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

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

BETWEEN:
GABRIELE VOLPI

Applicant/Appellant

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

Respondents

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

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

BETWEEN:
DELANSON SERVICES LIMITED

Applicant/Appellant

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

Respondents

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

Mr. John Martin KC, with John Wilson KC and Ms. Michelle Deveaux for Matteo Volpi
Mrs. Janet L.R. Bostwick-Dean for Simone Volpi

Hearing dates: 24-26 January 2024

RULING

KLEIN, J.

Arbitration—Dismissal of challenges and appeals of Arbitration Awards to the Supreme Court —Application for leave to appeal to the Court of Appeal—Principles—Realistic Prospects of Success—Whether test for leave to appeal to the Court of Appeal the same for Arbitration appeals—Declaration as to right of appeal—Whether appellants entitled to right of appeal as of right on point of construction of Arbitration Act

Costs—Application for Interim payment on account of costs—Principles—Matter commenced under R.S.C. 1978—Whether interim payment on account of costs permissible—Civil Procedure Rules 2022—Inter-relation between 1978 Rules and CPR 2022—Stay of Taxation—Principles

Stay of Arbitration—Whether stay should be continued pending appeal to the Court of Appeal and final determination of appeal if leave granted.

INTRODUCTION

[1] I have before me three notices of application consequential to the judgment I gave on 28 December 2023 in these proceedings ("the Judgment"). That judgment followed a major trial in which I dismissed multiple challenges to two trust Arbitration Awards (a partial Award issued 13 June 2020 and an Additional Award issued 26 August 2020).

[2] In the main, the applications are made by Gabriele Volpi (the settlor of the three Trusts of out which the arbitration proceedings arise) and Delanson Services Ltd., which was the professional trustee of the Trusts at the time of the 2016 distributions that are the subject of the arbitration proceedings. Matteo is one of Gabriele's two sons and one of the beneficiaries of the Trusts.

[3] Gabriele and Delanson both seek declarations as to their rights of appeal in respect of the Court's finding that there is no right to appeal points of law under the 2009 Act, except by consent of the parties, and leave to appeal to the Court of Appeal on various grounds under ss. 89, 90 and 91. In addition, they seek the continuation of the stay of the arbitration imposed by this Court and a stay of taxation of any costs by Matteo arising out of the proceedings. Matteo seeks the costs of the proceedings and an interim payment on account of costs. For convenience, I shall simply refer to Gabriele and Delanson as the appellants in this Ruling and Matteo as the respondent.

[4] The full background of the arbitration and associated legal proceedings are set out in the Court's ruling of 28 December 2023 and 13 June 2022, and are not repeated here. Reference

should also be made to the Judgment for the findings by the Court and the legal framework of the challenges and appeals.

[5] I heard the applications over 24-26 January 2024 and received additional written submissions from the appellants. I had the benefit of full written and oral argument on the issues and, on 6 February 2024, after careful consideration, announced my decision orally. I refused declaratory relief, denied the applications for leave by the applicants and in the main granted the application by Matteo for costs and interim payments. I promised to provide written reasons for my decision, and I now do so.

[6] These consequential applications, arising as they do out of complex trust arbitration and challenges/appeals that raised a welter of novel legal issues relating to trust arbitration and arbitral appeals in this jurisdiction, are themselves not straightforward. They also raise a number of collateral issues which do not arise on ordinary applications for leave to appeal. In respect of the present applications, I received over 200 pages of skeleton arguments (exclusive of the draft notices of appeal) and was referred to well over 100 authorities. The oral hearing lasted three days and additional written submissions were laid over because the hearing time was exhausted.

[7] It is important to summarize the applications and reliefs sought by the parties to put the applications in their proper context. Firstly, there is a notice of application by Gabriele filed 29 December 2023, supported by the 13th Affidavit of Richard Horton exhibiting the 11th Affidavit of Michael Bray, seeking:

(i) a declaration that Gabriele does not require the leave of the Supreme Court to appeal the ruling that the Supreme Court has no jurisdiction to grant leave to appeal to the Supreme Court on a question of law arising out of an award in arbitral proceedings, save with the agreement of all the other parties to the proceedings;
(ii) in the alternative, an Order granting leave to appeal against the ruling that Gabriele has no right of appeal in respect of the Tribunal's errors of law;
(iii) an Order for leave to appeal the findings of the court on the challenges under s. 89 that the Tribunal lacked substantive jurisdiction, under s. 90 that the Tribunal committed serious irregularities (which have caused or will cause substantial injustice) and, to the extent necessary, Gabriele's appeals in respect of the Tribunal's errors of law pursuant to s. 91;
(iv) an Order for the continuation of the stay of the arbitration previously granted by the Court on the 13 June 2022 pending the determination of any application to the Court of Appeal and any consequential appeal; and
(v) a stay of any costs Orders against Gabriele.

[8] Secondly, there is a Notice of application by Delanson filed 29 December 2023 seeking:

(i) a declaration (in similar terms to that sought by Gabriele);
(ii) an order for leave, to the extent necessary and in any event, to appeal to the Court of Appeal and a certification that such appeal raises matters of general public importance;

(iii) a continuation of the stay of the arbitration (in similar terms to that sought by Gabriele);
(iv) a stay of the taxation and payment of any costs in favour of Matteo.
(v) an order that the cost of this application be in the appeal.

[9] Finally, there is a Notice of Application by Matteo filed 29 December 2023, supported by the Affidavit of Adrienne Bellot (dated 29 December 2023), seeking orders for:

(i) costs of the Consolidated Action;
(ii) an order that Delanson and Gabriele make an interim payment of $1,500,000.00 or such other sum as the Court may order in respect of costs incurred in the action, and costs associated with Matteo's successful application for security for costs and the successful defence of Gabriele's interrogatories application;
(iii) release and payment to Matteo of the sums paid into Court pursuant to the order for security for costs dated 13 June 2022;

[10] It is convenient to deal with these claims under the following headings: (A) Issues relating to the Appeals; (B) Issues relating to the Stay of Arbitration; and (C) Issues relating to Costs.

DISCUSSION AND ANALYSIS

A. Issues relating to the Appeals

Declaration as to right of appeal.

[11] Proposed Ground 1 of Gabriele's Draft Notice of Appeal would contend that the Court "*erred in law in dismissing the Applicant/Appellant's appeal on the basis that, on the proper construction of ss. 91 and 92 of the Arbitration Act 2009, the Applicant/Appellant had no right of appeal in respect of errors of law made by an arbitral tribunal save with the consent of all parties to the arbitration*".

[12] Delanson takes a similar ground in what is described as its "first main ground of appeal" in its Notice of Appeal Motion. That ground states that the Court "*erred in finding that the Appellant ("Delanson") had no right to appeal, on questions of law, a partial award ("the Partial Award") issued on 13 June 2020 in arbitral proceedings between the Appellant and Respondents ("the Arbitration*") …".

[13] Both Gabriele and Delanson assert that they are entitled to appeal as of right the finding by the Court that the Act does not provide for leave to appeal on a point of law without the consent of all the parties (the "Construction Point") and seek declarations to that effect.

[14] The primary argument in support of this claim is that the appellants have an automatic right of appeal on the construction point because it is not a "*decision…on an appeal*" for the purposes of s. 91(5). Therefore, it is said that the s. 91(5) conditions for the grant of leave to appeal on a point of law do not apply, and the applicant/appellants are entitled to appeal pursuant to s. 10 of the Court of Appeal Act, which generally governs civil appeals.

[15] Necessarily, the claim for a declaration as to a right of appeal is predicated on the contention by the appellants that the construction decision was a 'final' decision for the purposes of s. 10 of the Court of Appeal Act, for which no leave is required. Leave is generally required for interlocutory decisions, subject to certain defined exceptions.

[16] But the parties do not even agree on whether the construction decision is a final or interlocutory one. Mr. Martin contended that the construction issue did not involve a final determination of the issue, using Lord Esher's "application test", as expounded in **Salaman v Warner and Others** [1981] 1 QB 734, to determine whether a decision is interlocutory or final for the purposes of leave to appeal. The application test has been accepted and applied in this jurisdiction (see **Peace Holdings Limited v. First Caribbean Bank** [SCCivApp No. 57 of 2014, unreptd.]). Basically, the test is "…*if the decision whichever way it is given will, if it stands, finally dispose of the matter in dispute, it is final. If, on the other hand the decision if given one way will dispose of the matter in dispute, but if given the other way will allow the action to go on, then it is interlocutory*" (at [24]). Thus, as the questions of law were not determined by the court's decision on the construction issue, it could not be said to be a final decision.

[17] Mr. Black contended that the simple question using the application test is whether the decision finally disposes of the matter. In this regard, he contended that the court's construction of the statute, whatever it decides, is a final determination of the meaning of the statute, which has precedential value. The fact that it was decided in a way which did not lead to the final determination of the proposed appeals on points of law, does not change that.

[18] I do not think this issue admits of any lengthy discussion. I would readily agree with Mr. Black (and Mr. Simms identified with Mr. Black on this point) that the construction decision is not in the nature of an interlocutory decision. True, it is a not a decision that would have determined the questions of law raised on the appeal. But it was dispositive of the interpretation question which arose on the applications. But as will become clear, even assuming that the construction decision was a final one, I do not think it assists the appellants' case for a declaration.

[19] Gabriele and Delanson cite the UK Court of Appeal case of **Sumukan Ltd. v Commonwealth Secretariat** [2007] EWCA Civ 243 in support of their claim for a declaration. The issue in **Sumukan** was whether the Court of Appeal had jurisdiction to grant permission to appeal from the first instance court's decision that the parties' arbitration agreement excluded any right to appeal a point of law under s. 69(1) of the 1996 Act. Section 69(1), similar to s. 91(1) of the 2009 Act, provides that "*Unless otherwise agreed by the parties, a party to arbitral proceedings may […] appeal to the court on a question of law arising out of an award*."

[20] The Court of Appeal held that the decision that the parties had "*otherwise agreed*" was a preliminary decision on whether the court had jurisdiction to entertain the appeal (or whether its jurisdiction had been excluded by the agreement of the parties), and therefore it did not fall within the restrictions on the grant of permission to appeal within s. 69(6) or s. 69(8). As the court said at [31]:

> It may thus be that one should not be surprised if as a matter of language a distinction is drawn between jurisdiction issues as preliminary decisions as to whether the section is to be applicable at all and other decisions […]
>
> There is a distinction between a decision as to whether the parties have agreed to exclude the court and (if they have not) the decision as to whether to grant or refuse permission to appeal. Until the court has decided whether there is an exclusion agreement it does not, in fact, engage on the considerations relevant to the question whether permission to appeal should be refused or granted.

[21] Section 69(8) is the equivalent of the Bahamian s. 91(5), which provides that:

> "The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purpose of a further appeal. But no such appeal lies without the leave of the court, which shall not be given unless the court considers that the question is one of general public importance or one which for some other special reason should not be considered by the court."

[22] Arguing by analogy with **Sumukan**, the appellants contend that the issue here is likewise a preliminary decision dealing with jurisdiction. If, as a matter of statutory construction, the 2009 Act excludes the ability to seek leave to appeal on questions of law, and there was no agreement to appeal (as was the case here), the Court did not have jurisdiction to entertain an appeal. Thus, the decision is "*not a decision…on an appeal*" for the purpose of s. 91(5), because it does not decide any issues of law on appeal.

[23] Gabriele and Delanson make the further point that since s. 91 of the Act does not apply to the construction decision, the conditions for appeals from points of law set out at s. 91(5) do not circumscribe the ordinary rights of appeal in civil matters under the Court of Appeal Act. They rely on the HL decision in **Inco Europe Ltd. v First Choice Distribution** [2001] 1 WLR 586 in support of this proposition. In *Inco Europe*, the HL was concerned with the construction of s. 18(1) (g) of the Supreme Court Act 1981, which provided that "*No appeal shall lie to the Court of Appeal… (g) except as provided by Part I of the Arbitration Act 1996*." Section 9 of the 1996, contained in Part I, was silent as to appeals, unlike s. 69 which (as has been noted) restricts appeals to where the first instance court grants leave. The Court concluded that s. 18(1)(g) contained a drafting error, in that it appeared to exclude a right of appeal under s. 9 (and similar sections that were silent on rights of appeal), rather than affirming the restrictions contained in sections such as 69 relating to leave to appeal.

[24] **Inco Europe** is not strictly on point, a concession made by Gabriele and Delanson. But they rely on it for the following statement of principle:

> "This style of drafting points strongly to the conclusion that where a section is silent about an appeal from a decision of the court, no restriction was intended. The draftsman must have intended that, sa*ve to the extent that an appeal was expressly circumscribed, parties to court decisions under the various sections would be able to exercise whatever rights of appeal were available to them from sources outside the Act itself*…"

[25] Thus, by analogy, it is contended that s. 91 of the 2009 does not therefore circumscribe rights of appeal that exist outside of the Act, in particular s. 10 of the Court of Appeal Act, which provides that, subject to specified exceptions, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in civil proceedings. It is therefore said that, as none of the exceptions set out in s. 11 or the Court of Appeal rules apply, there is an appeal as of right, and they seek a declaration accordingly.

