KCM instructed new solicitors, Stephenson Harwood, towards the end of December 2013. However, there was apparently some delay in those solicitors receiving the relevant documents and coming up to speed; and they eventually came on the record on 14 January 2014. In the event, KCM did not respond to the tribunal's invitation to "show cause" within the fourteen day period specified in paragraph 75(viii) of the Second Award. Thereafter, further correspondence ensued between Clyde & Co, Stephenson Harwood and the tribunal as summarised in Mr Hirst's first witness statement which it is unnecessary to set out in detail save to note that by email dated 29 January 2014, the tribunal gave certain confirmations sought by Stephenson Harwood including that the matters set out in *inter alia* paragraphs 47 and 75(viii) were "final".

Third Award

9. A further hearing took place before the tribunal on 11 February 2014 attended by both parties' representatives. This was followed by an email from the tribunal on 13 February 2014 confirming that certain of the declarations and orders made in the

Second Award were "final" and giving further directions with regard to other outstanding matters; and the tribunal's further award (the "Third Award") dated 24 March 2014 whereby KCM were ordered to pay U&M's costs relating to the First Award on an indemnity basis assessed in the sum of £1,262,399.80. It is important to note that this figure included the "interim" amount of £1,096,876.01 as referred to in paragraph 75(i) of the Second Award. As explained by the tribunal, its decision to award costs on an indemnity basis was because of its view that KCM's conduct was "wholly unjustified" and "obstructive"; and that it felt unable to accept as credible the evidence of KCM's principal witness.

Challenges to the Second Award

10. Meanwhile, on 3 February 2014, KCM issued an arbitration claim form challenging the Second Award under sections 67 and/or 68 of the 1996 Act. The application was supported by the witness statements of Haris Zografakis and Bhanu Pratap. In breach of the rules, the arbitration claim form did not properly set out the grounds relied upon although this failure was subsequently rectified by amendment. In summary, with regard to s67 of the 1996 Act, KCM challenges the Second Award in three respects on the basis that the tribunal lacked substantive jurisdiction to determine the relevant matter viz:

    i) U&M's claim for a declaration that it is entitled to be reimbursed for its legal costs incurred in connection with certain legal proceedings in Brazil and Zambia;

    ii) U&M's claim for payment of certain invoices that were not the subject of any Request for Arbitration nor referred to in any Statement of Claim (nor otherwise pleaded by U&M); and/or

    iii) The Order that KCM pay U&M the sum of £15,000 in respect of a deposit towards the LCIA's costs and the Tribunal's fees paid by U&M (on behalf of KCM) to the LCIA.

11. With regard to s68 of the 1996 Act, KCM challenges the Second Award on the basis of three types of alleged "serious irregularity" viz:

    i) The tribunal failed to comply with s33 of the 1996 Act, in that it did not: (a) give KCM a reasonable opportunity to put its case and deal with that of U&M; (b) adopt procedures suitable to the circumstances of this case; or (c) provide a fair means of resolving the matters falling to be determined;

    ii) The tribunal exceeded its powers; and/or

    iii) The tribunal failed to conduct the proceedings in accordance with the procedure agreed by the parties.

12. In response, U&M served the first witness statement of Mr Hirst which I have already referred to above and also a witness statement of Marcelo Mendonca dated 24 February 2014. KCM subsequently served a second witness statement in reply from Mr Zografakis on 28 March 2014.

13. The hearing of these challenges is fixed to take place on 7/8 July 2014.

The present applications

14. The present applications are those of U&M issued on 5 March 2014 for (i) security for costs in relation to KCM's challenges to the Second Award under s70(6) of the 1996 Act; and (ii) security for the sums due under the Second Award in the total sum of US$41,259,274.47 (i.e. the outstanding invoices) and £1,096,876.01 (relating to costs and the deposit) under s70(7) of the 1996 Act. As to the former application, the sum originally claimed by way of security was £187,813.45; but this was increased to a total of £643,514.50 as set out in an updated schedule served on 13 June 2014.

U&M's evidence in support of its applications

15. U&M's applications were supported by a second witness statement of Mr Hirst (Hirst 2) which set out in some detail matters concerning the present financial position of KCM and the steps which, it is said, have been taken by KCM in relation thereto. This was summarised in paragraph 58 of Hirst 2 as follows:

> "*(a) KCM has plainly set its mind against honouring either the First Award or the Second Award.*
>
> *(b) No challenge in this Court was ever made to the First Award dated 9 November 2013 and the Court would almost certainly not grant an extension of time for such a challenge.*
>
> *(c) In the circumstances, it is to be expected that KCM will seek to resist enforcement of the Awards made against it. In relation to the First Award, on 11 February 2013 KCM obtained ex parte relief in Zambia extending the period of time within which it could seek to apply for a stay of enforcement of the First Award. In relation to the Second Award, KCM has issued its various Challenges which I have described above.*
>
> *(d) The evidence (both from a respected news source Bloomberg and from the official records of the Zambian parliament) suggests that KCM is embarking on a course of conduct involving failing to pay debts, seeking to pass those debts on to the Zambian Government, and heading towards "to [sic] a situation where bankruptcy is entailed". This is in the context of KCM being 79.4% indirectly owned by Vedanta, a very wealthy company indeed.*
>
> *(e) There is cogent, independent and recent evidence therefore that KCM is being deliberately run into the ground and that Vedanta may be preparing to abandon KCM along with KCM's various and substantial debts in the region of US$1.5 billion. Even KCM's own documents reveal KCM's inability to pay its current trade creditors.*

(f) KCM failed at the appropriate times to engage with U&M and the Tribunal in relation to the substance of the matters which it is now seeking raise by way of challenge to the Second Award. Even now, it is taking technical points and declining to assist in relation to matters of substance before the Tribunal as I have explained in my First Witness Statement."

