Neutral Citation Number: [2016] EWHC 2999 (Comm)

Case No: CL-2016-000209 (s68 challenge). CL-2016-000293 (enforcement)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Hearing 17th and 18th November 2016

Before :

Sir Michael Burton

Sitting as a Judge of the Commercial Court

- - - -

Between :

Tony Pulis	**Claimant**
- and -	
Crystal Palace	**Defendant**

- -

Ian Mill QC, Rupert Baldry QC and David Lowe (instructed by Walker Morris LLP) for the Defendant

Fiona Banks and James Rivett (instructed by Edwin Coe LLP**)** for the Claimant

Judgment: 18th November 2016

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JUDGMENT

Sir Michael Burton Friday, 18th November 2016

(3.00 pm)

SIR MICHAEL BURTON:

1. This has been the hearing of an arbitration claim brought by Mr Anthony Pulis, who was respondent in the original arbitration, against the Partial Final Award ("the Award") given on 10 March 2016 by Arbitrators under the FA Premier League rules before a Premier League Managers' Arbitration Tribunal, namely Messrs Nicholas Randall QC, Edwin Glasgow QC and, as chairman, Kenneth MacLean QC.
2. The claimant in the arbitration, now defendant in the arbitration claim before me, was Crystal Palace Football Club, CPFC. I shall call Mr Pulis the Claimant, as above the respondent below, and I shall call Crystal Palace the Defendant.
3. I am satisfied that although the hearing was in private, as in the first instance all arbitration claims are likely to be, this is an appropriate case whereby the judgment should be given in open court, and I have carefully considered in particular the leading decision in this area of **Department of Economic Policy & Development of the City of Moscow v Bankers Trust Company [2005] QB 207,** and particularly per Mance J, as he then was, at paragraphs 38 and 39.
4. The arbitration claim is by reference to s. 68 of the Arbitration Act 1996 ("the 1996 Act"), which provides under the heading "*Challenging the award: serious irregularity*" that:

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

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

And I then quote only the two subparagraphs relied upon here by the Claimant:

"(a) failure by the tribunal to comply with section 33 (general duty of tribunal)

...

(d) failure by the tribunal to deal with all the issues that were put to it."

s.68 (3) sets out the powers of the tribunal if there is shown to be such serious irregularity, including remitting and setting aside the award with a presumption not to set aside but to remit, unless it is satisfied that such would be inappropriate.

5. There was reference in the Defendant's opposition to the arbitration claim to s. 70 of the 1996 Act , and in particular to the provision whereby, under (2), *"An application or appeal may not be brought if the applicant or appellant has not first exhausted ... (b) any available recourse under section 57 (correction of award or additional award)."*

   I was referred in particular in that regard to **Torch Offshore LLC v Cable Shipping Inc [2004] EWHC 787 (Comm).**

6. I am however satisfied that the two challenges made by way of s. 68 to this Award are not, or would not amount to, a correction of the Award, so as to qualify for recourse under s. 57. If the Claimant were right, it would mean in relation to the two grounds, either no liability of the Claimant at all or, in relation to the second ground, a substantially lesser figure in damages; and I am clear that neither of the two grounds

argued before me would have or could have been satisfactorily dealt with by an application under s. 57.

7. The issues in the arbitration concerned the Claimant's departure from the Defendant club in August 2014, and the events leading up to it. It was common ground in the arbitration that under his contract of employment the Claimant was due to be paid a bonus of £2 million gross, if he successfully kept Crystal Palace in the Premier League after the 2013/2014 season, which he did, and if he remained in employment on 31 August 2014, which latter condition was in the event not fulfilled. In early August 2014, ie some two weeks or so before the date of 31 August, the Claimant requested early payment of the £2 million bonus and the Defendant acceded to this request, paying him on 12 August 2014. On the following evening, 13 August, the Claimant informed the Defendant for the first time that he wanted to leave the club and he did so the following day.

8. The Tribunal identified at paragraphs 3 and 4 of the Award that there were two main areas of dispute between the parties. The first, by reference to two alleged fraudulent misrepresentations, consisted of the claim by the Defendant that the Claimant had deceived it into paying him his bonus early, relying upon a case that the Claimant had assured the Chairman of the Defendant, Mr Parish, on 8 August that he was committed to the club and would consequently be remaining until at least 31 August 2014 (the first fraudulent misrepresentation); and that he urgently needed the money early so that he could buy some land for his children (the second misrepresentation), and that the club paid the bonus to him so induced.

9. The Defendant submitted before the Arbitrators, and the Arbitrators found, that both those representations were false: he was not committed to the club, that is he did not have the intention to remain until at least 31 August, and there was no such land

transaction. The case for the Defendant was that the Claimant wanted the bonus early so that he could leave the club, with his bonus, to join another club, and he did so do.

10. Secondly, each side alleged that the other had repudiated the Claimant's employment contract. The Defendant relied upon the Claimant's fraud in relation to the bonus, and contended in addition that the Claimant had refused to take control in respect of the upcoming Arsenal game, the first game of the season, on 16 August 2014, leaving it no choice but to appoint another manager.