[26] Mr. Martin's primary submission in response to the claim for a declaration is that the Court's decision as to whether there was a right to appeal on questions of laws under section 91 was a decision on an appeal under that section and is caught by section 91(5). His case is, first, that the principle in **Sumukan** does not apply, as that case drew a distinction between situations where the court was exercising the s. 69 jurisdiction and where it decided that there was no jurisdiction, such as where the parties had agreed to exclude the jurisdiction of the Court. In other words, it was said the court had pre-existing jurisdiction to entertain an appeal, but the absence of consent simply prevents the exercise of the jurisdiction, unlike the situation in **Sumukan** where the court's jurisdiction was excluded *ab initio*.

[27] In this regard, he referred to paras. 13, 30 and 31 of **Sumukan**, where the Court said as follows:

> [13] "There can be no real issue that a decision as to the existence of an exclusion agreement is not a decision covered by subsection (8), but for completeness Mr. Speight argued that the decision is not a decision under Section 69 at all because it is a decision as to whether Section 69 is to apply or not." […]
>
> [30] Ultimately, the following factors have persuaded us that the court of appeal has jurisdiction. Firstly, although there might be a temptation in the interest of speed and saving costs to construe any part of the language of the 1996 Act in a way that renders all decisions under the various sections where permission of the court is required as final, if the first instance court so rules, there is a distinction between those cases where the court is assisting or overseeing the arbitration process and the cases where the question is whether the jurisdiction of the court has been excluded.
>
> [31] It may be thus that one should not be surprised if as a matter of language a distinction is drawn between the jurisdiction issue as a preliminary decision as to whether the section is applicable at all and other decisions. […]
>
> There is a distinction between a decision as to whether the parties have agreed to exclude the court and (if they have not) the decision as to whether to grant or refuse permission to appeal. Until the court has decided whether there is an exclusion agreement, it does not, in fact, engage on the considerations relevant to the question whether permission to appeal should be refused or granted.".

[28] The second point taken by Mr. Martin is that the question of what is a "decision" on an appeal under the corresponding provision of the English Act (s. 69) (or in relation to other

equivalent sections) is broadly defined, as is borne out in a number of high-level English decisions: **Cetelem SA v Roust Holdings [2005] 1 WLR 3555; ASM Shipping Ltd. v TTMI Ltd. [2006] 2 CLC 471; CGU Insurance plc v AstraZeneca Insurance Ltd. [2007] Bus LR 162; and National Iranian Oil Company v Crescent Petroleum Company International Ltd. & Ords. [2023] EWCA Civ 826.** It is not necessary to refer to all of them, and brief reference will only be made to **ASM** and **National Iranian Oil.**

[29] **ASM** was concerned with a challenge brought for alleged serious irregularity (s. 68 of the 1996 Act) on the ground that the third arbitrator was biased. The appellant sought to argue before the Court of Appeal that the judge had made no decision under the section because it was so clearly wrong, or because it was not a challenge on a decision but on a defence to the challenge. The trial judge held that there was apparent bias, but that the challenge had been waived and so dismissed the application and the application for permission to appeal. The relevant part of the ruling is at [9], where Longmore LJ said:

> "…Here there is doubt that Morrison J had jurisdiction either to accede to the application or to refuse it. Whichever way the decision went, it was still a decision under section 68 of the Act and a refusal of permission to appeal was likewise a decision under the section. It cannot, therefore, be challenged by way of appeal even if the decision is wrong or, even, obviously wrong. The fact that waiver (or indeed estoppel) can be said to operate as a defence to *prima facie* entitlement is, in our view, nothing to the point. A decision to refuse relief (for whatever reason) is still a decision under section 68 just as much as a decision to grant relief would have been if the decision to grant relief would have been if the decision had gone the other way."

[30] Then, in **National Iranian Oil,** the Court of Appeal concluded that a decision that a party had not lost a right to challenge under section 73 of the English Act was still a decision for the purposes of s. 67(4). This was guided by the policy of the English Act as "*being to avoid delay and expense*" (at [60]) and the conclusion (at [62]) that a decision which is "*part of the process*" of reaching a final decision on a challenge is a "decision" for relevant purposes. As Males LJ said at [65], "*Decision is a broad term*." The Court also noted [at 64] that the provision fell to be construed by reference to the statutory principles for arbitration, including "*the avoidance of unnecessary delay and expense and the limitation of court intervention in the arbitral process except where expressly provided*."

[31] Third, Mr. Martin made the general point that the court should exercise caution in granting declarations with respect to the existence of a right (or not) of appeal, as it is really for the Court of Appeal to decide what ability they have to entertain an appeal. [D-3, 71]

Court's conclusions on the application for declarations

[32] I agree that what is a "decision" on appeal under the terms of the Act is a broad one, as indicated in **ASM Shipping** and **National Iranian Oil**. I also accept the principle in **National Iranian Oil** that the question of what constitutes a decision or judgment for the purposes of an appeal falls to be determined by reference to the statutory principles for arbitration, including the avoidance of unnecessary delay and expense and the limited intervention principle (s. 3 of the Act).

[33] I must say that I was initially attracted by the submissions that the **Sumakan** exception applied in this case, and that the decision as to whether, properly construed, the Act provided for the grant of leave on questions of law was a preliminary decision akin to the issue of whether the court's jurisdiction was ousted by agreement in **Sumakan.** But on reflection, I agree that a distinction is to be made, even though it may appear to be a finely reasoned one. In other words, a finding that the court has no jurisdiction means that the provisions of Act and the policies which undergird those provisions are never engaged, whereas in the instant case, the Court had statutory jurisdiction *ab initio* and the provisions of the Act were invoked as part of the construction question. I believe this distinction is important for reasons that I hope to elucidate shortly.

[34] In support of the argument that the construction point is not subject to the restrictions on appeal at s. 91(5), Mr. Simms pointed out that the issue could potentially have been raised on a construction summons. That might well be so. I would also add that the question of law could also have been raised as a preliminary issue pursuant to s. 56 of the Act. But one cannot lose sight of the fact that the question of law arose as a preliminary issue in the context of an appeal on points of law from an arbitral award pursuant to s. 91.

[35] I believe that the provisions of s. 56 are helpful in elucidating how Parliament intended that preliminary issues of law would be dealt with within the context of the Arbitration Act. That section provides for the Court to determine, as a preliminary matter, any question of law which substantially affects the rights of any of the parties either if the application is made with the agreement of the parties, or with the permission of the Tribunal, and the court is satisfied that the application will save costs and is made without delay. Importantly, if the Court makes a decision on the question of law, s. 56(6) is in the same language as s. 91(5): the decision is "*treated as a judgment of the court*" for the purpose of an onward appeal, and subject to the leave of the Court on the criteria that the question of one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.

[36] As I had occasion to remark in the June 2022 Judgment: "…*the Act was clearly intended to be a self-contained code governing arbitration, and it can hardly be thought that Parliament in replacing a regime which had pertained for over 100 years, would not have been astute to prescribe for appeal rights on points of law*" [at 377]. Thus, in approaching the question of whether the applicants may have a free pass to the Court of Appeal on the construction question, the Court is entitled to look at the general approach of the Act to appeals and the statutory principles for arbitration.

[37] In this regard, I would make a passing reference to **Henry Boot Construction (UK) Ltd. v Malmaison Hotel (Manchester) Ltd**. [2001] QB 388 (a case Mr. Black would be very familiar with), where Waller LJ (in coming to the conclusion that s. 69 of the 1996 English Act did not provide for an appeal without leave and that refusal of leave cannot be reviewed by the Court of Appeal) said:

> "I also reject Mr. Black's submissions that once matters are in court the philosophy applicable to arbitration somehow has no further application. Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible: see generally section 1(a) of the Arbitration Act 1996. Limitations on

> the right of appeal is consistent with that philosophy and one tribunal dealing with the question is also consistent with that philosophy: see the observations of Sir John Donaldson MR in the *Aden* case [1987] QB 650, 655. As Lord Nicholls of Birkenhead emphasized in *Inco Europe Ltd. v First Choice Distribution* [2001] 1 WLR 586, 590C, many sections of the 1996 Act provide for applications to the court and some of them restrict appeals from decision of the court. The Act thus adopts the same philosophy and the construction I have placed on section 69 is consistent with its context."

[38] In my judgment, it would be subversive and disruptive of the carefully calibrated scheme Parliament put in place for assisting and overseeing the arbitration process if a preliminary decision on a point of law raised under s. 56 would count as a "*judgment of the court for the purposes of an appeal*", and thereby require leave for an onward appeal, but the same question of law if raised and determined during the hearing of a challenge/appeal would not be caught by the prescriptions of the Act. I am of the view that such a decision must count as a "decision" or judgment of the Court for the purposes of an appeal. It therefore does not escape the rigours of 91(5).

[39] But even if I am wrong on this point, it does not mean that this Court necessarily *ought* to grant the declarations sought. It is trite law that a declaration is a discretionary remedy that will only be granted in circumstances where it is appropriate. In **Financial Services Authority v Rourke** [2002] CP Reg 14, Neuberger J. said:

> "…the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order.
> […]
> It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

[40] Then, in the authoritative text of *Zamir & Woolf on Declaratory Judgments* (4th Ed., 2011), this is what is said [§ 4-99]:

> "If it can be shown that a declaration would not serve any practical purpose, this will weigh heavily in the scales against the grant of declaratory relief. If, on the other hand …the grant of declaratory relief will be likely to achieve a useful objective, the court will be favorably disposed to granting relief. The question of whether or not any useful purpose would be served by granting declaratory relief is therefore of prime importance in determining how the discretion should be exercised…A declaration which would serve no useful purpose whatsoever can be readily treated as academic or theoretical and dismissed on that basis. However, while a declaration which resolves an issue of law cannot be described as being of

> no practical utility, the point may still be academic or theoretical because there is no existing factual claim which it will resolve."

[41] In my judgment, declaratory relief is not appropriate in all the circumstances of this case. The grant of the declaration would simply enable a leapfrog appeal of the construction question, but it would not assist in resolving the merits of the claims in respect of the alleged errors of law of the Tribunal. This is because the appellants would still have to satisfy the criteria for the grant of leave to appeal questions of law from the tribunal, whatever that test might eventually be held to be and logically the applicable test, in the absence of statutory guidance, must be one for the Supreme Court to determine.

[42] The issue of the applicable test for leave to appeal points of law was adverted to at several places in the Ruling. Between [386] and [390], I set out the tests for the grant of leave under s. 69(3) of the English Act and the test as developed at common law under the English Arbitration Act 1979 ("*The Nema"* test), and at several places in the Judgment whether question of appeal on a point of law arose, opined generally that I was not satisfied that the applicants/appellants in the challenges before the Court would have met the requisite standards employing the common law test or the approximating the UK statutory test: [432], [477], [490], [502].

[43] Further, as no onward appeal to the Court of Appeal is available without the leave of the Supreme Court, it would mean that even if the appellate court were to accept that the provisions of s. 91 and 92 should be generously construed to read in a right for the court to grant leave to appeal questions of law to the Supreme Court (and for reasons given later in this judgment the Court thinks the prospect of this is fanciful) the appellants would not have received leave to appeal the tribunal's alleged errors of law, nor leave for an onward appeal from the Supreme Court. So, in this context the declaration would have no practical utility.

[44] The next general point auguring against the grant of the declaration (and Mr. Martin laid this marker down in oral submissions), is that the Court should tread carefully in making a declaration in respect of rights of appeal where the argument is, as the appellants contend under s. 10 of the Court of Appeal Act, that the Court of Appeal has a concurrent jurisdiction to determine the same rights. I agree.

[45] Furthermore, I do not apprehend that any injustice will be caused to the applicants if the declaration is refused. The appellants intimated during the hearing that they will be making a renewed application to the Court of Appeal if leave is refused by this Court. Therefore, they will have an opportunity to press the argument that they have an appeal as of right on the construction point under s. 10 of the Court of Appeal Act. Therefore, the refusal of this Court to grant a declaration will not prejudice them.

[46] Therefore, having regard to all the circumstances of this case, I refuse to make the declaration sought by Gabriele and Delanson that they have a right to appeal pursuant to s. 10 of the COA.

Leave to appeal the construction point in the alternative

[47] Both Gabriele and Delanson argue in the alternative that, if the court does not accept the argument that the construction point comes within the general regime of civil appeals (and is not caught by s. 91(5)), they should be given leave to appeal under s. 91(5) on the grounds that the question is one of general public importance, which the Court of Appeal should consider, and that in any event these grounds disclose a reasonable prospect of success.