KCM's evidence in response

16. In response, KCM served statements from Messrs Zografakis, Gnanasivam and Dawar dated 22 April 2014 the effect of which was summarised by Mr Dunning in his skeleton as follows:

i) KCM is one of the two largest mining and metals companies in Zambia and one of the largest integrated copper producers in Africa. KCM is primarily engaged in the exploration, mining, production and sale of copper and copper by-products, which it exports to markets worldwide, and it operates four open pit and underground copper mines in Zambia. It has an annual capacity of approximately 200,000 metric tonnes of copper concentrates.

ii) Over a number of years, KCM has been the single largest private sector employer in Zambia, with around 18,000 permanent employees and contractors. KCM also generates a substantial amount of public revenue (having been identified has the largest mining contributor to the Zambian National Treasury in 2009 and the second largest in both 2010 and 2011 and has made a major contribution to economic development in Zambia. KCM has also made a significant contribution to Zambia's local communities and it currently runs two hospitals, eight clinics and two schools.

iii) The mines in the Zambian Copperbelt were nationalized during the 1970s. However, privatization plans were afoot by the 1990s and during the same decade, the country's major mining entities were privatized. As part of this process, in March 2000, the Anglo American Corporation (previously the major shareholder in KCM) acquired a 51% shareholding in the company. In March 2002, the Anglo American Corporation sold its shareholding in KCM and the company was restructured. KCM's major shareholders became government entities: ZCCM Investment Holdings Plc ("ZCCM") and Zambia Copper Investments Limited ("ZCIL").

iv) In November 2004, Vedanta acquired a 51% shareholding in KCM, which stake was increased to 79.4% in 2008. Vedanta is a diversified resources and mining company that is listed on the London Stock Exchange (FTSE 250) and has operations in countries including India, Australia, Liberia, South Africa, Namibia, Ireland, Sri Lanka and Zambia. Since Vendata took its initial stake in KCM in November 2004, KCM has invested over $2.8 billion in upgrading equipment, building new facilities and expanding capacity. These investments increased mining reserves and extended the life of the mines by over 25 years.

v) The remaining 20.6% interest in KCM is held by ZCCM, which is listed on the Lusaka and Euronext exchanges and is 87.6% owned by the Zambian Government. Given KCM's contribution to Zambia's economy and mining

industry, the number of people employed by KCM and the many more who are directly or indirectly reliant upon it, the Zambian Government takes a keen interest in KCM and its activities. It is represented on KCM's Board by 3 out of 8 Directors (1 being a direct nominee of the Government and the other 2 being representatives of ZCCM).

vi) KCM has experienced difficulties in its relationship with the Zambian Government and certain activist groups in Zambia in recent months. However, the reports show that the points made against KCM by these groups do not reflect the reality of the commercial challenges it faces. Moreover, the documents show that the criticisms levelled at KCM by the Government in the light of KCM's proposed redundancy program have now been resolved.

vii) In this respect, a "Business Improvement Plan" ("BIP") was presented to the Minister of Mines in late February 2014, which includes a commitment of funding to improve production and profitability to the Zambian Government and an assurance that there will be no redundancies. This BIP was accepted by the Minister of Mines (on behalf of the Zambian Government) by a letter dated 3 March 2014, which stated:

> "*We are happy with the discussions and dialogue that the government has had with your team in a bid to resolve the matters at hand.*
>
> *The Government of the Republic of Zambia, through my Ministry greatly value the investment that the company has and continues to make in the Mining Industry of Zambia.*
>
> *We should continue to dialogue as we have done in an transparent manner and look forward to greater success of KCM Plc. ...*
>
> *We assure you that the government of Zambia remains committed to KCM Plc and we look forward to greater success as a result of your Business Improvement Plan of 28 February 2014 ...*"

The approval of the BIP and the Zambian Government confirmation of its support for KCM and its activities received wide publicity.

viii) KCM's (audited) financial statement to 31 March 2013 and draft accounts for the financial year ended 31 March 2014 confirm that in the financial years ending 31 March 2103 and 31 March 2014, KCM had <u>total</u> assets in excess of US$2.5 billion. In the same years, KCM had <u>net</u> assets (i.e. after all liabilities have been taken into account) of just over US$1 billion and US$930.40 million, respectively, and revenue of US$1.74 billion and US$1.27 billion, respectively.

ix) In 2013, KCM's total liabilities amounted to US$1.54 billion and are expected to be US$1.60 billion in 2014. Liabilities in these sums are not, however, unusual for a mining company the size of KCM. Similarly, KCM's ratio of assets to liabilities is in line with those expected in both the mining industry and in the industrial goods industry. KCM secured US$700 million of funding

from Standard Bank and Standard Chartered Bank, two of the largest banks in Africa, in late 2012. It would be reasonable to assume that those banks carried out extensive due diligence before providing the said facilities and satisfied themselves as to all the relevant facts regarding the company. KCM also has other short term facilities with banks. KCM's profitability and cashflow were strong in the year ending 31 March 2012 (when it made a profit after tax of US$119 million) but it then weakened significantly in the year ending 31 March 2013 (when it made a loss of US$6.3 million after tax). KCM's financial results for the year ending 31 March 2014 are projected to be weaker still.

x) There are four primary factors that have affected KCM's profitability and cashflow in 2013 and 2014 viz (i) the weak international copper price; (ii) increased costs of production; (iii) a continuing dispute with the Zambian tax authority (the ZRA), which continues to withhold some US$95 million of KCM's VAT tax credits that should be refunded in due course; (iv) the cessation of production at the COP F & D mine, which was brought about by KCM increasing its mining rates to the point that it would have been uneconomic for KCM to continue mining there.

xi) However, KCM has recently addressed these problems. In particular, KCM restructured its loans, obtained new bank financing and sought an injection of capital from Vedanta. An improvement in production and a stronger set of financial results are expected in the current financial year ending 31 March 2015. KCM was thus able to abandon its planned redundancy program. Moreover, notwithstanding the difficulties that it has experienced in recent years, there is evidence that KCM has not defaulted on the payment of employee salaries, repayments or interest payment of bank loans, or payments to the Zambian Government or utilities. It is inevitable in the circumstances that certain trade creditors are experiencing delays in payment, since KCM has to prioritise its payments in respect of goods critical to production. However, KCM still enjoys amicable relationships with its other creditors and none has made any application to the local courts for relief.