11. The Claimant's case was, apart from denying the fraud, that he had only wanted to leave if it was mutually agreeable for him to leave on the eve of the new season, which he claimed it had been. This latter issue led to a conclusion by the Arbitrators in paragraph 149 of the Award, quite irrespective of the frauds, that on 13 August the Claimant made it clear to Mr Parish that he was refusing to take the Arsenal game, and the Arbitrators concluded that that was a sufficiently unequivocal statement that he was not prepared to continue to perform an obviously fundamental part of his contract as manager, being an anticipatory repudiation of the agreement which the Defendant was entitled to accept.

12. This whole question of repudiation which, as I said earlier, was based in part upon that refusal and in part upon the subsequently discovered frauds, justifiable by reference to **Boston Deep Sea Fishing v Ansell 39 Ch.D.339 CA** , did not form part of the argument before me, but it was accepted by both sides that, dependent on my resolution of the issue as to the fraudulent misrepresentations, there might be a consequential impact upon this second issue, the repudiation issue, even though it was not specifically argued before me.

13. The Arbitrators found in the Defendant's favour in respect of both key areas of dispute. They held that the Claimant was liable to the Defendant in damages for deceit in respect

of the bonus, and awarded the Defendant damages to reflect the gross sums it had paid out in connection with the bonus, not only the net sum paid to the Claimant, something short of £1 million, but also the connected tax and National Insurance payments of something over £1 million. As I have indicated, the Arbitrators also held that the Claimant had repudiated his employment contract, and since he had left to join another club he was liable to pay liquidated damages to the Defendant in an agreed amount of £1.5 million. In total, the Claimant was ordered to pay the Defendant, in respect of all these issues, a sum of £3,776,000 in damages.

14. A crucial issue in determining whether the Claimant had acted dishonestly in relation to procuring early payment of his bonus, to which, of course, he would not have otherwise been entitled, because he did, in fact, leave prior to 31 August 2014, was the date of a certain meeting, which became known as the "Heated Players' Meeting". I shall call that the HPM. That is because the Claimant claimed that he was committed to the Defendant until the time when his bonus was paid, and only then changed his mind because of the events of the HPM, which he said coincidentally took place on the very same day as the payment of the bonus, i.e. 12 August. He said that the events of the HPM had caused him, for the first time, no longer to be prepared to commit himself to the club, in the light of what occurred at the HPM.

15. The Defendant contended, by contrast, that the HPM took place on 8 August, and so could not explain the Claimant’s having suddenly changed his mind on 12 August, as he claimed and, in any event, that at and after the HPM the disputes which had been the subject of the HPM were resolved, so that thereafter the Claimant can have had no continuing reason for concern arising out of it.

16. The Defendant's case was that the real reason for what occurred was that he waited until he had the bonus in hand, and then on the day afterwards informed the Defendant that he wanted to leave.

17. The Arbitrators found that the Defendant was right about the date of the meeting and about the Claimant's reason for leaving when he did:

"135. The Panel's firm conclusion is that the Heated Players' Meeting occurred on 8 August. Mr Pulis has remained adamant throughout the proceedings that it occurred on 12 August in the face of the objective evidence which suggests otherwise. The Panel has anxiously considered whether it is simply dealing with an honest difference in recollection. Regrettably the Panel has concluded that Mr Pulis has not been willing to concede that the Heated Players' Meeting did not occur on 12 August because he realised that he had otherwise no explanation for his sudden desire to leave the Club on 13 August, having told the Chairman only 5 days previously that he was happy and committed to the Club in the context of a discussion where he solicited early repayment of his bonus.

136. Since the Panel has concluded that the Heated Players' Meeting occurred on 8 August, Mr Pulis' explanation for his sudden desire to leave the Club cannot be true. There must therefore be another reason. Once Mr Pulis' case is rejected that it was the Heated Players' Meeting which convinced him that he should seek a parting of the ways, one is left with the objective facts that he told Mr Parish that he was happy and committed to the Club on 8 August and he sought to leave 5 days later on 13 August. The only thing that had changed was that he had received early payment of his bonus on 12 August. The Club submits that early payment of the bonus and his decision to

leave the Club are inextricably linked. In the absence of any other explanation from Mr Pulis, this is plainly the most logical inference. Indeed, it is the only inference.

...

141. The Panel has rejected as untrue Mr Pulis' case and evidence that he only decided to leave the Club as a result of the Heated Players' Meeting on 12 August. It is not satisfied that he was candid with the Tribunal as to his real reason for seeking to leave. It is much more likely that he intended to seek more lucrative employment with another Club and that is the real reason he sought early payment of his bonus, rather than an urgent need for the money for a non-existent land transaction."

18. The Arbitrators also made a further finding in relation to the second fraudulent misrepresentation alleged against the Claimant, which finding was not challenged before me at all. The Tribunal found that the Claimant had deliberately sought to deceive the Defendant with his claims about needing the bonus early in order to buy some land for his children:

"101. It is clear beyond doubt that the statement that Mr Pulis needed to show £2 million in his account preferably by 13 August to proceed on the purchase of property was completely untrue. There was at that date no imminent property transaction for which Mr Pulis had an urgent need of £2 million (net of tax). Mr Sheron had no proper basis for believing that there was any such imminent transaction.

.....