Public importance point

[48] As to the public point argument, Mr. Black stressed that the Judgment was a "hugely important" case to the Bahamas, which was seeking to establish itself as a major centre for trust arbitration, as the Judgment dealt with many novel issues in trust arbitration and the 2009 Act that would benefit from a decision of the appellate court. In this regard, Mr. Black referred to several press releases and reviews in major arbitration journals on the public importance of the Judgment, which had been widely circulated, including one in the "*Global Arbitration Review*", considered the leading arbitration journal. These are exhibited to the 14th Affidavit of Mr. Horton filed by Gabriele. In particular, he referred to an abstract from a write-up where UK Counsel from Taylor Wessing (counsel for Matteo) is quoted as having said:

> "[The] appeal is the first of its kind under the Bahamas Arbitration Act, which has huge ramifications in future trust arbitration that extends beyond the Bahamas. …This precedent setting case will no doubt be an important addition to the 'thin and underdeveloped' case law as referred [to] by [the] judge that will impact the wider trust arbitration sector."

[49] Mr. Black made several further general points in support of the submission that the issues raised were ones of general public importance. Firstly, it is said an interpretation that there is no right to appeal on a point of law, except at the whim of a party, would open the door for unjust and egregious decisions by a tribunal to go uncorrected. Secondly, it would remove the ability of the Court to supervise the administration of the trust and abrogate the power of court to protect beneficiaries (**Crociani v Crociani** [2014] UKPC 405, in a judgment given by Lord Neuberger, one of the Arbitrators, referring to the well-known Privy Council case of **Schmidt v Rosewood Trust** [2003] UKPC 26). Thirdly, it would leave in the hands of private tribunals who may come up with arbitrary decisions the development of the law on trusts, and it is no answer to say that these decisions are "private decisions" because they may end up in the public domain when subjected to judicial scrutiny, and in any event many are now published as precedents.

[50] Mr. Martin countered that to the extent that the issue of leave to appeal on a point of law constitutes an issue of public importance, the effect is overblown by the appellants. This is because any effect the Judgment might have as setting a precedent with respect to the approach to the issue of leave to appeal a question of law under the Arbitration Act is only short-lived, and has been overtaken by statutory intervention (see the 2023 amendment to the Arbitration Act, with effect from 23 June 2023). The amendment adopted the UN Model Law provisions on arbitration appeals (Article 34(2)), basically abrogating the right to appeal on points of law, and thereby removing any ambiguity as to the ability to appeal questions of law, at least from 23 June 2023.

[51] I do not need to set out the provisions of the amendment, but it repeals and replaces ss. 89 to 91 and sets out an exhaustive list of grounds on which an award may be set aside. These are divided into grounds which may be asserted by a party and grounds which the court may consider

of its own initiative. The first category is as follows: (i) lack of capacity of the parties to conclude an arbitration agreement; (ii) lack of a valid arbitration agreement; (iii) lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; (iv) the award deals with matters not covered by the submission to arbitration; (v) the composition of the arbitral tribunal or the conduct of the arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Act. The latter grounds involve (i) non-arbitrability of the subject-matter of the dispute or violation of public policy.

[52] I should say right away that I accept, as a matter of general principle, as stated in one of the leading cases, that "*the construction and interpretation of material emanating from Parliament is both a matter of public importance, and one of the court's proper functions*" (**Rolls Royce plc v Unite The Union** [2009] EWCA Civ 387 at [54]).

[53] But I agree with the submissions of Mr. Martin that to the extent the ruling creates a precedent as to the interpretation of the Act, its effect is ephemeral considering the legislative changes. As indicated, the Act was amended on 23 June 2023, and the judgment was issued on 28 December 2023. Mr. Black is right to point out that the Judgment could potentially be persuasive for any potential arbitration appeals commenced before the amendment, but no evidence was led as to whether in fact any appeals were extant so as to even be affected.

[54] There is another reason, which I think is of some significance, why I do not think that the issue of whether the court has an ability to grant leave on a question of law is of any public importance so as to require clarification by the Court of Appeal. This is because that Court has already expressed an opinion on the issue, even though it may be considered *obiter dicta*. In **Therapy Beach Club Incorporated v. Rav Bahamas Limited and Another** [SCCivApp No. 23 of 2018], in an application for leave to appeal to the Privy Council, the Court of Appeal said this:

> "23. Parliament was very clear in making the distinction between an application challenging an award under sections 89 and 90 and an appeal from an arbitral tribunal under section 91. Indeed, an appeal under section 91 requires the consent of all parties and section 91(5) provides:
>
> > 'The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal."

[55] As indicated, the Court of Appeal was considering whether to grant leave to appeal to the Privy Council in the context of a challenge arising under s. 90, so strictly speaking it was not embarking on a definitive interpretation of s. 91. But it was clear that the Court of Appeal, albeit cursorily, read s. 91 the same way this Court interpreted it in the Ruling.

[56] I therefore do not think that the question of whether the Act provides for the court to grant leave to appeal raises any questions of public importance that requires the scrutiny of the Court of the Appeal. In summary, this is mainly because the COA has expressed an opinion on s. 91 (as it

was under the un-amended Act), and in any event Parliament has clarified the position with respect to appealing points of law by the 2023 amendment.

Delanson's additional grounds for asserting an appeal as of right

[57] Delanson advances several additional arguments in support of a right as to appeal as of right, which may be summarized as follows: (i) that the common law right to appeal was not abrogated; and (ii) the Court's inherent supervisory jurisdiction over trusts. Although Mr. Simms made quite a bit out of these points in written and oral submissions, I think they can be dismissed in relatively short shrift.

[58] As to (i), I dealt with this at paras. 377 and 385 of the Ruling. There is no merit in the argument that the rights which existed at common law to appeal or challenge any award survived the 2009 Act. I think s. 102(2) is very clear:

> "Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award."

[59] Mr. Simms argued that s. 102(2) prohibits "*the revival of any jurisdiction which had previously been abrogated*", but that "*it did not itself purport to abrogate any jurisdiction*". With respect, the draftsman was making it clear that the previous jurisdiction to challenge an award for errors of fact or law on the face no longer existed, because the provisions of the 2009 Act now provided a complete code governing all aspects or arbitration. There is no other logical or reasonable interpretation of this provision.

[60] I also find no merit in the argument that the court's "inherent" supervisory jurisdiction over trusts is a ground or reason in support of a right to appeal. I dealt with this issue to some extent in dismissing the claim by the appellants for the court to itself exercise the jurisdiction to set aside the Trust for mistake in the challenges/appeals before the Court. This is what I said [at 321]:

> "320. It has to be remembered that the court, although it still retains some inherent powers in its ability to support the arbitral process (as noted in the court's Ruling on the interlocutory issues) is exercising supervisory and review powers when a challenge/appeal is brought under the limited grounds available under the Act. The orders or remedies which the court may make on a s.89 application [s. 89(3)] are to "(a) confirm the award; (b) vary the award; or (c) set aside the award in whole or in part", and one of the foundational principles is that the court should not intervene "in matters governed by this Act" except as provided. I do not think that a s. 89 challenge, because it involves a *de novo* hearing of the issue that was under consideration by the Tribunal, can be used as a backdoor route for a party to attempt a second bite at the cherry under the guise of invoking the supervisory jurisdiction of the court."

[61] Likewise, I am not of the view that any recourse can be made to the Court's supervisory jurisdiction as a backdoor route for an onward appeal to the Court of Appeal. The Act specifically provides for how any challenges/appeals taken before the Court arising out of an arbitral award are to progress to the Court of Appeal: ss. 89(4), 90(5), and 91(5). There is no room to imply any residual ability to appeal based on any inherent jurisdiction.

Leave to appeal challenges under s. 89, and 99.

[62] The applicants also seek leave to appeal the court's finding relative to challenges raised to the Tribunal's determination of issues said to constitute errors going to substantive jurisdiction and serious irregularity. Unlike an appeal on a point of law, s. 89(4) and 90(5) simply state that "*The leave of the court is required for any appeal from a decision of the court under this section*."

Test for grant of leave

[63] Mr. Black reminded the Court that the general test for the grant of leave was whether the appeal has a realistic prospect of success: see **Maria Inglesias Rouco and another v. Juan Santiago Bushnadiego** [2020] 2 BHS J. No. 160, where the Bahamian Court of Appeal (making reference to well-known English authorities frequently applied in this jurisdiction said):

> "[23] The test on a leave application is whether the proposed appeal has a realistic prospect of success or whether it raises an issue that should in the public interest be examined by the court or whether the law required clarifying: per Lord Woolf in *Smith v Cosworth Casting Process Ltd.* [1997] 4 All ER 840.
>
> [24]. In a Practice Direction issued by the Court of Appeal in the United Kingdom in 1999 Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) 1994 WLR 2, the following appears:
>
> > 'The general test for leave
> >
> > 10. […] The general rule applied by the Court of Appeal, and this is the relevant basis for first instance courts deciding whether to grant leave to appeal, so that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for consideration.
> >
> > 11. The approach will differ depending on the category and subject matter of the decision and the reason or seeking leave to appeal, as will be indicated below. However, if the issue to be raised on the appeal is of general importance that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave.' "

[64] There was some discussion between counsel as to the test for the grant of leave to appeal, apparently arising out of a comment by Mr. Martin referring to a "*real likelihood*" of success. Mr. Black was quick to refer to the leading case of **Swain v Hillman** to make the point that all the "*realistic prospect*" required was a ground that admitted of an argument that was not fanciful and that the threshold was not as high as suggested by Mr. Martin.

[65] However, as the arguments were developed and clarified in oral submissions, I did not understand Mr. Martin to be suggesting a different test for the grant of leave. In fact, he acknowledged in oral submissions that the general test is one which focuses on the "*realistic prospects of success*", and indeed the parties referred the court to the same English authorities for the statement of the test. However, he contended that the emphasis was slightly different in arbitration matters because of the special considerations that apply in the context of arbitration. Therefore, the starting point was not the default position that leave should be granted *unless* there was no realistic prospect of success; but that leave should be granted *only* if there was a realistic prospect of success.

[66] This is because arbitration awards, and any appeal from them, are not meant to be stepping stones to a further appeal. They are intended to be final except in very limited circumstances. A significant distinction (and an important one) is that the Court's decision on leave to appeal from an arbitral award is generally final and not renewable in the Court of Appeal, expect in extremely rare circumstances where the judge's decision has gone so wrong as to be aberrant or be tantamount to no decision at all (**Sumukan**). A lesser point of distinction is that whereas final decisions are generally exempt from leave requirements, leave is required in arbitration cases, even though they rank as final decisions.

[67] In this regard, Mr. Martin referred to a number of UK authorities which speak with one voice in setting out the general proposition that special considerations and a more restrictive approach is taken to arbitration appeals: (i) **AMEC Civil Engineering Ltd v Transport Secretary** [2005] 1 WLR 2339; (ii) **Itochu Corpo Johann MK Blumenthal GMBH** [2012] 2 CLC 864; (iii) **Interprods Ltd. v la Rue International Ltd.** [2015] EWCA Civ 374; and (iv) **National Iranian Oil (supra).** I only refer to the extract from AMEC.

> "On 11th October 2004 Jackson J. sitting in the Technology and Construction Court dismissed Amec's appeal in a persuasive judgment. He gave Amec leave to appeal to this court, his leave being a necessary pre-condition of such an appeal under section 67(4) of the 1996 Act. I am not convinced he was right to do so. The policy of the 1996 Act does not encourage such further appeals which in general delay the resolution of disputes by the contractual machinery of arbitration. The judge and the arbitrator reached the same conclusion for substantially the same reasons. ...
> Their combined experience and authority was, I think, sufficient to conclude the matter without an expensive second appeal."

[68] So while it is accepted that the "*realistic prospect test*" applies as the general test for the grant of leave where the Act provides generally for the Court to grant leave to appeal without specifying any discrete conditions, I accept that the Court in applying the test cannot lose sight of the principles set out in the Arbitration Act relating to how arbitration awards should be approached.

Grounds

[69] I now come to look at the grounds which the appellants have indicated they intend to take on appeal if leave is granted. Not surprisingly, there is quite a bit of overlap in the grounds listed by Gabriele and Delanson, and where there is coincidence of interests the grounds will be dealt

with together. However, for convenience, and to the extent that there is some difference in approach because of the respective roles of the appellants, it is convenient to examine the grounds separately.

[70] In summary, **proposed Ground 2** of Gabriele's Draft Notice of Appeal would contend that the Court was in error in upholding the Tribunal's substantive jurisdiction under s. 89 based on the Court's determination (like the Tribunal) that the Trusts were not authorised purpose trusts (APTs). The ground as stated is that the Court "*…erred in law in holding that the Trusts were not Authorised Purpose Trusts for the purpose of the Purpose Trust Act 2004; and that the Second Respondent's failure to obtain the leave of the Court pursuant to s. 6 of the Purpose Trust Act 2004 did not affect the Tribunal's substantive jurisdiction to determine his claim, but instead merely rendered his claim inadmissible before the Tribunal*."

[71] The main reasons asserted for this ground is that: (i) the failure to obtain the leave of Court pursuant to 6(1) meant that "*no arbitral tribunal could be constituted and no arbitration could proceed…because in those circumstances the commencement of any arbitration and the formation of any tribunal contravened a provision of the substantive law of the seat*"; and (ii) that the Trusts fulfilled the statutory criteria under s. 3(1) of the PTA and thereby constitute APTs within the meaning of s. 3(2) of the PTA.