17. In summary, Mr Dunning submitted that the evidential weight of these documents far outweighs all the rhetoric, politically motivated reports and hearsay media stories relied upon by U&M (including that referred to below); and that they are direct evidence, whereas the materials on which U&M seek to rely on are replete with spin and hype. Further, Mr Dunning submitted that KCM's assets are located almost exclusively in Zambia and any costs judgment of this Court obtained against KCM could be enforced against them. In this respect, the provisions of Part II of the Administration of Justice Act 1920 extend to Zambia, and section 10 of the same provides for the issue to a judgment creditor under a judgment obtained in the United Kingdom of a certified copy of the judgment on proof that the judgment debtor resides in some part of the British Dominions to which Part II of the 1920 Act extends, with a view to the judgment debtor then securing the enforcement of the judgment in that place.

U&M's further evidence

18. Thereafter, on 6 June 2014, U&M served in reply (i) a further witness statement from Mr Hirst ("Hirst 6") referring to further investigations as well as various further press reports and a report commissioned by the Government of Zambia's Technical Audit Committee ("GTAC") dated 21 January 2014; and (ii) an expert accountancy report from Grant Thornton. At the outset of the present hearing, Mr Dunning on behalf of KCM objected to this recent evidence on the basis, as he submitted, that it was not in truth "reply" evidence; and that it was unfair to allow it to be admitted because KCM had not had sufficient time to put in further evidence themselves in response. I do not accept the former objection. In my judgment, it is plainly evidence by way of "reply" - in particular to the evidence of Mr Dawar. As to the latter objection, I recognise that KCM has not been able to put in further evidence in response. However, the timetable laid down by the Court did not envisage any further evidence from KCM. Whilst I readily accept this may not be ideal, it seems to me inherent in this type of process that the gate must come down at some stage. The alternative is an endless exchange of evidence leading to unacceptable delays and increased costs both of which are contrary to the overriding objective. In my judgment, the right approach is for the Court to do the best it can in the circumstances viz to consider all the evidence as it stands, recognising that KCM has not put in its own further evidence and that U&M has not put in any further evidence it might have wished to put in in further response.

U&M's case as to KCM's financial position

19. Having regard to the entirety of the evidence including Hirst 6 and the Grant Thornton report, Mr Dale summarised KCM's financial position as follows:

    i) The financial information relating to KCM is opaque. KCM has resisted providing financial information to U&M. It has steadfastly resisted U&M's application for security for costs on the basis of witness evidence from Mr Dawar which states that KCM has "*solid finances and a promising future*". This is plainly disingenuous and presents a deliberately misleading account as to the state of KCM's financial condition.

    ii) It is clear that KCM is now at the centre of very heated public controversy as to its business practices, what happens to the vast amounts of money it earns from mining in Zambia, and whether it is wrongfully diverting its assets to Vedanta or other third parties. On the one hand, KCM is a very large mining organisation, and on the other hand it is unable to pay its debts as they fall due.

    iii) KCM's financial position is such that it has been reported in the press that during this year it has even been unable to pay for its basic utilities. In particular, in January 2014 KCM was in a position where its emergency underground telephone lines were cut off for failure to pay its telephone bills; and in May, KCM has had to seek a court order to avoid its electricity supply being disconnected for failing to pay its electricity bills.

    iv) These are simply the most graphic examples. There is an article on the website of the Times of Zambia dated 19 March 2014 headed "*KCM defies Govt Order*". This states that various contractors and suppliers are owed monies by

KCM and have not been paid, some from as far back as 2005. KCM has not been making payments to ZCCM and US$100 million or more is outstanding.

v) The Government of Zambia is plainly very concerned about KCM's conduct. In February 2014, the Vice President of Zambia stated in Parliament that "*there were some very strange things happening at KCM*", that Vedanta was "removing a lot of money" from Zambia, that it was hiding information from the Government and that it wanted the Government to assume its liabilities of US$1.5 billion. This was described by the Vice President as a very big issue of national importance. Various independent sources corroborate this. Even the Mineworkers Union of Zambia President has expressed his concerns.

vi) The GTAC report gives a clear insight into the extraordinary state of affairs at KCM. The GTAC report sets out very clearly that as at that date:

a) KCM has total liabilities of US$1.567 billion as at 30 September 2013, that its current liabilities exceeded its current assets by US$123 million and that it was unable to meet its current obligations as they fell due and that its losses at the end of November were US$35 million compared to a budgeted profit of US$134 million.

b) KCM's loans with Standard Bank were secured on all assets, implying that the company had been "effectively mortgaged".

c) KCM defaulted in September 2013 on a key covenant with Standard Bank and the Bank had given a waiver up to 31 March 2014.

d) Vedanta had not taken any financial risk on KCM since investing and that it had called in prematurely a loan of US$500 million in September 2011. The lack of foreign direct investment from Vedanta was entirely at odds to the impression sought to be conveyed by Vedanta. The alleged US2.8 billion investment which Vedanta claimed it made into KCM was in fact made up of US$2.07 billion of internally generated cash flows and US$739 million through borrowing from banks, mainly Standard Bank. It was clear that Vedanta had not injected any capital into KCM as it was supposed to have done.

e) Copper was being sold by KCM (through Standard Bank) to Fujairah Gold, a subsidiary of Vedanta in Dubai in such a way as to result in an under-pricing of metal sold to a related company in a manner which was not at arms' length.

f) KCM had no clear strategic survival business plan despite the "current grave financial crisis".

g) It was not possible to ascertain the value of the approximately US$1m payment made by KCM to Vedanta for "Annual Management Fees".

h) There was ineffective government oversight of KCM's operations.

vii) The GTAC report is entirely at odds with the way in which KCM has sought to present its internal affairs, financial condition and relationship with the Government. By contrast, it is entirely consistent with the report produced by Grant Thornton (without reference to the GTAC report) in support of the Security Applications.

viii) Further, on 13 May 2014 an article in the Lusaka Times with an accompanying video of a speech given by Anil Agarwal (the Chairman of Vedanta Resources Plc and Chairman) at a conference in Bangalore in March 2014 was reported to much public consternation. In the video, Mr Agarwal stated that KCM was "giving him $500 million every year in profit, plus an extra $1 billion". He also revealed that he had bought KCM for US$25 million compared to an asking price of US$400 million. This has created nothing short of a storm in Zambia with Government, the press and interested third parties seeking an explanation and investigation as to what is occurring. However, no explanation has been forthcoming from KCM or Vedanta. It is hard to understand how the extraction of such sums could be legitimately warranted and such payments do not appear in KCM's accounts.