137. The Panel is also unimpressed with Mr Pulis' evidence concerning the land transaction. The objective evidence shows that there never was any imminent transaction at any time that Mr Pulis was seeking early payment or was making representations to the Club concerning his need for early payment. From what he told

Mr Parish on 8 August and what his agents repeated to Mr Parish thereafter, the Panel concludes that he deliberately gave Mr Parish the impression that he had a pressing need for the money in relation to a land purchase that he intended to proceed with. He also sought to play on Mr Parish's goodwill by referring to the land as being for his family (Mr Parish having recently attended the wedding of one of his daughters). There was in truth no pressing need for the money at all, since at no time was there a plot of land on the market which Mr Pulis was remotely close to purchasing. The Panel is satisfied that Mr Pulis intended to give Mr Parish the false impression that he had a pressing need for the money for use in connection with an imminent land transaction and that he knew or was reckless to the fact that the impression he was giving to the Club was a false one. His motive in doing so was to secure early payment of £2 million."

19. Consequently, the Arbitrators found as follows:

"*139. The Panel also concludes that Mr Pulis was not telling Mr Parish the truth when he told him on 8 August that he was happy and committed to the Club and would be there on 31 August. The Panel has rejected his case that the Heated Players' Meeting occurred on 12 August and that was the reason for his apparently sudden change in mind from being happy and committed to the Club on 8 August to wanting to leave on 13 August. It is simply not credible that he could honestly say that he was happy and committed to the Club on 8 August and have changed his mind so completely by 13 August, when nothing had happened other than him having received £2 million from the Club. Indeed, since Mr Parish had conceded to the players' bonus demands on 8 August and had paid Mr Pulis' bonus early as requested, one would have thought that he ought to have been feeling less frustrated rather than more frustrated on 12 August.*

140. The Panel therefore concludes that Mr Pulis deliberately misled Mr Parish concerning his intentions on 8 August with the intention of persuading him to authorise early payment of his bonus. The Panel also accepts that the Club relied on Mr Pulis' representations and assurances both as to his intentions and as to his supposed pressing need for payment in making early payment. If Mr Pulis had told the Club the truth concerning the supposed property transaction or about the state of his intentions, the Club would not have arranged early payment of his bonus. The Panel concludes that Mr Pulis' motive in misleading the Club was to secure early repayment of his bonus."

20. There was a consequent conclusion in the Final Award dealing with interest and costs, given on 27 April 2016, to which to that extent there is a consequential challenge, as follows:

"... it is appropriate to stand back and consider the picture which has emerged following the hearing of an arbitration which has been hard fought on both sides. On the Tribunal's findings, Mr Pulis secured early payment of his bonus from the Club by deceit in August 2014. The day after he had secured payment of £2 million (net of tax), he dropped the bombshell on the Club that he intended to leave, leaving it, as must have been his intention, in the lurch on the eve of the new season and an important game against Arsenal. When pursued by the Club to recover compensation for his breaches of duty, the excuse that he raised and maintained throughout the proceedings was a false one concerning the timing and effect of the Heated Players' Meeting. By any standards his conduct (prior to and during the litigation) has been shown to be disgraceful."

And I refer also to paragraph 41 of the Final Award, in which the Arbitrators reached a consequential conclusion that it was appropriate in the circumstances to make an award of indemnity costs because of their conclusions as to the conduct of the Claimant.

21. It is common ground that the date of the HPM was central to the resolution of the first fraudulent misrepresentation, although not of the second fraudulent misrepresentation. As I have said, the Claimant's case was that it took place on 12 August and was, effectively, the turning point, whereafter what had previously been his content with the club was changed to discontent.

22. The Defendant's case was that the HPM was on 8 August, that the dispute with the players was more or less resolved, and hence there was no outstanding problem thereafter, and if the Claimant was happy to stay on the 8th, then there was nothing thereafter which could have caused him to change his mind.

23. The Claimant challenges, under s. 68, to which I have referred, the Award, relying on two grounds, one going to liability and one to quantum. I shall call them Ground one and Ground two.

24. Ground one was ably argued by Ms Fiona Banks of counsel. The Claimant's case is that the Arbitrators completely ignored the evidence of two witnesses who gave oral evidence for the Claimant that the HPM was on the 12th, Messrs O'Keefe and Price. The Arbitrators found that the HPM was on 8 August, without dealing expressly with that evidence, even though the evidence of those witnesses was described by Mr Harris QC, then representing the Claimant, in his closing submissions, as "*fatal*" to the Defendant's case.

25. It is necessary to consider a number of paragraphs in the Award and for me to remind myself, by virtue of the fact that it is common ground, that:

    (i) a s. 68 challenge can only succeed in exceptional circumstances, and

    (ii) an arbitrators' award should not be read as a statute and should be approached in a "*reasonable and commercial way expecting, as is usually the case, that there*

will be no substantial fault that can be found with it", **Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14 at 14F** per Bingham J.

26. The Arbitrators addressed the question of oral evidence at the following paragraphs:

"5. The events which are germane to the resolution of these disputes occurred within a relatively narrow time frame in August 2014 and in a relatively few number of meetings, discussions and communications between Mr Pulis and his representatives and the Club and its representatives. The Panel's determination as to what was or was not said and by whom in the course of these meetings and discussions turns upon its assessment of the witnesses' evidence in the context of evidence provided by contemporaneous documents and other circumstantial evidence.