[72] I made two critical findings in respect of this ground: (1) that the question of Matteo's ability to institute the claim (in the absence of the declaration which the applicants said was required) went to *admissibility* rather than *jurisdiction* [at 158, 167, 168]; and (2) that the Trusts were standard discretionary trusts, based *inter alia,* on the fact that they were created for the benefit of a specifically identified class of beneficiaries (of whom Matteo was one) [176].

[73] As was reasoned at para. 168 of the Judgment:

> "I therefore have little hesitation in concluding that s. 89 of the Act is not engaged in respect of the challenge that absent a declaration from the Court authorizing Matteo to bring the arbitration proceedings, the Tribunal had no substantive jurisdiction. If the Tribunal had accepted the applicant's contention that the Trust were APT's, at the very most it would have been required to stay the proceedings for the requisite declaration to be obtained and/or directed that the proceedings be refiled after the necessary declaration was obtained."

[74] At para. 176, I said this:

> "[I] also find, based on a review of the relevant provisions of the Trust (6, 7, 8, 22, 23, and 24) that the Trusts are standard discretionary trust created for the benefit of a specifically identified class of beneficiaries and in respect of whom the Trustees in their discretion could apply the trust capital or income. I do not think the fact that the Trust specifies a modality for how the "essential necessities" of the beneficiaries were to be provided for during their lives (e.g., by providing for the preservation, investments and increase of assets) undermines in any way the fact that it is a trust established for the benefit of specified individuals."

[75] I also note, with some disquiet, that Gabriele's grounds in respect of the APT issue have mutated from the challenge taken before the Tribunal and this court. For example, Gabriele's and Delanson's challenge before the Tribunal was that Matteo had no "*standing*" to bring the claim [at paras. 156, 157, 164], not that the commencement of the arbitration and formation of the Tribunal was void for contravention of the APT Act. This is being asserted for the first time before the Court as a proposed ground of appeal. Further, and as indicated, the entire argument of the appellants on the APT jurisdiction issue is predicated on their contention (which has been rejected by both the Arbitral Panel and this Court) that the Trusts were APTs—a characterization which did not seem to occur to anyone until the commencement of the arbitration.

[76] With respect, the applicants have not advanced any compelling reasons as to why the Court of Appeal should upset any the findings of the Tribunal or Court on this point, and I am not satisfied that these grounds have a realistic prospect of success.

[77] **Proposed Ground 3** of Gabriele's Notice deals with the Tribunal's handling of the mistake counterclaim and the Court's conclusion on the arbitrability of that dispute. It is framed as follows:

> "The Learned Judge erred in law in holding that (i) the Tribunal was competent to rule on its own substantive jurisdiction; and that (ii) the Tribunal had substantive jurisdiction to determine the claim; and that (iii) the Applicant/Appellant was procedurally barred (whether pursuant to s. 95 of the Arbitration Act 2009 or by an estoppel or otherwise) from contending that the Tribunal was not competent to rule on its own substantive jurisdiction and that it did not have substantive jurisdiction to determine the claim."

[78] The main reasons or sub-grounds are stated as follows: (i) the doctrine of separability does not apply to trust arbitration and disputes regarding the validity of the creation of a trust are non-arbitrable; (ii) the Trusts were void *ab initio* for mistake (with the result that the Tribunal was not competent to rule on its substantive jurisdiction or that it had jurisdiction to determine the claim); (iii) that the applicants/appellants claim to set aside the Trust for mistake was outwith the scope of the arbitration clause on a proper construction of cls. 26 and 27; and (iv) that a party to arbitral proceedings is free to assert a positive case in the alternative to his primary case that the Tribunal lacks jurisdiction, and that the procedural bar at s. 95 cannot confer jurisdiction to determine a claim.

[79] The Court's assessment of this issue is at [282-300], and the conclusion on the arbitrability is at [291] and [292]. At [291], the Court said:

> "The Bahamian Parliament specifically made trust disputes subject to arbitration as a matter of public policy. Indeed, it went further and clothed the arbitral Tribunal with all the powers of the court (statutory and under the inherent jurisdiction) relating to the administration, execution, or variation of a trust. The tribunal was also given the same the powers of the court to appoint persons to represent the interest of any persons (including a person unborn or unascertained) or class in a trust arbitration. Further, as noted, unless otherwise agreed by the parties, the tribunal has power (inter alia) to "*(4) (c) to order the rectification, setting aside or cancellation of a deed or other document*," powers which arguably can only be exercised in relation to a validity challenge. "

[80] The Court made several important conclusions on the issues raised on these proposed grounds: (i) that the abrogation of separability did not prevent the arbitral tribunal from determining its own jurisdiction, because s. 7 of the Act deems an arbitration clause in a written trust instrument as an "arbitration agreement" [268]; (ii) that properly construed, the provisions of the Trusts did not exclude validity disputes [285, 286]; and (iii) that in any event the applicant/appellant was procedurally barred, since the challenge had not been taken [316].

[81] On this point, Mr. Black (and Mr. Simms) complained that, to the extent that the court relied on the recent Privy Council case of **Family Mart China Holding Co. Ltd. v Ting Chaun Holding Corporation** [2023] UKPC 33, as part of its reasoning on the issue of subject-matter non-arbitrability, they were disadvantaged in that they were not allowed an opportunity to comment on and distinguish that case to their benefit. In summary, in **FamilyMart**, the Cayman Court of Appeal took the view that matters leading up to a petition to wind up a company on the just and equitable ground could not be arbitrated, because the making of the order would be reserved to the Court. On appeal to the Privy Council, the Board took the view that there was a halfway house position, in that some matters leading up to a winding up petition could be arbitrated, even if the final winding up order could only be made by the court.

[82] However, this Court only referred to that case for the general statement of principle on the question of non-subject matter arbitrability. In this regard, I accept Mr. Martin's submission that the case stated no new principle, and the appellant's criticism of the Court's reference to it is irrelevant to the issue of whether the removal of the separability principle in Schedule 2 of the Act represented a public policy decision that an arbitral tribunal should not decide a validity dispute, or that such matters were only reserved for the courts.

[83] It is important also not to lose sight of the fact that the arguments directed to non-arbitrability of the mistake claim arise in the context of Gabriele voluntarily submitting that dispute to the tribunal. In his submissions, Mr. Martin characterized this challenge as "bewildering", and emphasized (as the court observed) that it was Gabriele who raised the issue and invited the Tribunal to determine it (see para. 58 of Matteo's written submissions):

> "As noted in footnote 290 to Matteo's submissions on the [section 98] challenges, Gabriele's closing submission in the arbitration contained the following:
>
> > 'It is accepted that the Tribunal has jurisdiction to decide whether or not the mistake claim is arbitrable.' "

[84] Further, the Court's finding as the unavailability of this challenge before the Court based on the prohibitions of s. 95 (which precludes an appeal not taken before the Tribunal within a certain timeframe) was based on the fact that the appellants never challenged the competence-competence jurisdiction of the Tribunal on the basis of national law or public policy. The only challenge was to whether such a dispute was excluded by the terms of the arbitration agreement, and therefore there is now no basis or ability on which to challenge this finding [see 313]. It was simply not an available challenge before this Court.

[85] In all the circumstances of this case, I am again not persuaded that the proposed grounds of appeal under Ground 3 have any realistic prospects of success.

[86] **Proposed Ground 4** of Gabriele's Notice addresses the issue of the finding of knowing receipt by the Tribunal in respect of Gabriele. It contends that this amounts to a serious irregularity causing substantial injustice under s. 90 of the Act. The ground is generally stated as the Court "*erred in law in holding that there was no serious irregularity causing substantial injustice to the Applicant/Appellant in the Tribunal's decision that the Applicant/Appellant had the required knowledge to be personally liable in knowing receipt*."

[87] In its reasons/sub-grounds, the appellant (i) impugns the Tribunal's factual findings that the appellant had knowledge that the distribution would exclude the other beneficiaries and directed and/or influenced Delanson's decision to distribute; (ii) alleges that the Tribunal's decision was unfair in that it made findings against the applicant/appellant without warning and without affording him a chance to respond; (iii) and asserts that there was an error in finding that even if there had been a serious irregularity there was no substantial injustice, because, (a) the wrong test was applied with respect to substantial injustice; and (b) had the appellant been given a chance to rebut the conclusion that he directed or influenced the trustees, the Tribunal might not have concluded that he had the requisite knowledge to render him personally liable in knowing receipt.

[88] The Court dealt with this issue between paragraphs 551 to 557.

[89] For the reasons I gave, and as noted in particular at 555, I was satisfied that Gabriele had every possible opportunity to persuade the court differently on this issue. While the possible role of Advocate Fenoglio may not have been expressly dealt with by the Tribunal, there could be no conceivable doubt as to the matters which Gabriele was being asked to address, and he had a fair opportunity to do so. The Tribunal simply did not accept what he said were the reasons for the distribution.

[90] I also note that one of the criticisms made of the Court's decision under this ground is that it is said to have applied the wrong test of "substantial injustice", because of what was said at para 556:

> *"In my view, even if the question or issues which Gabriele and Delanson argue were not put to Gabriele in cross-examination had been put, there is nothing to suggest that the Tribunal would have reached any different conclusion with respect to the issue of knowing receipt."*

The test is said to be that the outcome of the arbitration *might well have been different*, had the alleged irregularity not occurred.

[91] With respect, there is little in this complaint. The Court set out the test of substantial injustice at paras. 118-119, 120(iii), and made several references to it in discussing the grounds of appeal brought under s. 90 [511, 501, 476, 450]. In any event, the formulation used at [556] was a minor variation on language used by the Privy Council in **Rav Bahamas Ltd. v. Therapy Beach Club Incorporated [2021] UKPC 8**, where it said: "…[*i]n general there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity"* [para, 37, **Rav Bahamas**, [118].

[92] I need not mention that **Rav Bahamas** is a Privy Council case which is binding on this Court and the Court of Appeal. In fact, that case is authority for the proposition that substantial injustice may be *inferred* from the nature of the irregularity, even in cases where it is not specifically pleaded by a party, or adverted to by the court. In light of this statement of principle, and having regard to the paragraphs of the Ruling referred to above, it is difficult to see how any complaint could be sustained that the Court applied the wrong test for assessing whether an irregularity caused substantial injustice.

[93] I therefore do not find that this ground discloses any realistic prospect of success on appeal.

Delanson Grounds

[94] I turn now to look at Delanson's grounds of appeal.

[95] Delanson's "second main ground of appeal" is related to questions of law and is generally framed as follows: "…*insofar as the judge, substantively and on the merits, dismissed Delanson's appeal of the Partial Award on questions of law, such dismissal should be reversed and Delanson's appeal of the Partial Award on questions of law should be allowed by the Court of Appeal*."

[96] Delanson caveats this ground in the following terms: "*Having concluded that Delanson had no right to appeal the Partial Award on questions of law, the Learned Judge did not determine Delanson's appeal of the Partial Award on questions of law. However, if that is incorrect and the Learned Judge's decision did amount to a substantive dismissal of Delanson's appeal of the Partial Award on questions of law, and/or in any event, the Court of Appeal should allow an appeal of the Partial Award on the questions of law which follow*."

[97] Delanson sets out four reasons for advancing this ground: (1) that the Court misdirected itself in its finding on the scope of powers issue, and in declining to find that the trustee of the Trust had an unfettered discretion to distribute the Trust to the Second Respondent, so that there was no violation of the Trust when all assets were distributed to Gabriele in their entirety; (2) that the Judge erred in finding that the trusts were not APTs, such that Matteo, who did not seek authorization under s. 6(2) (c), "*had no standing to bring his claim in breach of Trust whether in the Arbitration or elsewhere*"; (3) the Judge erred in upholding the Tribunal's finding that Delanson's exercise of its discretion in the distributions involved a breach of the duty of adequate deliberation ("the inadequate deliberation issue"); and (4) that that the Judge erred in declining to overturn the Partial Award on the ground that if the Tribunal were wrong to find that Delanson acted outside the scope of its powers, the Distribution were voidable, not void, and the Tribunal had a discretion whether to set them aside.

[98] I should note here that several of the questions of law listed by Delanson in its second main ground as substantive grounds of appeal overlap with what were listed as putative grounds of appeal by Gabriele. In his draft Notice of Appeal, Gabriele sets out several issues of law which Mr. Black indicated the Court of Appeal would be asked to determine *should* leave be granted: (i) that the Tribunal's construction of the trust imposing a restriction on the trustee's ability to dispose of the trust was erroneous; (ii) that the tribunal's decision that the exercise of the trustee's powers outside this supposed restriction constituted a fraud on the power that rendered the exercise of the

power void rather than voidable; and (iii) that the Tribunal's decision to set aside the trustee's exercise of the discretion was wrong. Consequently, these points were not developed or pressed on the merits in Gabriele's application for leave, which I think was the right approach.