ix) There was immediate fall-out from the speech in the Zambian press. In particular:

a) There is a front page headline and subsequent article in the Post, a Zambian newspaper dated 15 May 2014 and entitled "*KCM Owner mocks Zambians and Govt*". This article contains further comment on Mr Agarwal's conference speech. The first paragraph gives an indication of the tenor of the article: "*Konkola Copper Mines owner Anil Agarwal has mocked the Zambian government over the paltry amount of money he paid to buy the mine, which is now giving him hundreds of millions of dollars in profit per year.*"

b) There is an article on the website of the Lusaka Times dated 20 May 2014 entitled "*Government will not nationalise KCM-Mines Minister*". This reports a statement from the Mines Minister stating that the "*Government will not nationalize Konkola Copper Mines (KCM) in view of recent revelations by Vedanta Resources Chairman Anil Argawal that the mine has been giving him profit exceeding $500 million per year.*"

c) There is an article on the website of the Times of Zambia dated 20 May 2014 entitled "*Zambia: KCM Will Pay Back, Says Government*". Amongst other things, that article stated "*Additionally an audit carried out on the operations of KCM revealed that the company was poorly managed and heavily indebted to the tune of US$1.567 billion and threatened with insolvency.*"

Grant Thornton's report

20. The Grant Thornton report is a lengthy and detailed document. For present purposes, it is sufficient to set out the significant points as summarised by Mr Dale:

i) It is unclear why Vedanta has recently carried out the corporate restructuring which has left KCM separated from all other group subsidiaries.

ii) KCM has over the last four financial years reported a decreasing trend for operating profit and net profit. KCM's costs appeared historically to be uncompetitive in comparison to other Zambian mining firms, and it is likely that this remains the case. KCM will not be able to trade its way out of its financial difficulties in the short term.

iii) According to the draft accounts for the year ended March 2014:

a) KCM had current liabilities greater than current assets by almost US$500 million, with the major portion of short term assets not readily convertible into cash: the majority of KCM's current assets are relatively illiquid.

b) KCM had a 90% debt to equity ratio, higher than larger more diversified companies in the mining sector such as Anglo American (56%).

c) KCM had a negative cashflow before increasing borrowings. Indeed, "KCM appears to be using borrowing facilities to their maximum extent already".

d) The majority of KCM's assets are fixed assets which appear to be largely or wholly secured to repay bank borrowings. "*On the face of it, according to the latest balance sheet seen, the company has greater assets than it does liabilities. However, the balance sheet also shows that the value of its assets is predominantly tied up in fixed assets, which are in use in mining operations, and are already secured to the banks*".

e) There are numerous indications in the evidence available showing that KCM has not been able to meet liabilities to date and has delayed payments to various creditors. The evidence contradicts Mr Dawar's statement that KCM has never defaulted on various classes of payment. "*Based on the balance sheet…there is a strong basis to believe that KCM is not currently in a position to pay unsecured creditors for their debts as they fall due.*"

f) KCM has repaid a loan to Vedanta and replaced it with a bank loan, and has also made certain dividend payments to Vedanta. Whilst there are some indications of Vedanta supporting KCM with some smaller sums, there is no firm commitment of overall financial support from Vedanta to KCM (indeed overall net funds flow for the last few years appears to have been *to* rather than *from* Vedanta).

g) "There is a real risk in relation to KCM's ability to pay creditors as they fall due, and there is certainly a reasonable basis to conclude that KCM would not in all likelihood be able to pay U&M's costs or the Second Award".

h) In 2013 KCM became involved in a dispute with the Zambia Revenue Authority which was withholding some US$95 million of KCM's VAT tax credits, a dispute which remains unresolved. "The achievability and timing of any recovery appear uncertain."

i) There may be some reason for concern in relation to related party trading. If the Zambia Revenue Authority considers that the sales were on less than commercial terms, it might take steps to try to recover any tax that should have been payable in Zambia, quite apart from any such transactions also being seen as putting assets beyond the reach of KCM's creditors.

j) There is no evidence in the financial statements to show how KCM is giving Vedanta US$500 million in profit every year plus an extra US$1 billion. If these claims are true then it must be happening by unreported means.

k) The Business Improvement Plan prepared by KCM at the Government's request fails to provide credible information to support the projections contained in it. "*... the BIP is limited in detail to support its forecasted improvements to production and financial performance. In my opinion, it does not appear to offer a credible improvement plan to improve KCM's financial and operational position to the extent that it would be in a position to pay KCM's costs and the Second Award if ordered to do so"*. "*Overall, KCM's outlook shows no immediate signs of improving.*" "*KCM appears to lack a credible plan to restore its financial health*."

The position of Vedanta

21. As I have stated, KCM is a subsidiary of Vedanta which is a FTSE 250 company and a global diversified mining and minerals conglomerate headquartered in London, quoted on the London Stock Exchange and, on its face, an immensely wealthy organisation: Vedanta's audited accounts for the year ended 31 March 2013 showed that Vedanta had total assets of US$45,950,200,000, revenue of US$14,989,800,000, and gross profit of US$3,287,500,000. However, U&M's request that Vedanta provide security to support KCM's applications has been met with a dismissive response. In such circumstances and in the absence of any undertakings by Vedanta, it seems to me that the apparent financial strength of that company cannot assist Mr Dunning. On the contrary, Mr Dale submitted that there was a number of features in the relationship between Vedanta and KCM which supported his own case in relation to both applications. In particular, he drew attention to the following matters:

i) Vedanta has taken steps to restructure its subsidiaries under Sesa Sterlite Ltd, other than KCM. The restructuring and the exclusion of KCM from it are unexplained and the inference is obvious. (The remaining 20.6% of KCM is owned by ZCCM Investment Holdings Inc, which is a Zambia Government owned entity.)

ii) Vedanta lending to KCM was repaid in 2011 and replaced by bank lending through Standard Bank. The apparent agreement by Vedanta to inject funding into KCM appears not to have been followed through.