6. Bearing in mind that serious allegations of impropriety have been levelled by the Club against Mr Pulis in connection with the early payment of his bonus and termination of his employment, the Panel directs itself with reference to the requirement that, although the Club's burden is to prove its allegations on the balance of probabilities (ie that it is more likely than not that they occurred), when assessing the probabilities the Panel will have in mind, as appropriate, that the more serious the allegation the less likely that it occurred. The Panel also bears in mind the words of Robert Goff LJ in Armagas Ltd v Mundogas SA (The 'Ocean Frost') [1985] 1 Lloyd's Rep 1, where he said at 56 - 57:"Speaking from my own experience I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict

of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth".

.....

23. It is also common ground between the parties that feelings were running high amongst the players at this meeting, that voices were raised and that the atmosphere was a tense and charged one. For this reason the meeting has been referred to by the parties, and the Panel adopts their description, as the Heated Players' Meeting. There are, unsurprisingly, differences in the recollections of the witness who gave evidence about a meeting which took place eighteen months ago. Understandably, none of them can be expected to have a precise recollection as to what was said in a relatively short meeting when emotions were running high or can have expected to be giving evidence about what transpired many months later. In so far as any of the differences in recollection as to what took place at the meeting matter to the resolution of this dispute, the Panel resolves them as set out below.

24. By far the greatest bone of contention between the Club and Mr Pulis over the Heated Players' Meeting concerns the date when it actually occurred. The Club's case is that it took place on the morning of Friday 8 August 2014, while Mr Pulis' case is that it took place 4 days later on Tuesday 12 August 2014. It might seem surprising that the date of the meeting assumed such importance given that the nature and content of the discussions was largely common ground. However, the precise date on which the Heated Players' Meeting occurred assumed a pivotal role in the parties' respective cases on the facts because Mr Pulis received early payment of his bonus on Tuesday 12

August. The following day, 13 August 2014, Mr Pulis approached Mr Parish with the news that he wished to leave the Club.

...

27. The oral evidence concerning the timing of the Heated Players' Meeting must be considered in the context of the contemporaneous documents. They provide a framework which allows the Panel to test the accuracy of witnesses' recollections and the probabilities of the Heated Players' Meeting having occurred either on the 8 August or the 12 August 2014. This is particularly important in the present case since it was apparent that both sides were (at one time or another) to an extent confused or under a misapprehension as to the sequence of events and relevant dates as appears from the sequence of the pleadings and the witness statements."

27. The Defendant submits that the Arbitrators plainly had the evidence of Messrs O'Keefe and Price in mind, not least because of the heavy reliance upon that evidence placed by Mr Harris in his colourful closing submissions. The Defendant submits that the Arbitrators specifically addressed those witnesses in the following paragraphs:

"36 ... Various other statements were served in support of Mr Pulis' case that the Heated Players' Meeting took place on 12 August 2014. Mr Pulis' pleaded case and the case supported by his statements thus remained that it was the Heated Players' Meeting (which he says was on 12 August) which led him to seek an 'amicable separation' from the Club.

...

60. Mr Pulis' version of events on 12 August was confirmed in the witness statements and sworn evidence given by a number of witnesses called on his behalf.

61. Mr Pulis also called three former players who were at the relevant time on the periphery of the first team squad and are now no longer with Crystal Palace to say the Heated Players' Meeting took place on 12 August and that it could not have been on 8 August. They were Mr Barry Bannan, Mr Stuart O'Keefe, and Mr Lewis Price ...

....

65. The Panel has carefully considered all the evidence presented to it in the form of witness statements, oral evidence, expert reports and contemporaneous documents. It has also considered the detailed submissions made by both parties in their opening and closing submissions.

66. The Panel concludes that the irresistible inference from all the evidence is that the Heated Players' Meeting occurred at the Club's training ground on the morning of Friday 8 August 2014 and not on 12 August as alleged by Mr Pulis. In the Panel's estimation that is the only conclusion which is consistent with the contemporaneous documents and with the oral evidence which the Panel can accept. The Panel's reasons for this conclusion are set out in the paragraphs which follow. However by way of comment at this stage the Panel is unable to accept the submission made by Mr Harris that some of the eye witness evidence called in support of Mr Pulis should be viewed as being superior to the surrounding contemporaneous and forensic evidence [The use of the description "*superior*" seems to me to echo the submission by Mr Harris that the evidence of those superior witnesses should be regarded as *fatal* to the Defendant's case]. *The Panel considers that eye witness evidence of this nature is notoriously unreliable because of the general unreliability of human recollections many months after incidents have taken place."*

28. The Arbitrators set the oral evidence for the Claimant against the following. First the evidence of Mr Parish, the Chairman, in the following paragraphs. In paragraph 45 the evidence of Mr Parish is recorded that the HPM could not have taken place on 12 August as the Claimant claimed, since he, Mr Parish, was not at the training ground on 12 August. The Arbitrators continued that apart from Mr Parish's evidence that the HPM took place on 8 August, supported by the evidence of Mr Alexander, Mr Moody and Mr Guyett, the Defendant referred to a number of documents which it said are consistent only with the HPM having taken place on 8 August, and I shall refer to that evidence in a moment.

29. But so far as Mr Parish is concerned, the Arbitrators set out in paragraphs 56, 57, 62, 63, 64 and 78 to 79 the evidence which was adduced as to Mr Parish's movements on 12 August, and the supportive evidence of taxi fares, of telecommunications evidence called as expert evidence, and the hairdressing salon at which he attended on the relevant morning when the HPM is said to have occurred, and the Arbitrators were persuaded by that evidence.