[99] In any event, this Court dismissed all of these asserted questions of law on the basis, first of all, that no leave was available to appeal a point of law and, secondly, that even assuming it were, it was unlikely that the test for the grant of leave would have been met. For example, as to (1), the Court dismissed this ground on the basis that it was satisfied that no appeal on a point of law was available [425], but it also opined that even if an appeal were available, it is unlikely that the leave threshold could have been surpassed [423].

[100] With respect to (2), I have dealt with this ground under Gabriele's proposed Ground 2. Mr. Martin also made the point in oral submissions that to the extent that the APT issue is now being taken solely as a section 91 challenge by Delanson, there is no practical utility in such an appeal, because even if the Tribunal got it wrong, that decision is not appealable as a question of law. Put at its highest, Delanson would be seeking leave to appeal simply to ask the Court of the Appeal to delineate the boundaries between an APT and an ordinary trust as an academic matter. But this would have no practical effect on the litigation, having regard to the conclusions by the Tribunal and this Court regarding the Tribunal's competence to determine the ATP issue. In any event, he contended that the decision of the court is plainly right to draw a distinction between an ordinary trust with clearly defined beneficiaries and an authorized purpose trust, where the Court has to supply the person to do the complaining because there is no beneficiary.

[101] I also observe here that the upshot of Delanson's challenge to the APT is to assert that Matteo has "*no standing*" because of the lack of the s. 6 declaration, not that these provisions prevented the Tribunal being constituted (as now claimed by Gabriele). I am not of the opinion that there is merit in any of these challenges. In any event, as has been pointed out, the standing or ability of Matteo to have brought the arbitration has been affirmed by both the Tribunal and the Court.

[102] As to (3), the Court dismissed this challenge on the basis that the appeal on a point of law was not available, and again that the appellants would not be able to meet the test for the grant of leave [460].

[103] With respect to (4), again the Court dismissed this ground on the basis that an appeal was not available on a point of law, and that the test would not be satisfied [512]. I said further [512]:

> "Further, I also accept Matteo's submissions that in any event (and always with the view that even if the court is wrong in its conclusion on the question of law), the law is settled that the ability to challenge the Tribunal's exercise of its discretion is extremely circumscribed (*Al Hadha Tracing Co.v Tradigrain SA, supra*) and do not at all arise on the grounds contended for by Gabriele and Matteo."

[104] As the Court has been at pains to point out, the appellants face nearly insuperable hurdles in trying to advance an appeal on questions of law. This is because firstly, as the Court has concluded, no leave is possible without consent, and secondly because in any event the appellants would not likely have satisfied the threshold for the grant of leave to appeal a question of law,

whichever test was employed. Thus, there are several procedural hurdles even before the question can even arise as to whether the Court of Appeal should consider any ground of appeal on the merits of the questions of law. I do not see how the applicant/appellant can even cross the first bridge as to whether leave to appeal questions of law from the Tribunal is available under the Act.

[105] The "third main ground" of appeal relates to the challenges made by Delanson to the Partial Award under s. 90 of the Act (serious irregularity causing substantial injustice). Again, Delanson sets out a number of sub-grounds and reasons. They are as follows: (i) that the Judge erred by not acceding to the challenges under s. 90(2) (a), with respect to the Tribunal allegedly ignoring material evidence with respect to the "scope of powers issue" and the inadequate deliberation issues; (ii) the challenges under s. 90(2) (b) on the grounds that the Tribunal exceeded its powers and intervened in the trustee's exercise of its discretion; (iii) the challenge under s. 90(2) (d) of the Act on the basis that the Tribunal failed to deal with all the issues put to it on the "Discretion Issue"; and (iv) the challenges under s. 90(2)(f), on the basis that there was uncertainty or ambiguity arising from the reasoning in the Partial and the Additional Partial Award in relation to the construction of Delanson's distributive powers.

[106] I dealt with the s. 90(2)(a) challenge at paras. 426 to 429, and dismissed them for two main reasons: (i) factually the assertion was incorrect, as the Tribunal did advert to the matters alleged (paras. 539-540 of the Partial Award), and (ii) as said [438], only in the most exceptional cases (of which this was not one) will a Tribunal's finding of facts and treatment of the evidence ever amount to a serious irregularity (**UMS Holding Ltd. v Great Station Properties Ltd., Brockton Capital LLP v. Atlantic-Pacific Capital Inc**. [2014] EWHC 1459.

[107] It is also important to note on this point (as mentioned several times in the ruling) that the Tribunal's findings on Delanson's deliberations were also made in the alternative and gave Delanson the benefit of the doubt on those counter-factual bases, such that there was no possible prejudice to Delanson.

[108] The 90(2) (b) challenge was dealt with at paras. 453-454; see also the assessment of several of the procedural challenges at 479-490. I dismissed it because (i) the challenge was misconceived in that the applicant/appellant did not identify any power either under the arbitration agreement or the Act which the Tribunal is said to have exceeded so as to engage this section (see legal considerations relating to such challenges discussed at [99-102]); and (ii) even if the Tribunal erroneously exercised a power which it had (and none was substantiated) it cannot at law constitute a s. 90(2)(b) challenge. At para. 479, I also stated that as to the alleged s. 90 irregularity resulting from the allegation that the Tribunal drew adverse inferences from the failure to call Mr. Carollo as a witness, firstly that in fact it was not established that any adverse inference had been drawn, and it was "rather fanciful" to suggest that any hypothetical evidence of Mr. Carollo would have made a difference.

[109] The challenge on the ground that the Tribunal failed to deal with all the issues put before is discussed at [505-510]. The court dismissed it primarily on the grounds that no sustainable challenge was made out, as in any event the ground only arises where there is a failure to deal with issues crucial for the decision of the claim or specific defences raised. As noted at [506], the challenge on this ground was to the Tribunal's finding, on a hypothetical basis, as to the exercise

of its discretion to set aside the Distributions if it had found them voidable and not void (which it in fact it did). At the end of the day, the Tribunal found the Distributions *ultra vires*, and set them aside on that basis. How it might have exercised its discretion if it found the Distributions were voidable (rather than void) does not change the outcome of anything.

[110] As to the claim that the alleged inconsistency in reasoning creates uncertainty and ambiguity, I dealt with this at para. 430, and 610-615. As stated there, this challenge is insurmountable because of (i) the s. 95(2) procedural bar (challenges to correct any "ambiguity" in an award to be made within 28 days) and because (ii) the mischief s. 90(2) is directed to is "*the effect"* of the award, as to which there is no uncertainty. The reasoning of the Tribunal does not make the effect of the award uncertain, and an attack on the reasons of the Tribunal can hardly give rise to a challenge on the ground of serious irregularity [606-607].

[111] I would also therefore dispose of these grounds as disclosing no realistic prospects of success on appeal.

B. Issues Relating to Stay of Arbitration

[112] By way of background, the Court announced a stay of the arbitration on 3 March 2021. This was formalized in the Ruling of 13 June 2022, staying the arbitral proceedings pending the hearing of the challenges/appeals. It was common ground that the stay lapsed on the handing down of the Court's decision determining the challenges/appeals, although this was extended by the Court for a short period pending the hearing of the consequential applications for leave.

[113] I apprehend that the stay issue can be dealt with in a relatively short compass. As I rejected leave to appeal, and did not find any merit in the grounds being advanced, it stands to reason that the Court was not satisfied that there were any good grounds on which to continue the stay of the Arbitration. I did grant a *pro-tem* stay for a period of one month to allow the appellants to approach the Court of Appeal.

[114] But I make a few observations for completeness. There is no dispute over the law and legal principles relating to a stay of arbitration. The jurisdiction exists under legislation and procedural rules: s. 67 of the 2009 Act, s. 16(3) of the Supreme Court Act, RSC Order 31A, Rule 18(d), and RSC Order 55, Rule 3, all of which empower the court to order a stay of proceedings, including a stay pending appeal. The parties were also content to adopt the principles which were set out in the Court's Ruling of June 2022 Ruling as follows (at [76)]:

> "(i) A stay pending appeal is not automatic; it has to be justified, and it is often said to be the exception rather than the rule;
> (ii) The court, however, has a wide if not unfettered discretion to grant a stay, and must take into account all the circumstances of the case;
> (iii) A party contending that this appeal will be rendered nugatory failing a stay must produce cogent evidence of the reasons why a stay should be given;
> (iv) A hopeless or weak appeal will never justify a stay, and a party seeking a stay should adduce strong grounds of appeal, as the prospect of the appeal succeeding may be a determining factor where the balance of harm appears to be even;

> (v) Fifthly, and perhaps most importantly, the court should conduct a balancing exercise to determine which party would be irremediably harmed by the grant or refusal of a stay; and (vi) Sixthly, in the application of the above principles, the court has to take into consideration the specific feature of international arbitration".

[115] The appellants argue that several of the initial factors which they argued in support of the initial stay continue to apply, and these are reasons to continue to stay the arbitration. These include (i) realistic prospects of success on appeal; (ii) that Matteo is not being kept out of money because of the stay, because he is a discretionary beneficiary and as he is unlikely to see any funds for a while because even if the Trusts are re-constituted it will take some time before any trustees can make any distributions; and (iii) that Gabriele and Delanson have more to lose if the arbitration continued, both because of the incurring of additional cost and the risk of exposing confidential information to Matteo.

[116] Mr. Martin resisted the stay on two main bases. The first was simply that, if the court refused leave to appeal, it follows as a matter of logic that any continuation of the stay must also be refused, as in that scenario that court would have decided that any appeal does not stand any realistic prospect of success, and in those circumstances there would be very little chance of any appeal ever eventuating. This is a point of some significance as in the context of leave applications for challenges and appeals under s. 89, 90 and 91, as leave to appeal can only be granted by this Court and not by the Court of Appeal.

[117] As to the second basis, he contended that even if the Court were to grant leave, the stay should be refused. This was because the substantive balance had shifted decisively since the stay decision, as the Court had now considered the merits of the challenge and comprehensively rejected the challenge and appeals as being without merit. Other reasons for not granting the stay include: (i) there is no risk of irremediable harm to because the arbitration is not at a stage of a money judgment, and all it means is that the parties will proceed to stage 2; (ii) the long delay caused by the stay has caused real prejudice to Matteo (and the other beneficiaries) who are being kept out of their rights pending reconstitution of the Trusts; (iii) the delay has been caused largely as a result of strategic decision taken by the applicants/appellants in pursuing hopeless an abusive challenges; (iv) and none of the alleged grounds of prejudice asserted by the applicants/appellants can be substantiated, e.g., the entitlement to progress the arbitration is not contingent on Matteo demonstrating an ability to pay costs, and in any event the evidence discloses that Matteo has complied with costs orders; and (v) the complaint about the disclosure of commercially sensitive information is misplaced, as confidentiality orders are a standard part of commercial arbitration and there are standard procedures and precedents in place to mitigate and manage any risks.

[118] In any event, I refused leave for the appeals, so the point of what would have been the position if leave were granted is superfluous, and nothing more needs to be said of it. Furthermore, as noted below (postscript), the appellants' attempt to renew their application for leave to appeal to the Court of Appeal following this Court's oral decision refusing leave was dismissed on the grounds that the Court of Appeal has no jurisdiction to grant leave.

C. Issues Relating to Costs and Interim Payment on Account

[119] The appellants accept in principle that costs ought to follow the event and that there is no basis on which they can resist Matteo's entitlement to costs. However, both Gabriele and Delanson argued that any taxation of costs should be stayed pending the determination of the final appeal and vigorously opposed the application for an interim payment on account of costs.

Stay of Taxation of Costs

[120] It is common ground among the parties that the Court has the power to grant a stay of the taxation, and the only question is whether the court should exercise its discretion. In this regard, Mr. Black referred to the Court of Appeal case of **Amber Louise Murphy v Hot Pancakes Ltd.** (SCCivApp No. 95 of 2020), where the Court discussed the applicable principles in the context of an application by the respondents to stay taxation of the appellant's bills of costs, while the respondent's application for restitution was still outstanding. The Court of Appeal confirmed that the Court had jurisdiction to stay the taxation of costs which the court had ordered a party to pay [at 12], and that the burden was on the respondents [payers of the cost] to show why "*it was in the interest of justice that the taxation should be stayed*" [at 14]. The Court further said [at 21, 37[:

> "21. The test as to whether to grant a stay pending the determination of taxation is a relatively simple one. It is whether there is some merit in the applicant's restitution action and whether the granting of a stay is the order that is likely to produce less injustice between the parties. See two decisions of the Court of Appeal of **Jamaica in Khemlani v Khemlani** [2019] JMCA App 17 at paragraph 46 and **Kenneth Boswell v Selnor Developments Company Limited** [2017] JMCA App 30." […]
> 37. It is clear that there must be exceptional circumstances to grant a stay of taxation proceedings. And in the words of Hoffman, LJ,[1] that the argument to proceed to taxation would be a waste of time and money is often "no reason for granting a stay of taxation". It was clearly a critical fact to the exercise of the discretion to stay the taxation that the taxation would be long tiresome and complicated and may last "four to six weeks".