iii) The juxtaposition of KCM's apparently poor position on paper with Mr Agarwal's statement that KCM is giving Vedanta US$500 million profit every year since 2009 is obviously troubling. The accounts for KCM do not make any provision for any such payment. This may be occurring through "transfer mis-pricing", i.e. by the selling of copper to an associated company at an undervalue allowing the seller to declare less profit (or even a loss) and reduce its tax liability. The associated company, usually based in a tax haven or lower tax jurisdiction, then makes a large profit on resale of the copper. In the case of KCM, it appears that this practice is indeed being done through a subsidiary called Fujairah Gold (owned by Vedanta) based in Dubai. These transactions amount to transactions at an undervalue, putting KCM's assets beyond the reach of creditors. The Mineworkers Union of Zambia president Nkole Chishimba is recorded in the Post Newspapers Zambia website as saying "*The business of copper is traceable. It is therefore surprising that wealth from Zambia remains a mystery when the process of copper mining is traceable*". Neither KCM nor Vedanta has sought to explain any of this, notwithstanding all the information now in the public domain.

22. In summary, Mr Dale submitted that KCM's evidence was demonstrably inaccurate, implausible, and must be wrong to KCM's knowledge; and that it appears to be willing to say and do anything (both to the tribunal and to the Court) to evade making payment to U&M. In particular, he submitted:

i) The figures do not support KCM's assertions. Not only has there been an increase in short term borrowings, losses before tax have increased and the cash balance has reduced. Such assets as there are are in fact predominantly fixed assets used in mining already secured to the banks. The ratio of assets to liabilities is neither appropriate nor sustainable – it cannot properly be said that KCM is not highly leveraged.

ii) The documents clearly show that KCM is not able to meet liabilities as they fall due – utility providers and other creditors have not been paid. It is unsustainable for Mr Dawar to suggest that KCM has been "operating normally for several years" or that there has been no default on payments of salaries, repayments or interest payments of bank loans or payments to the Government or for utilities. As described above, there have been issues with KCM's telephone lines and electricity due to failure to pay bills.

iii) There is no merit in any suggestion that ore volumes have fallen with the cessation of mining at the COP F&D. This had nothing to do with rates (the Tribunal found as a fact that U&M continued to use existing rates), COP F&D was always a small part of KCM's production, and even when it was operational production targets were not met.

iv) There is no substance behind Mr Dawar's assertion that things should improve in the current financial year.

v) In light of the recent investigations and discoveries, there plainly is considerably urgency in this case.

vi) Mr Dawar makes various comments on the Vedanta accounts and some other documents, but in context and in the light of the documents now available as a whole, these comments are unconvincing.

vii) Ultimately, Mr Dawar's concluding comments contain assertion but are not backed by substance. The evidence available in fact shows that his assertions are incorrect. KCM plainly does not have "solid finances and a promising future". On the contrary, it is unable to pay its debts as they fall due and in the circumstances the Court can quite properly reach the view on credible evidence that KCM is engaged in a sustained course of deliberately not paying its debts.

23. Against that background, I turn to consider the two applications advanced by U&M.

Security for costs: s70(6) of the 1996 Act

24. Having summarised the evidence, I can deal with this application quite shortly. There is no dispute that the Court has jurisdiction to make an order for security for costs pursuant to s70(6) of the 1996 Act. Nor is there any dispute between the parties as to the applicable principles viz that as stated by the Court of Appeal in *Republic of Kazakhstan v Istil Group Inc* [2006] 1 WLR 596 at [31]-[32], (i) the Court has to act in accordance with the overriding objective when exercising its jurisdiction under s70(6); and (ii) the correct approach is the same as that under CPR 25.12 and 25.13.

25. Here, Mr Dale submitted that pursuant to CPR 25.13(1)(a), it was just to order security having regard to all the circumstances of the case. In particular, Mr Dale relied upon (i) CPR 25.13(2)(c) i.e. KCM is a company and there is reason to believe that it will be unable to pay U&M's costs if ordered to do so; and (ii) CPR 25.13(2)(g) i.e. KCM has taken steps in relation to its assets that would make it difficult to enforce an order for costs against it. In that context, Mr Dale referred me to the notes in the White Book at paragraphs 25.13.12 to 25.13.14 which it is unnecessary to cite in detail save to note the commentary to the effect that a company with assets with a value exceeding its debts will nevertheless be unable to meet its debts if those assets are illiquid; that a net asset balance is not determinative of the question whether a company can pay a costs liability when it falls due; and that the issue involves consideration of the nature and liquidity of the assets. In addition, Mr Dale referred to the decision of Longmore J in *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 39 where he set out at p41 col 2 the principles on which the discretion to order security should be exercised in the context of a s67 challenge as follows:

i) There is no formal fetter on the Court's discretion, and in particular bearing in mind s1(a) of the 1996 Act, it would be a rare case where security for costs would be ordered if the applicant for relief (i.e. respondent to the security application) had sufficient assets to meet any order for costs and if those assets were available for satisfaction of any such costs order.

ii) A s.67 challenge involves a consideration of jurisdiction afresh, though it does not follow that the existence of the award is not relevant. It does have

relevance, especially if there is no cogent reason put forward for saying it is wrong. However, in any case this is not nearly as important as the question of whether there are sufficient assets which are available for execution (the award might tip the scale if the court could not be certain on assets).

26. That guidance was followed by Teare J in *X v Y* [2013] 1 Lloyd's Rep 230 which involved applications under both s70(6) and 70(7) of the 1996 Act. As the Judge stated at [18], the question was whether there was a "*real risk that the assets of X are not readily available for the satisfaction of any order for costs which may be made by the court against X*". In other words, the test is not one on the balance of probabilities but one of "real risk".

27. Here, I am entirely satisfied that, at the very least, the requirements of CPR 25.13(2)(c) are met; that, in particular, there is a real risk that the assets of KCM will not be readily available for the satisfaction of any order for costs which may be made against KCM; and that it is just in all the circumstances to make an order for security. In my judgment, that is the obvious and inevitable conclusion if I take into account the entirety of the evidence including Hirst 6 and the Grant Thornton report as summarised above even bearing in mind the possibility that KCM might have been able to put in further evidence by way of rebuttal.