30. The Arbitrators also set the oral evidence of the Claimant and his witnesses against the documentary and other contemporaneous evidence and the likelihoods, and it is that which was referred to in paragraph 45, to which I referred above, though the assessment by the Arbitrators of all that evidence is set out in paragraphs 37 to 43, 46, 47, 48, 49 and 50, 53, 54 and 56.

31. In paragraph 66, which I have quoted above, the Arbitrators referred to " *the irresistible inference from all the evidence*" that the HPM occurred at the Club's training ground on the morning of Friday 8 August 2014, and not on 12 August as

alleged by the Claimant, and to their doubts about the eyewitness evidence relied upon by Mr Harris, which I have already cited.

32. The Tribunal says at paragraph 71 that, most significantly, the contemporaneous documents were inexplicable if the HPM did not take place on 8 August, including the evidence which showed that the bonus schedule was marked as agreed on the afternoon of 8 August.

33. Further, the Arbitrators deal again with the overwhelming likelihoods, and they indeed describe the reverse as "*inconceivable*" in paragraph 73, and also in paragraphs 75, 76 and 77. This very careful analysis by the Arbitrators ends as follows in paragraph 85:

"It follows from the above that the Panel is driven to conclude on the evidence that the Heated Players' Meeting took place on 8 August. This conclusion is the only one available to the Panel which is consistent with the wealth of hard-edged contemporaneous documentation and forensic evidence. Although Mr Harris fought valiantly to undermine this evidence his efforts have merely served to reinforce in the Panel's mind the overwhelming force of this objective evidence. The Panel also considers it telling that there is not one single item of objective contemporaneous or forensic evidence that positively puts Mr Parish at the training ground on the morning of 12 August. In the light of this evidential picture the Panel considers that there is no realistic option on the evidence other than to conclude that the meeting took place on 8 August and not on 12 August."

34. I have considered the authorities to which both sides refer me on s. 68, in particular **Schwebel v Schwebel [2011] 2 All ER (Comm)** at 1048, **Petrochemical Industries Co v Dow Chemical Co [2012] 2 Lloyd's Law Rep 691, Sonatrach v Statoil [2014] 2**

Lloyd's Law Rep 252, and **Secretary of State for the Home Department v Raytheon Systems Limited [2014] EWHC 4375 (TCC) and [2015] EWHC 311 (TCC).**

35. I have also considered the Award itself, given by expert practitioners and arbitrators, who, as the Defendant's skeleton sets out, heard live evidence from 14 witnesses for each of the parties, and considered a further ten unchallenged statements, and were addressed with detailed written opening and closing submissions from the parties totalling 383 pages, in addition, of course, to the documentary evidence, and the transcripts, which they will have had the opportunity to consider.

36. I did not call on Mr Mill QC for the Defendant, who put in a compelling skeleton argument, assisted by Mr Rupert Baldry QC and Mr David Lowe of counsel. Ms Banks accepted that her obligation, by reference to the s.68 authorities, was, as she put it at the outset, to show that the evidence of the two witnesses was "altogether ignored" or "entirely overlooked", and she so asserted. Her submission in essence was that the arbitrators were obliged, either as a result of the duty of fairness, by reference to s. 68(2)(a), or by way of dealing with an issue by reference to s. 68(2)(d), to address directly the evidence of the two witnesses and say why, despite their evidence, the meeting was on 8 August, or to state that their evidence was rejected, although she accepted that it would have been enough to say that other evidence was preferred to them, and that it was not necessary for the Arbitrators to say in terms why their evidence was rejected.

37. I am entirely satisfied: one, that the issue as to what day the HPM took place was fully canvassed, considered and dealt with: two, that the evidence of Messrs O'Keefe and Price was well known to the Arbitrators, was considered and was taken into account. Both

those witnesses were cross-examined by Mr Mill QC on Day 9, and it is plain that their evidence was challenged by him. Having heard that evidence, the Arbitrators concluded that the inference to the contrary, to be drawn from the totality of the evidence, was "*irresistible*".

38. There was, in my judgment, and in the light of the authorities, no need for the Arbitrators to explain why they preferred other evidence, or why they did not accept the evidence of those witnesses, provided that they had -- and they plainly had -- carefully considered their evidence, not least because they make express reference to them in the course of the Award, as I have set out. I refer in particular to the words of Akenhead J in **Schwebel** at 1059, at paragraph 23(b), where he said:

"*Arbitrators who are required to give reasons in their awards do not have to list all the arguments or items of evidence as advanced, which they accept and which they reject. They should identify usually the primary evidence which they do find compelling where the case depends upon factual findings because that will be part of the reasoning."*

39. The Arbitrators plainly did do that which Ms Banks said that they should have done, namely state that they preferred the other evidence to the oral evidence adduced by the Claimant. And it is quite clear that the so-called "*fatal*" evidence of Mr O'Keefe and Mr Price is what was being referred to in paragraph 66 of the Award, which I have cited above.

40. Three, in any event there was no substantial injustice, which is, of course, a necessary requirement of s. 68 to be proved by a challenger as a result of any irregularity under s. 68, even if there was one, since there was another basis for the finding of fraud which was not sought to be challenged, namely by reference to the non-existent land transaction: see paragraphs 101 and 137 of the Award.