[121] In *Arab Monetary Fund v Hashim* [1994] Lexis Citation 3324, Staunton LJ said:

> "There has not really been any dispute as to the test to be applied whether this court should grant a stay. There must be, it has been said in some recent cases, some good reason or special circumstances to justify depriving a party of the benefit of an order granted by a judge at first instance. That applies both to an order for payment of damages or debt and to an order for taxation of costs. There must be good reasons. It is not necessary to go into the matter any further than that. There has been some argument as to whether waste of time and money in conducting a taxation is capable of being a good reason. In that connection we were referred to the Lucas case already cited. In my judgment, it plainly is capable of being a good reason; whether it is in any particular case is a matter that has to be decided in the circumstances of the case.
>
> It is said that this taxation is going to be long and complicated. The forecast is that it will take four to six weeks and will cost a great deal of money, although we have

[1] In *Arab Monetary Fund v. Hashim* [1994] Lexis Citation 3324, a case in which the English Court of Appeal granted a stay of taxation in a matter which was said to involve a "*very difficult and tiresome task for the Taxing Master*…".

> not been given a figure for that yet. […] When it comes to taxation, the appetite of these parties shows that it is only too likely that it will take a very long time and cost a lot of money. Of course, it is in the nature of litigation that sometimes time and money turn out to have been wasted, because the purpose for which they were incurred is in the end not determinative. If a party, as in this very case, loses on one issue only, it was a waste of time and money to fight all the others. So it is not necessarily, in the eyes of the law at any rate, wrong that time and money should be spent on a taxation of costs in this case, even if it turns out to have been conducted on the wrong basis, and that it is necessary to the whole thing over again; that is merely one of the misfortunes of litigation, which are many."

[122] Mr. Black submitted in oral submissions that the conditions for the grant of a stay are satisfied for five main reasons, which are summarized as follows:

1. The proposed appeals will satisfy the criteria for the grant of leave to appeal.
2. The taxation will be complicated and protracted.
3. The taxation will be 'tiresome' (as per *Arab Monetary Fund v Hashim*), as it is extravagant and misconceived.
4. Matteo claims to lack funds and any money paid pursuant to taxation will not be reimbursed if paid over.
5. The case is exceptional in every way.

[123] Mr. Martin primary arguments resisting the stay of the taxation and any deferment of an interim payment if granted (also with reference to the principles stated in **Amber Louise Murphy v Hot Pancakes Ltd.**), were: (i) the interest of justice is in favour of no stay, as Matteo has expended significant costs in the proceedings and has won every point raised in the arbitration; and any stay would only cause further financial pressure on Matteo; (ii) Matteo stands likely to suffer the greatest harm by imposing a stay, because of many of the factors set out with respect to the stay of arbitration generally, but notably because of the time the appeal process has taken and the beneficiaries' lack of access to the trust assets; and (iii) the fact that the Court has robustly rejected all of the challenges and appeals for multiple reasons which are compelling and correct.

[124] Approaching this case in the round, I am satisfied that the justice of the matter does not augur for a stay of the taxation. Firstly, I have not been convinced of any realistic prospect of success on any of the grounds of appeal. Secondly, while as clearly demonstrated during the hearing for leave, there are likely to be heavily contested issues during any taxation of costs, in my view this matter does not come near the situation described in **Arab Monetary Fund** where the taxation was said to be likely to occupy four to six weeks. In fact, Mr. Black and Mr. Simms effectively conducted a mini-taxation of the claimed costs during the hearing in their arguments directed towards resisting payment of interim costs on account.

[125] I also do not think that the claims to limited funding by Matteo automatically translates into an inability to reimburse any funds paid over, on the chance that there is a different outcome on appeal (assuming leave is granted). In any event, I do not think that by itself this is a factor that should negate a receiving party from pursuing those costs by way of taxation, or justify a stay being imposed on that process. In response to an argument in **Arab Monetary Fund**, that the

paying party would have difficulty recovering the expense of taxation if they were successful, because of lack of affluence of some of the parties, Staunton LJ said that this was not a point to which he would "*give a great deal of weight*".

[126] I accept that this is not a run-of-the-mill case, and that virtually every point (as has been demonstrated in all of the hearings) is likely to be highly contentious and disputatious. But in my judgment the appellants have not made out the good reasons or special circumstances to justify depriving Matteo of the benefit of his order for costs.

Costs and interim payment on account of costs.

[127] The claim for interim payment on account of costs raises an interesting question on the interrelation between the RSC 1978 ("the RSC") and the CPR 2022 ("the CPR"). In particular, the issue is whether the provisions of the CPR can be applied to the determination of applications arising in matters commenced under the RSC. Put another way, do the procedural rules of the RSC exclusively govern matters commenced under those rules until their final determination, or might an applicant invoke elements of the CPR depending on the nature of the application being made?

[128] The appellants vigorously oppose the claim for interim payment. They argue that there is no jurisdiction for the Court to grant an order for interim costs, as the RSC is said to govern this application and under those rules interim payments are only possible in personal injury cases. Thus, notwithstanding that Part 17 of the CPR provides for the payment of interim costs, those provisions cannot be superimposed on a matter commenced under the RSC.

[129] The respondent's main argument is that even under the RSC the Court was not necessarily precluded from making an interim payment on account of costs, having regard to the wide powers and discretion of the Court under the Supreme Court Act to grant costs. However, the position is put on an even surer footing because of the CPR provisions for interim costs, to which it is submitted the Court can have regard, even if they may not be directly invoked by the respondent.

[130] Mr. Martin anchored his primary submission on the well-known provision of s. 30 of the SC Act, which grants the court wide powers to make an order for costs whether interim or final, as augmented by RSC O.59, r. 2. They provide as follows:

> "s. 30: Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court…shall be in the discretion of the Court or Judge and the Court of judge shall have full power to determine by whom and to what extent the costs are to be paid."
>
> "O. 59, 2.2: "the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the cost shall be paid, and such powers and discretion shall be exercised subject to and in accordance with these rules."

[131] Mr. Martin also referred to several authorities that amplify the width of the court's statutory jurisdiction to award costs (***William Downey v Blue Planet Ltd.*** (COA) para. 25, applied in **Richard Rolle v New Providence Development Company Ltd.**). I need not dwell on any of these cases, as the wide discretion of the Court with regards to costs needs little amplification.

[132] He then cited several authorities which either decided or contain dicta to the effect that, even in the absence of a specific statutory basis, the Court had an inherent jurisdiction under the old rules to make an interim payment on account of costs. The first is **Crociani v Crociani** [2014] JCA 095, where, in response to an argument that the Court of Appeal had no power to make an order for interim payment of costs (unlike the case under the CPR in England where there was express provision), Beloff J. said [at para. 5]:

> "… The wide discretion which the court enjoys under the first clause of this provision on its face could include a power to make an order for interim costs, and is not, in my view confined, on either a literal or a purposive construction, by the specific powers in the second clause which merely emphasizes and supplements the width of the first."

[133] In that case, the Court was construing its powers under art. 16 of the Court of Appeal Jersey laws, which is similar to s.30 of the SCA. Even though the Court was of the opinion that it had the power to make the order for interim costs, it considered that it would be preferable to have the jurisdiction put on a statutory footing [at para. 14] and that it might be preferable to have rules amended to make specific reference to interim payments, so that the Court would be applying "*lex lata*" rather than "*lege ferenda*".

[134] The next case relied on is the decision of Jones J. from the Cayman Islands in **Al Sadik v Investcorp Bank BSC** [2012] (2) CILR 33. That case also proceeded on the basis that the Court had an inherent jurisdiction to make an interim payment for costs even in the absence of a specific provision.

[135] Mr. Martin accepts that the CPR does not apply in full force to these proceedings, as they were commenced before the CPR came into force. But the second limb of his argument in support of the jurisdiction to grant interim costs is that the Court may have regard to the principles set out in the CPR, in particular Part 1 ("Overriding Objectives") and part 25 ("Case Management"), in exercising its discretion. This, he contends, permits the discretion under s. 30 to be exercised "*in a way which has regard to the ethos represented by the CPR*", and therefore allows the Court to award interim costs.

[136] The main provision of the CPR in this regard is 71.10(5), but it is useful to set out several of the relevant sections of Part 17 as follows:

17.1	"The Court may grant interim remedies including— […] (m) an "order for interim payment" under rules 17.4 and 17.15 for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay.
17.5(1)	"The Court may make an order as to costs that it considers just in relation to any order made under this Part."
17.15 (1) (c):	"The Court may make an order for an interim payment only if—

(c) the claimant has obtained judgment against the defendant for damages to be assessed or for a sum of money, including

17(15)4: "The Court must not order interim payment of more than a reasonable proportion of the likely amount of the final judgment."

71.10(5): "Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."

[137] Finally, he argues that if the court accepts that it has jurisdiction to make the order, there are a number of reasons why it should be exercised in favour of Matteo, namely:

(i) the taxation is likely to be a protracted process, considering the approach taken to the litigation, and the appellants will likely take every step to frustrate an early taxation;
(ii) it is in the interest of justice for the Court to make the order so as to take away any incentive for the applicants/appellants to attempt to keep Matteo out of his money by unmeritorious challenges to the cost claim;
(ii) it is disputed that the applicants/appellants have a realistic prospect of success on appeal, and;
(iv) the claim that Matteo would not be in a position repay any money paid to him because of lack of financial means are disputed by Gabriele's own evidence (Bray 11), which sets out that Matteo has complied with costs orders made against him in the millions of pounds.

[138] In the circumstances, Mr. Martin contended that Matteo would be seeking roughly $1.5 million as payment on account, which is roughly half the amount of the cost estimates contained in the affidavit of Ms. Adrienne Bellot (29 December 2023). In this regard, 50% of this total was said to be a "reasonable amount".

[139] Mr. Black and Mr. Simms made three essential points in opposition to the claim for an interim payment: (i) that there was no jurisdiction to order a party to make payment on account of untaxed costs; (ii) even if the court found that there was jurisdiction, it should decline to do so in all the circumstances of the case; and (iii) even if the Court were minded to make an interim payment, it should not do so in the amount claimed by the applicants/appellants and in any event the payment should be deferred.

[140] As to (i), Mr. Black and Mr. Simms argued that any power of the court to make an interim payment on account of untaxed costs must be enshrined in rules of court, and it was not possible to read that power into s. 30 without contorting the meaning of that section. They also referred to a formidable body of authority and jurisprudence standing in the way of the proposition that the court has an inherent jurisdiction to award interim costs (except as provided for under the RSC), and pointed out that there is in fact no English or local cases which supports this position.

[141] The first is the judgment in **Mars UK Ltd. v Teknowledge Limited** [1999] 2 Costs L.R. 44, 11th June 1994, where Jacobs J. confirmed that the UK position before CPR 44.3(8) was that there was no power to order interim payment if costs were sent off to taxation. The next is **In the Extradition of Viktor Kozeny v The Superintendent of her Majesty's Fox Hill Prison** [2008] 2 BHS J. No. 30, where Isaacs J. made the following observations [at 18]:

> "18. The view expressed by Jacob, J that prior to CPR 44.3(8), "if costs were sent off to taxation there was no power to order interim payment" may well be the case in England and dispositive of an application for interim payment inasmuch as our RSC is based on the old English Rules, that is, before the inclusion of CPR. 44(3)(8). There lies the difficulty for the Court on the present application. Caution dictates I await the ruling of the Court of Appeal on the issue of costs generally."

[142] Mr. Simms also referred to two additional local cases, both pre-CPR cases, in which the courts have held that no interim payment was possible on account of costs. The first was **Bolingbroke Limited v. Summit Insurance Limited and another** [2018] 1 BHS J. No. 21, which was a claim for interim payment in a non-personal injury matter, but which was not made under Order 29.9, but the wide case management powers of the Court under O. 31A.

[143] Order 29.9 defines interim payment as a payment on account "*of any damages in respect of personal injury to the plaintiff or any other person or in respect of a person's death*". Order 29.10 provides as follows: "*In an action for personal injuries the plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to appear has expired, apply to the Court for an order requiring that defendant to make an interim payment*." The claim for interim payment was grounded however on Order 31A, r. 18.3(c) (case management powers), which provides the Court with power to make any order or give any direction "*requiring the payment of money into Court or as the Court may direct*". Winder J., as he then was, dismissed the claim for interim payment as and stated:

> "7. I am not satisfied that the powers of the Court in case management could be stretched to expand the nature of the claims amenable to an interim payment. The rules specifically provide for interim payment as well as the mechanism by which it will operate. Further, that mechanism specifically limits the powers of the Court as to how interim payments may be granted.
>
> 8. I agree with the plaintiff's observations that other commonwealth jurisdictions have expanded the purview of interim payments under the Wolf CPR reforms. Respectfully, however, I am not satisfied that Order 31A rule 18 supplies me with the jurisdiction to engage in the judicial activism necessary to extend the operation of interim payments."