28. However, it seems to me that the same conclusion follows even ignoring Hirst 6 and the Grant Thornton report. In particular, it would appear that KCM has no assets in this jurisdiction. Thus, any order for costs against KCM would have to be enforced in Zambia. However, in my judgment, the steps employed by KCM in Zambia in seeking to resist enforcement of the First Award which is, on its face, a valid and enforceable award as a matter of English law are such as to demonstrate that there is, at the very least, a real risk that KCM will refuse to pay any costs order this Court might make against KCM or at the very least delay payment for as long as possible. To my mind, the prospects of KCM successfully resisting such enforcement in Zambia are entirely irrelevant in the present context.

29. Further, even looking simply at the latest draft accounts of KCM for the year ended 31 March 2014 as exhibited to Mr Dawar's statement and assuming for present purposes that they present an accurate snapshot as at that date (which Mr Dale did not accept), the consolidated statement of KCM's financial position at p8 shows current liabilities of some US$841.8 million and current assets of some US$342.5 million i.e. a shortfall of US$499.4 million; and, of such current assets, only US$10.2 million was in respect of "bank and cash balances". Taking those figures at face value, if U&M succeed in relation to the pending challenges against the Second Award, it seems to me that there are insufficient liquid funds to enable KCM to pay U&M's costs. In my view, this is fatal to KCM's position on the application for security for costs. *A fortiori* if the amounts due under the First Award are taken into account.

30. Mr Dunning submitted that the draft accounts exhibited to Mr Dawar's statement were no more than a "snapshot" of KCM's position as at 31 March 2014; and Mr Dale's reliance upon such "snapshot" wrongly ignores KCM's very substantial gross revenue stream which was, as shown in the accounts, approximately US$100 million per month in the year ended 31 March 2014. However (i) this has to be balanced against KCM's running costs and expenses which, as shown in the accounts, were more than its revenue stream and resulted in a net operating loss for that year of some

US$110 million; and (ii) there is no information which has been produced by KCM which indicates that there has been any change since 31 March 2014.

31. It is for these reasons that I concluded that there is, at the very least, reason to believe that KCM will be unable to pay U&M's costs if ordered to do so; and that there was an overwhelming case in favour of an order for security for costs in favour of U&M.

32. It was no doubt in recognition of this that Mr Dunning showed me at the beginning of the hearing a letter from Stephenson Harwood on behalf of KCM dated 19 June 2014 (i.e. the day before the hearing) containing an open offer of security for costs in the sum of £200,000. This was in excess of the sum originally claimed by U&M but significantly less than the amended figure of approximately £643,500. As to the quantum of security, Mr Dunning submitted that this updated figure was fundamentally flawed in particular because (i) it appeared in a schedule served very oes is admittedly not to get the winner its ma statement of truth when it was served as it should have been under the rules; (iii) it was only verified by a statement of truth very shortly before the hearing; (iv) it was in any event on its face excessive being about 350% of the original estimate; (v) it failed to provide an adequate breakdown so that it might be checked even in broad terms; and (vi) certain of the figures claimed were on any view exorbitant e.g. anticipated solicitor's costs going forward of some £242,000 based on 661 hours work although the hearing date is only about three weeks away and Counsel's fees of £200,000. Despite Mr Dale's submissions to the contrary, there was in my view considerable force in at least some of these objections in particular with regard to the last two figures in respect of anticipated costs. For these reasons, it seemed to me that the appropriate quantum ought to be assessed by reference to the total of the figure of £192,809 in respect of costs incurred to date as set out in the updated schedule together with an appropriate figure for what I would consider to be a reasonable amount going forward to include hearing costs of (say) a further sum of approximately £100,000. This is how I arrived at the figure of £300,000 with liberty to apply.

Security for the amount of the Second Award: s70(7) of the 1996 Act

33. As stated above, this application was made under s70(7) of the 1996 Act which provides in material part as follows:

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

34. At the outset, Mr Dunning raised a threshold objection which he submitted was fatal to much if not all of U&M's application under s70(7). In particular, he submitted that s70(7) does not apply to the US$41,259,274.47 and £1,096,876.01; that this was because s70(7) only engages in relation to "*money payable under the award*" (i.e. under the award being challenged); that, in this respect, it must be taken to mean only "money finally adjudged to be payable by the award"; and that neither of these sums relied upon by U&M was finally judged to be payable under the Second Award since in both respects the award is made on a provisional and/or contingent basis and/or it is not an award at all because it does not finally award the respective sums.

35. In the light of these submissions, Mr Dale conceded that he could not pursue the application in relation to the figure of £1,096,876.01; and he abandoned that part of his application. However, he maintained his application in relation to the much larger figure i.e. US$41,259,274.47. In that context, Mr Dunning advanced a two-pronged attack. First, he submitted that as appears from the extracts of the transcript of the hearing before the tribunal on 9 December 2013 referred to above, the tribunal was not asked to make a final determination but only an "interim payment" pursuant to Article 25.1(c) of the LCIA Rules. Second, he submitted that although there was no statutory definition of what constituted an "award", it was a central prerequisite of any "award" that there was a final determination of a particular issue or claim in the arbitration. In that context, he referred me to *Russell on Arbitration*, 23rd Edition paras 6-002, 6-004, 6-007 and *Mustill & Boyd The Law and Practice of Commercial Arbitration in England*, 2nd Edition, p386. Here, Mr Dunning submitted that there was no final determination because of the "show cause" provision and that the tribunal's determination was not therefore an "award" but, at most, a procedural order.

36. At first blush, both these points might seem highly technical; and I am not sure how they fit in with Mr Dunning's challenges under ss67 and 68 of the 1996 Act. However, at this stage of the argument and without prejudice to the further arguments that may arise on the substantive hearings under ss67 and 68, I am prepared to assume (for present purposes only) in Mr Dale's favour that they do not prevent the Second Award from being an "award" within the meaning of s70(7) of the 1996 Act.