41. Ms Banks submits that if the Arbitrators had taken a different view about the evidence of Messrs O'Keefe and Price they might not only have reached a different conclusion as to the credibility of the Claimant in relation to the date of the HPM, and thus as to the first fraudulent misrepresentation, but they might also have taken a different view about the second fraudulent misrepresentation. This seems to me to be hopelessly speculative. The case as to the non-existent land, described in paragraphs 93 to 109 of the Award, with the lack of any evidence which supported a case, or to justify his alleged need for the £2 million two weeks early, was so weak that I am satisfied that no possible enhancement of the Claimant's credibility would have saved it.
42. I turn to Ground two, persuasively argued by Mr Rivett of counsel, who was responsible for the preparation of what became known as the Tax Appendix, that is an appendix to the written submissions put in by Mr Harris on behalf of the Claimant, which included such an appendix, of which Mr Rivett was the author as an expert tax counsel, as part of the Claimant's written submissions.
43. Ground two is based upon the submission that the Arbitrators failed to consider at all the tax consequences if the payment of the bonus was fraudulently induced, resulting in payment to the Claimant of the £2 million bonus, of which only £959,000 was in fact paid by the Defendant to the Claimant, the balance of some £1.2 million being paid by the Defendant to HMRC in respect of tax and National Insurance.
44. The case made by the Claimant is described by the Defendant at paragraph 64 of Mr Mill's skeleton as follows:

"*The thrust of the arguments which Mr Pulis says the Tribunal has failed to engage with/ignored are that:*

(a) The tax element of Mr Pulis' Bonus paid by the Club to HMRC was not a loss suffered by the Club because it was open to the Club to reclaim those sums from HMRC;

(b) Mr Pulis was not enriched in the amount of tax paid to HMRC because those amounts were sums for which any liability to account was that of the Club (and not Mr Pulis) and were in fact paid to HMRC (and not Mr Pulis), and

(c) The Club (if it had suffered loss in the amount of those sums) failed to mitigate its loss by not pursuing HMRC to recover the tax it paid on Mr Pulis' bonus."

45. The detailed tax submissions were, however, set out in the Claimant's Tax Appendix, and it is that which Mr Rivett says was not addressed by the Arbitrators. The Arbitrators dealt with loss at paragraphs 145 to 147 of the Award:

"145. The Club seeks repayment of Mr Pulis' bonus on a number of legal bases. On the basis of the Panel's findings that Mr Pulis deliberately misled the Club as to his supposed pressing need for the money to be paid early and his state of mind with a view to securing early payment of his bonus, it follows that Mr Pulis is liable in damages in deceit to the Club in the amount of £2.2767 million which represents the Club's out of pocket loss caused by the early payment of the bonus. Although Mr Pulis personally received the sum of £959,000 net of tax, the Club paid the tax and National Insurance element to HMRC. It would not have done so but for the early payment of the bonus. It follows that that is a loss attributable to Mr Pulis having misled the Club into paying the bonus early. Mr Pulis argued that the Club had failed to mitigate its loss by not seeking recovery of the tax element from HMRC. However, since Mr Pulis was denying any wrongdoing or that the money had not been properly paid to him it is difficult to see what effective steps to recover the tax element of the payment that the Club could have taken

before trial. The Panel therefore rejects the complaint of failure to mitigate on the part of the Club.

146. In its submission for the hearing of this matter the Club had offered to seek repayment of the tax element from HMRC and only if it could not recover the tax element from HMRC to claim the tax element from Mr Pulis. For a reason that the Panel found difficult to follow Mr Pulis resisted this course. In closing submissions Mr Mill for the Club withdrew the offer to stay that aspect of the Club's claim pending an attempt to recover the tax from HMRC. Since we have rejected Mr Pulis' case that the Club has failed to mitigate its loss the Club is entitled to recover its out of pocket loss of £2.276 million.

147. The Panel considers that the Club was induced to pay the bonus early, and to pay the tax element of it, by Mr Pulis' representations concerning his state of mind and the supposed urgent need connected with a property transaction. It made the payments (and in making payment of the tax element discharged Mr Pulis' tax liability) under a mistake of fact (that there was a pressing need for the money when there was not; that Mr Pulis was happy and committed to the Club when he was not). The Club would also be entitled to recover at least the amount of the bonus received by Mr Pulis and the tax paid on his behalf on the basis of money paid to Mr Pulis under a mistake of fact. The fact that the tax element was paid to HMRC in discharge of Mr Pulis' liability to HMRC rather than direct to Mr Pulis does not mean that Mr Pulis has not also benefitted to the extent of the tax element which he would otherwise have had to pay out of his pocket."

46. There is no doubt:

(i) that as at the date of the hearing there had been, and the Arbitrators were right to find that there had been, no failure by the Defendant to mitigate their loss. No tax could have

been reclaimed at a time when the Claimant was still denying the fraud and asserting his entitlement to the bonus;

(ii) that the Defendant was entitled to rest on a case based not on unjust enrichment, so that it didn't matter that the monies were not paid in their entirety to the Claimant but to the Revenue, but based upon out-of-pocket loss, the Defendant having paid over the whole gross sum, directly as a result of the fraudulent misrepresentations which the Arbitrators found.