[144] The next case relied on is **Patrice Knowles v Island Hotel (T/A Atlantic Paradise Island)** [2022/CLE/gen/00382], which is a post-CPR case and contains the most comprehensive discussion of the interim payment regime under the new Rules. In that case, the Court refused to grant a further request for interim payment, in the exercise of its discretion, and instead ordered an expedited trial. But the case is cited for this general statement:

> "26. The Court does not possess inherent jurisdiction to order an interim payment. The jurisdiction of the Court to make an order for an interim payment is statutory. It is to be found in rules of court, formerly the RSC and now the CPR. Section 22 of the Supreme Court Act, which is modelled upon section 20 of the English Administration of Justice Act 1969 and section 32 of the English Supreme Court Act 1981, merely confers jurisdiction

> upon the Rules Committee to make rules of court enabling orders for interim payments to be made."

[145] The final case cited is **Rolle v Strachan et. al.** (unreported, No. 1064 of 1998], which is pre-CPR, where Dunkley J (Actg.) stated the principle as follows [p. 2-3]:

> "The Rules of the Supreme Court differ from the rules of the English rules on the subject of Interim Payment. The basic difference is that the Bahamian Rules only permit interim payment on account of damages in respect of personal injuries whereas the English Rules permit interim payment on account of damages generally and on account of certain sums other than damages. Section 22 of the Supreme Court Act, 1996, provides a foundation for the Rules Committee of the Bahamian Courts to make rules for the provision of interim payments in the broad terms of the English Rules. Interim payment is defined very broadly in that section. But the Rules have not yet been changed."

[146] Mr. Black and Mr. Simms rounded off the arguments on the jurisdiction issue with a further point that CPR 2(3), which mandates that the Court should have regard to the overriding objectives and case management principles when dealing with matters commenced under the RSC, cannot be relied on to create a retrospective power in relation to the RSC where no such power or jurisdiction existed under those rules. Rule 2(3) of the Preliminary Part of the CPR provides that:

> "2(3): Where in proceedings commenced before the date of commencement of the Rules, the Court has to exercise its discretion, it may take into account the principles set out in these Rules, and in particular the principles set out in Part 1 and Part 24."

[147] In the original version of the CPR, rule 3 revoked the Rules of the Supreme Court (S.I. No 48 of 1978). However, by an amendment added in 2023, the following was inserted after para. 3:

> "4. Notwithstanding rule 3, proceedings commenced in Court prior to the commencement of these Rules, to which these Rules in accordance with rule 2(1)(b) do not apply, shall continue under the Rules of the Supreme Court (S.I. 48 of 1978)."

[148] Mr. Simms argues that the effect of this provision is that the Court is governed entirely by the RSC in respect of any applications to which the CPR does not apply, and therefore the provisions in the new Rules providing for interim payment cannot be applied "retrospectively" to those matters.

[149] The appellants further contend that, even if the Court were to find that there was jurisdiction, it should refuse to exercise it discretion to award interim costs taking into consideration a number of factors, several of which overlapped with the reasons for the stay, namely: (i) that the appeals had realistic prospect of success; (ii) that the interim application will lead to further costs being incurred, as the court will need to conduct a mini-taxation; (iii) the difficulty in recovering payment if the case is reversed on appeal; (iv) and that any estimate should err on the side of parsimony to ensure that the receiving party only gets as much as it will be certain to collect.

[150] Finally, both Mr. Black and Mr. Simms attacked the estimate schedule of costs as being grossly inflated, and including many heads of costs that were irrecoverable. Firstly, it was

contended that what was before the Court in the Affidavit of Adrienne Bellot was not a "bill of costs" with any receipted bills, but a highly unreliable estimate, and the Court was being asked to make an award of $1.5 million based on that estimate. It was also contended that there were many items in the cost estimate which were either irrecoverable, inflated, or contained omissions that would make any assessment difficult, as follows:

(i) some $435, 844.44 of fees said to be payable to junior English counsel not admitted to the Bahamian Bar;
(ii) fees in respect of two silks, which was unnecessary;
(iii) fees for over $100,000 relating to the security for costs and other applications (not recoverable in respect of this hearing); and
(iv) failure to include the fees from Taylor Wessing (who were said to be effectively running the proceedings), which would make any assessment of the reasonableness of the estimated costs very difficult.

[151] In the circumstances, Mr. Black contended that the claim for $1.5million was grossly over-inflated. If the Court were minded to make an interim award, an amount of $500,000.00 would be more realistic, of which $400,000.00 was already covered by money in Court. I did not understand Mr. Simms to have demurred with this.

Court's analysis and conclusions

[152] I have spent some time setting out the parties' arguments on this issue because, as mentioned, it raises an important point of principle in relation to the award of interim costs and the inter-relationship between the RSC and CPR.

[153] On the point of jurisdiction, I accept Mr. Martin's submission that s. 30 of the SCA must be the *fons et origio* of the Court's power to award costs of any kind, including interim payments. It is that provision which empowers the Court to award costs and gives it a wide discretion as to the manner and circumstances in which it can be done. In this regard, and although nothing turns on it for the purposes of this analysis, it is important to point out that the definition of "interim payment" in the SCA is *not* limited to a payment in respect of personal injuries only (as is the case with Order 29), although it *does* exclude any payment on account of costs. It is defined under the Act as follows:

> "(5) In this section "interim payment" in relation to a party to a proceedings, means a payment on account of any damage, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party and any reference to a party to any proceedings includes any person who, for the purpose of the proceedings, acts as next friend or guardian of a party to the proceedings."

[154] Further, s. 22 of the SCA, which is the special section dealing with orders for interim payment, provides for provision to be "*made by rules of court enabling the Court in such circumstances as may be specified*" to make orders relating to interim payment (s. 22(1)). What was specified under Order 29 was for interim payment to be granted in respect of personal injuries

only. The law is clear that where rules of Court have been made, it would be wrong to exercise the inherent jurisdiction to arrive at an outcome different from that which would result from an application of the rules: **Tombstone Ltd. v Raja** [2008] EWCA Civ 1444. I therefore would accept in principle that interim payments were confined to personal injuries under the RSC.

[155] This is not to discount the cases where the courts have found that there was an inherent jurisdiction to order interim payment of costs even in the absence of expressed provisions providing therefor. An interesting example from the region that comes to mind (although not cited to the court by counsel) is the case from the Eastern Caribbean Court of Appeal of **Norgulf Holdings Ltd., Incomeborts Ltd. v (Appellants) v. Michael Wilson & Partners Ltd. (Respondents)** [2005] ECSC J1029-1. There, the court held that there was both an inherent jurisdiction to order interim payment of costs as well as jurisdiction conferred by rule 17.1(g) to grant interim remedies including "an order for interim costs", even though the rules did not include a provision similar to the English rule 44.3(8) [the Bahamian counterpart is rule 17.5(10)] which specifically empowers the court to order an amount to be paid on account before costs are assessed where it has ordered a party to pay costs.

[156] But the court's powers must depend on the particular statutory context under consideration, and will vary from jurisdiction to jurisdiction. In my opinion, the compendious effect of s. 22 of the SCA, the definition of interim payment under that Act so as to exclude payment on account of costs, and Order 29, clearly signal that Parliament intended to limit the Court's power with respect to the grant of interim costs to personal injury claims.

[157] But this does not dispose of the jurisdiction question. It is common ground between the parties that the CPR provides the Court with the ability to order interim payment for costs, including in circumstances where the claimant has obtained a judgment, *inter alia*, for costs to be assessed (17.14). The sticking point is said to be that Matteo cannot obtain any benefit from those provisions because these proceedings were commenced under the RSC and preliminary rule 4 provides for those matters to continue under the RSC.

[158] I reject this submission. In my view, rule 4 of the Preliminary Section of the CPR cannot be read in isolation and certainly does not admit of the restricted construction that counsel for the appellants attempt to give it. It seems reasonably clear that r. 4 was added by amendment to correct (what could only have been) the premature repeal of the RSC. As is clear from preliminary Rule 2, the CPR only applies (i) to matters commenced after the effective date (1 March 2022), or (ii) to matters commenced before the effective date where no trial date had been fixed, or where the trial date was adjourned prior to the commencement date. The effect of the repeal, therefore, was that matters to which the CPR did not apply would have been left in a lacunae, as there was no provision for conversion of matters commenced under the RSC to the CPR. Thus, the RSC had to be revived to continue to give life to and govern these pre-CPR matters until either they were either completed, or otherwise disposed of.

[159] The effect of this is that there are two civil procedure regimes governing proceedings in the Supreme Court, depending on whether they were commenced under the RSC or the CPR, which may pertain for the foreseeable future, unless an amendment is made to provide for the

conversion of RSC matters to the CPR within a certain time period and/or a sunset date is inserted for the RSC.

[160] But there is nothing in the transitional provision that leads to the conclusion that matters commenced under the RSC are hermetically insulated from the CPR provisions and that "never the twain shall meet". Indeed, this would be contrary to preliminary rule 2(3) of the CPR, which expressly requires the Court to have regard to the overriding objectives of the CPR when dealing with matters commenced before it took effect. In fact, I had occasion to point out to Mr. Simms during the hearing that their very applications belied their submissions on this point; they applied by Notices of Application as prescribed by Part 11 of the CPR, when summonses would have been required under the RSC.

[161] In this regard, it is useful to set out the overriding principles the court is required to have regard to:

> "**1.1 The overriding Objective**
>
> (1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.
> (2) Dealing justly with a case includes, so far as is practicable:
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate to—
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party.
> (d) ensuring that it is dealt with expeditiously and fairly;
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
> (f) enforcing compliance with rules, practice directions and orders.
>
> 1.2 **Application of overriding objective by Court**
>
> (1) The Court must seek to give effect to the overriding objective when—
> (a) exercising any powers under these Rules;
> (b) exercising any discretion given to it by Rules; or
> (c) interpreting these Rules.
> (2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merit.

[162] Secondly, and this is an important point, it should be noted that Part 17.1 of the CPR is not merely procedural in nature. It is an empowering section which sets out the Court's jurisdiction and power to grant interim relief or remedies, which may be statutory or inure as part of the Court's inherent jurisdiction (see **Tombstone Ltd. v Raja,** *supra*).

[163] The Court's jurisdiction to grant interim relief may be exercised in respect of any party who comes before the Court seeking the relief or remedy, and the ability to access that remedy

cannot be contingent on whether the matter was commenced under the RSC or CPR. As the maxim goes, "*ubi remedium ibi jus*" (where there is remedy, there is a right). And this is not a contravention of the non-retrospectivity principle, as Mr. Simms contended. The law is settled that there is no vested right to any procedure (see **Yew Bon Tew v Kenderaan Bas Mara** [1983] 1 AC 553 [558] (PC), and **Andrew Smith and another v First Caribbean International Bank (Bahamas) Limited and another** [2023] 1 BHS J. No. 76, per Winder, CJ [at 30].)

[164] The fact that the respondent might not have been able to obtain an interim payment on account of costs under the RSC is nothing to the point as to his ability to do so now. The remedy is now available as part of the Court's arsenal of interim remedies and the applicant has applied for it. Were it otherwise, it would mean that only parties to litigation to which the CPR applies would be able to access the full range of the Court's powers to grant interim relief. In this regard, it is to be noted that Part 17.1 provides statutory power to grant a number of interim remedies not hitherto available either under the Court's inherent jurisdiction, or under Order 29 (including, for example, an interim declaration (17.1 (a)). Can it really be contended that a litigant before the court could not seek an interim declaration upon application simply because his action was commenced under the R.S.C.? I think not.

[165] In this context, I think it is also important to distinguish between scenarios where the litigant may be required to abide by procedural rules regulating proceedings or applications under the RSC, as opposed to those rules which confer jurisdiction. The best example of this pertains to the treatment of costs. A litigant awarded costs in a matter governed by the RSC would be entitled to have those costs taxed in accordance with the costs regime under which the action was determined and the cost order made. This might inure to the benefit or disadvantage of a litigant, depending on whether they are the paying or receiving party, as the CPR makes radical departures from the RSC cost regime. But in such cases, the RSC would necessarily remain the governing provision for those actions.

[166] It is also useful to point out that interim remedies are by their very nature discrete remedies, which are self-standing and not necessarily limited by the nature of the underlying proceedings. In fact, there are clear signals in 17.1 that this was the intention. For example, Part 17.1 (3), and (4) provide as follows:

> "(3) The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.
> (4) The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind."

[167] I am therefore satisfied that, whether by the s. 2 (3) gateway, which requires the Court to give effect to the overriding objective in exercising any powers or discretion under the Rules even in respect of RSC matters, or by directly appealing to the Court's powers under Part 17.1 to grant interim remedies, there is jurisdiction to make an award for interim payment on account of costs, notwithstanding that the matter was commenced under the RSC.

[168] In doing so I should add that all of the cases relied on by Mr. Simms on the jurisdiction point may be distinguished. In **Bolingbroke**, the Court's conclusion was that the court's case management powers could not be stretched to conjure a power to grant interim payment for costs

where there was no statutory power to do so. The statutory power now clearly exists now under Part 17. **Patrice Knowles** and **Rolle v Strachan et. al.** simply says that the power to grant interim costs must be based on the statutory/rules provisions, not any inherent power, and again there is nothing here to detract from the Court's conclusion.