37. As to the scope of s70(7), although Mr Dunning accepted that the Court's discretion was as a matter of statute unfettered under s70(7), nevertheless he submitted that a number of first instance cases have discussed the principles according to which the discretion should be exercised and that two particular issues are relevant viz (1) the merits of the challenge and (2) whether the challenge prejudices the claimant's ability to enforce the award. In particular, Mr Dunning relied upon the analysis of Flaux J in *A v B* [2011] 1 Lloyd's Rep 363 where he stated at [32] and [50]:

> "*[32]… in most cases, there will be a threshold requirement that the party making the section 70(7) application demonstrates that the challenge to the jurisdiction is flimsy or otherwise lacks substance …*
>
> *[50] Thus, whilst it would not be advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under section 70(7), it seems to me that as a general principle the court should not order security unless the applicant can demonstrate that the challenge to the award (whether under section 67 or, indeed, either of the other sections) will prejudice its ability to enforce the award. Often this will entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced.*"

38. Thus, Mr Dunning submitted that, even in a case where consideration of the merits of the challenge does not preclude an order for security, the Court should not order security unless the applicant can demonstrate that the challenge to the award will

itself prejudice the applicant's ability to enforce it or diminishes the respondent's ability to honour it.

39. Further, Mr Dunning submitted that as to the merits issue (1), although the 'threshold requirement' discussed by Flaux J only applies to the s67 application and does not apply in terms to KCM's s68 challenge, nevertheless following *Danko International v Faucon Investment Co* [2006] EWHC 3729 (Comm) (unreported, 4 August 2006), at [22], it seems that "*the appropriate criterion to adopt*" still includes an assessment of "*the general strength of the claim*". Although Cooke J did not refer in this context to a 'threshold requirement', he effectively concluded at [26] that if the serious irregularity is arguable and not doomed to fail, that in itself is a good reason for not ordering payment in.

40. As to prejudice, issue (2), Mr Dunning referred me to my own judgment in *Terna Bahrain Holding Company WLL v Ali Marzook, Ali Binkamil & Ors* [2012] EWHC 4395 (Comm) in particular at [23]-[29], where I adopted the approach of Flaux J in *A v B* [2011] 1 Lloyd's Rep 363; and also to the decision of Teare J in *X v Y* [2013] EWHC 1104 (Comm) where he considered that he should also follow the approach of Flaux J in *A v B*:

> "*31. Mr Gruder further submitted that the court should not use the jurisdiction conferred by section 70 to improve the ability of a party to enforce an award as opposed to taking steps designed to put it out of the power of the other party to diminish its own ability to honour the award; see Peterson Farms v C&M Farming Limited [2003] EWHC 2298 (QB) per Tomlinson J. (as he then was) at paragraph 19 …*
>
> *32. I accept that the jurisdiction conferred on the court by section 70 should not be used [as] a means of assisting a party to enforce an award which has been made in its favour. Ordering payment in by X would certainly assist Y to enforce the fourth award. Such an order can only be justified (following the guidance in the authorities to which I have referred) if the existence of the sections 67 and 68 challenges to the award in some way prejudices the ability of Y to enforce the award or diminishes X's ability to honour the award…*
>
> *34. The conduct of X in refusing to honour the arbitration awards does not attract sympathy. However, that is not a legitimate reason for ordering that it pay the amount of the fourth award into court…*
>
> *35. I have therefore come to the conclusion that an order for payment in of the sum adjudged due to Y under the fourth award would be wrong in principle because the challenges to the award do not materially prejudice Y's ability to enforce the award. By contrast the making of an order for payment in would assist Y to enforce the award. Whilst that may be said to be desirable it is not, on the authorities, a good reason for*

making an order for payment in pursuant to section 70 of the Arbitration Act 1996." (Emphasis supplied)

41. Thus, Mr Dunning submitted that it is clear that the s70(7) jurisdiction cannot be invoked by U&M simply as a means of assisting its ability to enforce the Second Award; that it is not intended to give a creditor under an award a preference over other creditors of a foreign company, nor is it intended to give the English Court extra-territorial control over the affairs of a foreign company suffering from cashflow problems; that on the contrary, the stated purpose of s70(7) of the 1996 Act was only "*to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may (by design or otherwise) be diminished*" (the Departmental Advisory Committee Report on the Arbitration Bill, February 1996, paragraph 380); and that only if there is evidence to satisfy this test should security be ordered.

42. Mr Dale disputed much of the foregoing. In particular, he submitted that there was no "threshold requirement" under either s67 or s68 to show that the challenge was flimsy or otherwise lacked substance; alternatively, at the very least, there was no such "threshold requirement" under s68; and that there was, in any event, no specific requirement on the part of the applicant to show that the challenge itself caused prejudice to the claimant's ability to enforce the award.

43. It is fair to say that the approach advanced by Mr Dale derives some support from the leading textbook i.e. *The Arbitration Act 1996*, Merkin & Flannery (5th Edition, 2014) at pp346-348 which is somewhat critical of the decision of Flaux J in *X v Y* and urges the Court to take a harder line and be more supportive of the arbitral process as appears from the following passages:

> "*... With respect to the learned judge, it is difficult to see how, by merely making a challenge, a party could ever be said to be diminishing its ability to honour an award (nor why that should be the relevant test). As Teare J noted, the challenges would (as any challenge would) involve delay (if dismissed), but would involve no other prejudice. Teare J accepted that X's whole attitude to the arbitration (which, on the facts, smacked of constant attempts to squirm out of its obligations and a failure to honour any of the earlier arbitral awards, which were unchallenged) did not 'attract any sympathy', but yet refrained from making the one order that would have either forced X to pay up or end its challenge, which the court had accepted was flimsy ...*
>
> *We also agree that the bar should not be set too low or too high, so that perhaps the best test is the 'flimsiness' test first propounded by Tomlinson J (as he then was). However, we consider that, if the flimsiness test is met, there should be a presumption that security is ordered, unless the court considers that there is a good reason not to order it. It is for this reason the court should presume that, if the challenge is quite obviously flimsy, it is reasonable to infer that the challenger has an ulterior motive, which is bound to include seeking to avoid meeting the award, even if not openly (or secretly)*

dissipating assets. Although we are wary of stepping across into the field occupied by the CPR, there is a useful analogy with the power under CPR Part 24 to make a defendant with a dodgy defence pay the amount claimed into court (as discussed above in the context of Tajik Aluminium).