47. Mr Rivett submits that the Arbitrators failed to address the detailed submissions set out in his Tax Appendix, adopted simply by reference by Mr Harris in his opening and closing submissions. These tax submissions concluded as follows:

"50. The net effect of the various tax regimes is that if, contrary to Mr Pulis' case, he was not entitled to the Bonus and/or there exists a right on the part of CPFC to claim from Mr Pulis the Bonus, as alleged, ... then it will be open to CPFC (but not Mr Pulis) to recover the amount of any income tax and any Secondary (Employer) National Insurance Contributions from HMRC. Such a claim would arise on the basis that either Mr Pulis was not 'entitled' to the relevant sums, or on the basis that the sums did not properly constitute 'employment income' within the meaning of the relevant employment income tax regimes.

51. So far as mechanics of recovery from HMRC are concerned, it is possible that CPFC could recover overpaid income tax/NIC from HMRC under the PAYE machinery, (provided it can be demonstrated that ...)

52. In any event, so far as the mechanics of the regime are concerned even if the payment did not amount to an 'inaccuracy' within the meaning of regulation 67 of the PAYE

Regulations it will be open to CPFC to make 'freestanding' claims for recovery of any income tax/NIC from HMRC."

48. Mr Mill submits that this was at best a hope and an uncertainty: see paragraph 77(1) of the Defendant's skeleton in which he sets out that:

    "CPFC's position was and remains that (i) this is inherently uncertain, as it would depend on how HMRC treated any claim (since the award would not be binding on HMRC), (ii) it is uncertain whether HMRC would accept the claim."

    And he sets out certain other uncertainties. I refer also to the transcript at Day 11 at page 50 in that regard.

49. Mr Rivett submits that the Arbitrators should have addressed his submissions made in the Tax Appendix and failed to do so, and that such failure is a failure to deal with an issue as to whether the loss would or might be recoupable, and/or a failure to act fairly, and that it was a substantial injustice to the Claimant in that the result is that he is left to pay out the tax when it will or may be recoverable thereafter from HMRC.

50. Mr Mill submits that the result would, in fact, not have been any different, even had some reference been made by the Arbitrators to those arguments, and that there was no failure to deal fairly by the Arbitrators because it is important to address the fact that it is not just the Award to which this court must look, but the way the hearing proceeded before the Arbitrators, and that the alleged substantial injustice must be set in context.

51. There are two significant exchanges, which are apparent from the transcript. The first is at Day 11, pages 114 to 115, where Mr Harris said:

    "I will attempt ... if I may to perhaps rephrase [the point]. *The Club accepts that it may be able to get this money back and it wants the opportunity to try to do so, which means that the Club cannot now say to you today that this is loss that the Club has definitely*

sustained because it wants the opportunity and thinks it might be able to obtain this money back."

The Chairman then said:

"*The Club has paid out £2 million. It does not have the £2 million which it did have. Now at the moment there is a doubt, let's just put it neutrally, as to whether it can get that money back from the Revenue. That being the case why is it not right to say that as at today the company has suffered a loss of £2 million?"*

Mr Harris does not say, either then or thereafter, that he relies upon his Tax Appendix to say that the tax will be recoupable.

52. Secondly in Day 11, as referred to in paragraph 146 of the Award, there is a further relevant exchange. At page 119 Mr Harris had said:

"If you are not with me on what those submissions are about how it is a claim that should be dismissed now, then I would accept that you should adjourn or park that [ie the tax] *until such time as it could be further progressed by the Club with the Revenue."*

That led to the following passage at page 157, in an exchange between Mr Mill and the Chairman, when Mr Mill said this:

"The very kind offer that we made to stay part of it, in order to help Mr Pulis' cash flow was offered at the outset and rejected thunderously. I offered it in closing. It was again rejected thunderously. We will withdraw it, okay. We will use our best endeavours to assist Mr Pulis to get his money back and whatever form of words you want, but they don't want it. Fine. We were trying to help. We withdraw that offer of assistance. It doesn't mean you have to take that as binding upon you. I am just telling you that is our position and, frankly, it is one we are perfectly entitled to take."

53. Flaux J, at page 255 of **Sonatrach**, to which I have referred, at paragraph 11 said:

"The section [s. 68] *is designed as a long-stop available only in extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."*

I must remind myself of that.

54. It is quite clear that at one stage there was an offer, not taken up, that there should be a stay as to the tax element of the award, but that was not in the end available to the Arbitrators. I have read paragraphs 145 to 147 of the Award. I would find it very difficult to be satisfied that the Arbitrators failed to deal with an issue when it is so apparent from the exchange at Day 11, 114 to 115, which I have read, that Mr Harris was not challenging the position that there was *a doubt* as to the recoverability of the tax and, at page 157, that the proposed agreed stay had not occurred.

55. However, I am, in any event, satisfied that a failure to make specific mention of this in the Award made no difference at all to the result, and that there was no substantial injustice suffered.

56. In case that were not so, I am in any event satisfied that there is no substantial injustice by virtue of what has eventuated at the hearing before me. The substantial injustice which could be relied upon by the Claimant is the risk of double recovery by the Defendant as a result of a receipt by the Defendant of monies from the Revenue and their keeping the monies paid to them under the judgment; or a failure by the Defendant to take steps which might lead to the recovery of the tax, assuming that it is recoverable, and (notwithstanding the decision in **Ward v HMRC [2016] UKFTT 0439**) is only recoverable by the Defendant.