[169] As to the question of whether the Court should exercise its jurisdiction, I am completely persuaded that this is a case in which the Court should exercise its jurisdiction, for the following reasons. I have rejected the appellants' claim that they have a realistic prospect of success on appeal, and therefore I see no reason why the respondent should be kept out of at least some of the funds for his success in the challenges/appeals to the arbitration awards. In fact, having regard to the disparity of means in the main appellant (Gabriele) and the respondent, I am of the view that it would be in the interest of justice and in keeping with the overriding objective of the CPR (Part 1.1(2)(c)(iv)) to make the award.

[170] However, I do think there is merit in the appellants' contention that the claim for interim payment in the amount of $1.5 million is inflated. As Mr. Black and Mr. Simms point out, the respondent has not filed a bill of costs, but only an estimate, which they say is unreliable. Although good practice might require a bill of costs, I am not of the opinion that the failure to file a bill of costs is any impediment to the court conducting the exercise with a view to determining what is a reasonable amount for interim payment, although the court is required to adopt a more cautious approach in quantifying the amount where there is no bill of costs (see **Gee v Estate of John Richard Gee** [2022] EWHC 1590). In this regard, I would note that part 7.14 simply requires affidavit evidence in which the claimant is required to state his "*assessment of the amount of damages or other monetary judgment that are likely to be awarded*".

[171] Matteo has estimated his costs of these proceedings at $2,982,649.00, which Gabriele argues is "staggering" and which Mr. Black says is likely to generate arguments on taxation as to whether those costs are reasonable and reasonably incurred. The contention is that the Court must conduct a "mini-taxation" to determine what is likely to be the sum he might obtain after taxation. I do not think that it is necessary or desirable for the court to conduct a detailed analysis of the costs estimate to arrive at a reasonable figure for payment of interim costs. I accept, however, that the Court does need to conduct some kind of assessment to arrive at an appropriate figure of what costs the respondent is likely to obtain based on a hypothetical taxation to use as a benchmark for determining interim payment.

[172] In this regard, Mr. Black has set out in his written submissions a list of specific objections to the estimated costs as follows:

(i) The claim of $819,046.48 claimed on behalf of Bahamian fee earners across the five phases is an over-estimate, because much of the solicitor work conducted in support of these proceedings would have been done by UK solicitors.

(ii) The fees claimed in respect of Paul Wee (which are more than $400,000) who is said to be junior UK legal counsel and who is not called to the Bahamas Bar, are irrecoverable (in any event being fees of foreign lawyers) and should not be included in any calculation of a payment on account of costs.

(iii) The fees of more than $1,148,000.00 being claimed by Mr. Beltrami KC, in relation to Part 4 alone, and a further $223,100.00 being claimed by Mr. Wilson KC are duplicative and disproportionate, as only one of them presented Matteo's case at the relevant hearings.

(iv) The estimated costs in Part 2 and 3 of the estimated schedule for security for cost and interrogatories of $106,139.56 (which are subject of the 13 June 2022 cost order) are not recoverable as costs in respect of this hearing and should not be included in the calculation of any payment on account of costs;

(v) The costs in Part 1 of the estimated schedule for $251,490.29 for the period 13 June 2020 to 31 December 2020, are attributable to the stay application and should be excluded from a calculation of payment on account of costs at this hearing;

(vi) This leaves the estimate costs contained in Part 4 (for the period 1 January 2021 or nearly $2.332 million) and Part 5 (estimated costs of consequential hearing of nearly $300,000 million)

(vii) Following on from this, $1,858,744.00 on counsel's fees in Part 4 is high and will likely be taxed by more than 50%.

(viii) Next, it is said that the claim of nearly $450,000.00 by six fee earners in Mckinney, Bancroft & Hughes is excessive, and the time spent is likely duplicative of each other and an overestimate given the amount of work which Taylor Wessing is likely to have done.

(ix) The Court should treat the estimates for the consequential hearing in January 2024 (Part 5) with a considerable degree of caution, especially based on the fact that the court reduced the sum of more than $1,600,00.00 sought by Matteo by way of security by some 75% on the basis that it was "clearly duplicative", etc.

[173] I agree with (ii), (iv) and (v), and would deduct those. In respect of (i), I see no basis for reducing the claimed costs simply on the assertion that much of the work has been done by UK solicitors. The work of the UK solicitors is not before this court, and therefore the Court has no way of assessing how much of the work in relation to these matters was done there as opposed to here. In any event, the UK solicitors' costs cannot be claimed before this Court. I would, however, deduct 10% from the $450,000.00 claimed by the six fee earners in (viii) ($45,000.00) on the grounds that some of the work is likely to have been duplicative. As to (ix), I would also deduct 15% from the $300,000.00 claimed for the consequential hearing. As to (vii) (counsel's fees generally), other than the deduction made at (viii), I make no further deductions. On my calculations, Matteo is likely to receive slightly upwards of $2 million on taxation ($2,134,962.15).

[174] I now turn to the amount of interim payment that I think would be reasonable in the circumstances, on the basis that the respondent is likely to receive costs in the amount of at least $2 million. I consider that in all the circumstances of this case it would be reasonable to award Matteo $800,000.00 by way of interim payment, which is just about 40% of the costs that on a rough estimate and based on the points of objection taken by Gabriele, Matteo will likely be awarded on taxation. As indicated, Matteo has sought that the monies paid into Court be paid over as part of any interim award (which I have ordered), and therefore I will order that the additional $400,000.00 be paid by Gabriele and Delanson in the following proportion: $250,000 by Gabriele, $150,000.00 by Delanson.

[175] I do not accede to Gabriele's request to defer the interim payment and will order that the payment be made within 21 days of the delivery of this Ruling.

CONCLUSION

[176] For the reasons given above, I dismissed the applications for declarations and for leave to appeal by Gabriele and Delanson in their entirety and granted in part the application by Matteo for interim payment on account of costs, as well as the costs of the consequential applications.

[177] The terms of the Order giving effect to the Court's decision, with the exception of the quantum of the interim payment on account of costs, have already been drawn and agreed by the parties, and a copy of the Order is annexed to this Ruling.

Postcript

[178] I note by way of postscript that the Court of Appeal on the 22 March 2024 dismissed the appellants' attempt to renew their application for leave to appeal to the Court of Appeal, following this Court's oral decision announced on 6 February 2024 dismissing the appellants' applications for declarations and leave to appeal, mainly on the ground that refusal of leave by the Supreme Court in arbitration appeals was not reviewable by the Court of Appeal.

Klein J.

22 May 2024

In the Commonwealth of The Bahamas
In the Supreme Court
Appeals Division

2020/APP/sts/00013; 2020/APP/sts/00018; CLE/gen/No.00632 of 2020

'TER OF THE WINTER TRUST, THE SUMMER TRUST AND THE SPRING TRUST

AND IN THE MATTER OF AN ARBITRATION

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

BETWEEN:

GABRIELE VOLPI

Applicant / Appellant

- and –

(1) DELANSON SERVICES LIMITED
(2) MATTEO VOLPI
(3) SIMONE VOLPI

Respondents

ORDER

BEFORE the Honourable Mr. Justice Loren Klein

DATED the 6th day of February, 2024 A.D.

UPON an arbitration with its seat in The Bahamas that was commenced by letter from the Second Respondent, Matteo Volpi ("Matteo") to the Applicant/Appellant, Gabriele Volpi ("Gabriele") and the First Respondent, Delanson Services Limited ("Delanson") dated 30th November 2018 (the "**Arbitration**").

AND UPON THE HEARING of the following Consolidated Action:

(i) the Originating Notice of Motion in Action No. 2020/APP/sts/00013 and Originating Notice of Motion in Action No. 2020/APP/sts/00018 both commenced by Gabriele on 9th July 2020 and 23rd September 2020 respectively, and

(ii) the Originating Notice of Motion in Action No. CLE/gen/No.00632 of 2020 commenced by Delanson on 9th July 2020

AND UPON the hearing of the following Notices of Application arising consequential to the Courts Ruling on 28th December 2023 ("the Ruling"):

(i) Application by Gabriele supported by the Thirteenth Affidavit of Richard Horton exhibiting the Eleventh Affidavit of Michael Bray both filed on the 29th December 2023 seeking orders for (i) a declaration that Gabriele does not require the leave of the Supreme Court in order to appeal the Ruling that the Supreme Court has no jurisdiction under section 91 of the Arbitration Act 2009 to give leave to appeal to the Supreme Court on a question of law arising out of an award in arbitral proceedings save with the agreement of all the other parties to the proceedings., (ii) alternatively an order for leave to appeal to the Court of Appeal on the grounds set out in the draft Notice of Appeal set in the draft Notice of Appeal exhibited to Eleventh Affidavit of Michael Bray, (iii) an order for the continuation of the stay of the arbitration previously granted by this court on the 13th June 2022 pending the determination of any application to the Court of Appeal and any consequential appeal and (iv) a stay of any costs orders against Gabriele..

(ii) Application by Delanson filed on 29th December 2023 seeking orders for (i) a declaration (ii) an order for leave to appeal to the Court of Appeal and a certification that such appeal raises matters of general public importance

(iii) a continuation of the stay of the arbitration pending the determination of any application to the Court of Appeal and any consequential appeal and (iv) a stay of the taxation and payment of any costs in favor of Matteo.

(iii) Application by Matteo supported by the Affidavit of Adrienne Bellot both filed on 29th December 2023 seeking orders for (i) costs of the Consolidated Action (ii) an interim payment on account of costs incurred in the Consolidated Action and (iii) the release and payment to Matteo of the sums paid into court pursuant to the security for costs order dated 13th June 2022 on account of costs awarded to Matteo.

AND UPON HEARING Mr. Michael Black KC with Ms. Wynsome Carey for Gabriele, Mr. Brian Simms KC with Mr. Marco Turnquest and Mr. Wilfred Ferguson for Delanson and Mr. John Martin KC with Mr. John Wilson KC and Mrs. Michelle Deveaux for Matteo and Mrs. Janet Bostwick-Dean with Mr. Tavarrie Smith for Simone Volpi.

IT IS ORDERED THAT:

1)

a. The applications by both Gabriele and Delanson for declarations that each of them may appeal as of right from the Ruling and the findings in the Ruling that the Supreme Court has no jurisdiction to grant leave to appeal to the Supreme Court on a question of law arising out of an award issued in arbitral proceedings, save with the agreement of the other parties to the proceedings, are refused and dismissed.

b. Gabriele and Delanson's applications (in the alternative) for an order granting leave to appeal from the Ruling that neither Gabriele nor Delanson have a right of appeal in respect of errors of law, is refused and dismissed.

c. Gabriele and Delanson's applications for leave to appeal the findings of the Court on the challenges under s.89 that the Tribunal lacked substantive jurisdiction, under s. 90 that the Tribunal committed serious irregularities and, to the extent necessary, appeals pursuant to s. 91 in respect of the errors of law said to have been made by the Tribunal, are refused and dismissed.

d. Delanson's application for leave, to the extent necessary, and in any event, to appeal on the grounds of appeal referenced in its draft Notice of Appeal Motion, is refused and dismissed.

e. Delanson's application that the Court certify, to the extent necessary, that each of its grounds of appeal raises matters of general public importance, is refused and dismissed.

2) In respect of the stay of arbitration applications by Gabriele and Delanson:

a. The application of Gabriele and Delanson for an order that the stay of arbitration be continued pending any renewed application to the Court of Appeal and the appeal, is refused and dismissed.

b. The stay of the arbitration as ordered by the Stay Ruling of this Court dated 13th June, 2022 pending the determination of the Consolidated Action, is hereby lifted.

3) In respect of the Costs of the Consolidated Action:

a. Gabriele and Delanson shall pay to Matteo (i) the costs of the Consolidated Action, (ii) the consequential applications and (iii) the costs of the Stay Applications (which by the Stay Ruling dated 13th June 2022 were directed to abide the outcome of the Consolidated Action); such costs to be taxed if not agreed.

b. The applications of Gabriele and Delanson for an order staying taxation of costs and payment of costs pending the determination of any appeal to the

Court of Appeal and Delanson's application that the costs of the consequential hearing be cost in the appeal are refused and dismissed.

c. The application by Delanson to adjourn any payment to Matteo on account of costs until the lifting of the order staying the arbitration, is refused and dismissed.

d. Gabriele and Delanson shall make an interim payment on account of the costs awarded to Matteo in the Consolidated Action only in an amount to be determined by the Court.

e. The sum of $400,000 paid into court by Gabriele and Delanson pursuant to the Court's security for cost order made on 13th June 2022, is hereby released to Matteo in part payment of the interim payment on account ordered at paragraph d above.

AND IT IS FURTHER ORDERED THAT:-

4. A *pro tem* stay of the Arbitration is hereby granted for a period of four (4) weeks from the date of the pronouncement of this Order.

Judge: _____ Date: 6th MARCH 2024

BY THE COURT

REGISTRAR