We therefore suggest that too much store has been placed by a fear of being seen to enforce awards by the back door, and to whether the very fact of bringing the challenge is in and of itself likely to impact upon the winner's ability to enforce the award. If this test is not abandoned altogether, it should be relegated to very much a second filter after the first filter of the flimsiness test. As to the back-door enforcement argument, we would suggest (as the cases appear to demonstrate) that, in the majority of cases, the loser avoids paying in security, as it realises the weakness of its case and the risk of losing its money. What that does is admittedly not to get the winner its money, but it saves the winner wasting more time fighting a battle it is bound to win …

In many cases, the victor in the arbitration simply does not have sufficient evidence to know that the loser is using its right to mount an unmeritorious challenge as a cover for alienating assets, yet that is often what happens. If an applicant is serious about its challenge to an award and confident in its success, it ought not to baulk at being asked to 'put up or shut up'. There are far too many examples of unscrupulous losers getting away without honouring awards, making (in some cases) the entire process a waste of time and money, and giving arbitration a bad name in the process. We suggest that the court's role, if it is to be truly supportive of the arbitral process, is to do what it can to stymie the sort of obstructive behaviour that is becoming all too frequent, by making orders that either stop the unscrupulous in their tracks (because flimsy challenges are abandoned), or at least give the victor a better chance of demonstrating that the arbitration was not a futile exercise."

44. This is strong criticism; and I certainly agree that the Court's general approach is and should be strongly to support the arbitral process. However, I remain in agreement with the analysis and approach outlined by Flaux J in *A v B*; and I also agree with the further observations of Teare J in *X v Y* - although it is important to emphasise what Flaux J himself said in *A v B* i.e. it would not be advisable or appropriate to lay down hard and fast rules in this context. In particular, it seems to me that such approach is consistent with the rationale underlying s70(7) as stated in the DAC report referred to above. I am more doubtful about Mr Dunning's submission with regard to the decision of Cooke J in *Danko*. The case pre-dates *X v Y*; it does not appear from the Judgment itself that there was any detailed consideration of the relevant principles; and it does not seem to me that Cooke J was intending to lay down any particular guidelines as to the exercise of the Court's discretion under s70(7) in the context of a challenge under s68.

45. Turning then to the present case, I am anxious to make plain that I heard only very limited argument as to the merits of the challenges advanced by KCM; and nothing that I say should in any way influence the substantive hearing of the challenges which is scheduled to take place very shortly i.e. on 7/8 July. Be that as it may, so far as U&M's main claim in respect of the outstanding invoices is concerned, I have to say that, in my view, the challenges are indeed flimsy. In particular, it seems to me that the highpoint of KCM's case is that in the lead-up to the hearing on 9 December, U&M's application was limited to a "provisional order" only; that such "provisional order" is not an "award"; and that the idea to make an "interim award" emerged only during the course of the hearing after KCM had decided to withdraw and when no representative of KCM was present. (In passing, I should note that the term "interim award" is not one used in the 1996 Act and is ambiguous: see *Sucafina S.A. v Rotenberg* [2012] EWCA Civ 637.) However, it seems to me that the tribunal did its best in somewhat difficult circumstances; and that KCM has no proper complaint given (i) its complete failure to engage properly with the tribunal's directions prior to 9 December hearing; (ii) its own decision to withdraw from that hearing; and (iii) the fact that it was subsequently provided not only with a full copy of the transcript at the conclusion of the hearing but also with ample opportunity to "show cause" after receipt of the Second Award. Further, given such circumstances and also that it appears that KCM has never advanced any substantive reason for not paying the outstanding invoices, it seems to me that the challenges advanced by KCM are in relevant respect properly to be characterised as "flimsy".

46. Further, Mr Dale submitted that KCM's challenges did indeed inevitably prejudice U&M's ability to enforce the Second Award. In particular, he informed me – on instructions - in the course of his reply submissions that it would, in effect, be difficult if not impossible to enforce the Second Award in Zambia pending the determination of KCM's challenges before this Court; and that there was, at the very least, a real risk that KCM would dissipate its assets in the meantime.

47. I agree that the evidence shows a real risk of dissipation of assets. Indeed, it was on that basis that I granted a without notice freezing injunction in favour of U&M against KCM at a separate hearing on 17 June. By consent that injunction has now been continued on varied terms until the return date which has been set as not before 15 July 2014.

48. Be that as it may, there was no evidence before me that KCM's challenges in this Court would prevent, hinder or otherwise prejudice the enforcement of the Second Award in Zambia. Nonetheless, Mr Dale submitted that I should make such inference having regard to KCM's conduct both generally and having regard to the steps which it has taken – and continues to take – in resisting enforcement of the First Award. In my view, such submission misses the point. I am ready to assume in favour of U&M that KCM will indeed resist enforcement in Zambia come what may; but it does not seem to me that such prospect is related to the present challenges and absent evidence to that effect, it does not seem to me legitimate to make such inference. On its face, regardless of the pending challenges, the Second Award is (at this moment at least) valid and binding as a matter of English law. Zambia is a party to the New York Convention and, as such, the Second Award would seem enforceable under Article V (or its local equivalent). I accept, of course, that in light of the present pending challenges to the Second Award before this Court, under Article VI of the Convention

(or its local equivalent), the local Court (i.e. Zambia) may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of U&M, order KCM to give suitable security. I also accept that these two aspects i.e. (i) adjournment of the decision on enforcement and (ii) security are discrete; that if U&M were to take steps to enforce the Second Award in Zambia and if the Court in Zambia were to adjourn the decision of the enforcement, it would not be bound to order security; and that if the Court in Zambia were to adjourn the enforcement and not order security, there would be strong grounds for saying that the present challenges were indeed prejudicing U&M particularly in the light of the risk of dissipation of assets. However, quite apart from the fact that U&M have not taken steps to enforce the Second Award in Zambia, there is no evidence as to what the Court in Zambia might or might not do in such circumstances.

49. For these reasons, I am not persuaded that there is any relevant prejudice so as to justify an order under s70(7).

Conclusion

50. For these reasons, I upheld the application by U&M for security for costs in the sum of £300,000 under s70(6) of the 1996 Act; but, in the exercise of my discretion, rejected the application by U&M for security under s70(7) of the 1996 Act.