57. The Defendant expressly agreed in the course of the hearing before me, and recorded in a draft order which has been put before me, that the Defendant agrees to use the following

reasonable endeavours, at the expense of the Claimant, to give assistance to the Claimant in his future efforts to recover the tax and National Insurance paid by the Defendant to HMRC in respect of the bonus of £2 million, if so requested by the Claimant, making, jointly with the Claimant, an application to HMRC to recover the tax for the benefit of the Claimant, and that in the event that, or insofar as, HMRC refused to allow such recovery, and, if so requested by the Claimant, making and/or cooperating in an appeal against such refusal, but only in the event that leading counsel practising at the Tax Bar has advised the parties in writing that such an appeal would have reasonable prospects of success, provided that the Defendant should not be required to undertake any such action there referred to unless and until it is in receipt from the claimant of cleared funds.

58. Secondly, the Defendant agreed that, if and insofar as the Defendant recovered any tax from HMRC, and if and insofar as the Defendant had already recovered such funds from the Claimant, such that retaining the tax would entail double recovery on the part of the Defendant, it would, on such recovery, pay those sums over to the Claimant. That seems to me to resolve any injustice that might have resulted from that not being spelled out by the Arbitrators, assuming there was such an agreement on offer, which at that stage there was not. Nevertheless, the indication that was given by the Defendant in the course of the hearing was entirely consistent with that position.

59. I turn, finally, to the discrete point made by Mr Rivett relating to corporation tax. This arises from the short paragraph at the close of the Tax Appendix at paragraph 54, where he said:

"Even if, contrary to Mr Pulis' case set out above, CPFC is entitled in principle to claim from Mr Pulis its loss arising from the income tax and NIC paid to HMRC in respect of

the bonus payment, CPFC's claims do not take into account the benefit of any corporation tax deduction that has been enjoyed by CPFC in respect of the bonus payment which would reduce the amount of any loss that CPFC has suffered."

60. This was not raised by Mr Harris at any time in the arbitration, except by a generic reference to his reliance upon the written submissions. Although, of course, it was for the Defendant to establish its loss, this was a fraud claim and any ambiguity falls to be resolved in favour of the innocent victim. But, that said, it is not clear that there was any corporation tax deduction, even now. There was no exploration of that in the arbitration. If it was being actively pursued as a point, one would expect that the Claimant would have sought disclosure in relation to it. It is not surprising that the Arbitrators did not deal with it in the absence of any such investigation, any such disclosure, or any reliance on the point in argument.

61. The Claimant did not address the absence of any reference to it in the Award when counsel on his behalf came to make their submissions for the Final Award, but instead they put their case in paragraph 40 of their submissions on interest and costs for the purposes of the Final Award, as follows:

"The [Defendant] *has, however, had the benefit of a reduction of its corporation tax bill by virtue of the expenditure of the bonus. In those circumstances it is appropriate to make a deduction from the interest calculation in respect of the damages in deceit."*

62. Paragraph 37 of the Defendant's response submissions reads as follows:

"Mr Pulis then contends at paragraph 40 that because CPFC has had the benefit of a reduction in the corporation tax bill due to paying the bonus to Mr Pulis there should be an unspecified deduction from the interest it should be awarded. CPFC submits that no such deduction is appropriate. It is already claiming the relatively low rate of 2 per cent

over base, corporation tax is low and it will, in any event, have to pay corporation tax on the damages it receives."

63. In paragraph 14 of the Final Award the Arbitrators addressed this dispute:

"Mr Pulis submits that an (unspecified) reduction to the award of interest should be made to reflect the corporation tax savings the Club would have enjoyed as a result of paying Mr Pulis' bonus in August 2014. The Tribunal rejects this suggestion in the light of (i) the already modest rate of interest sought by the Club (ii) the absence of any suggested calculation from Mr Pulis (iii) the Club's submission that it may have to pay corporation tax on the award of damages (which has not been challenged by Mr Pulis in the exchange of cost and interest submissions)."

64. Mr Rivett relies upon the Arbitrators' failure to deal with the corporation tax issue by reference to s. 68. I remind myself of paragraph 23 in **Schwebel**, which I have already referred to, and I refer also to the words of Flaux J, which I have set out above.

65. In Mr Mill's skeleton at paragraph 77(4), he said, after setting out the reference to the Final Award paragraph 14, which I have recited:

"It is not open to Mr Pulis now to re-litigate this point. Further, the Tribunal was right to find that there was no real benefit to CPFC, because it would have to pay tax on the sums recovered from Mr Pulis in due course."

66. In his oral submissions on Ground two Mr Mill put the case about the point not being open to the Claimant in a different way; namely by way of reliance on s. 73 of the 1996 Act, which reads:

"If a party to arbitral proceedings takes part or continues to take part in the proceedings without making either forthwith or within such time as is allowed by the arbitration agreement or the Tribunal or by any provision of this part any objection ... (d) that there

has been any other irregularity affecting the Tribunal or the proceedings, he may not raise that objection later before the Tribunal or the Court ..."

67. He effectively submits that the Claimant elected, on 24 March 2016, when he put in paragraph 40 of his submissions for the purposes of the Final Award, not to raise the point by way of complaint against the Partial Final Award, but to rely on it instead by way of reducing the interest claimed, and as a matter of fact there was a reduction in the interest claimed, in the sense that a lesser rate of interest was, in the event, awarded.

68. The Defendant further relies, as I have indicated, on the reason given in the Final Award, and repeated in its skeleton, that if, in fact, there was any tax advantage, that would have been neutralised, and will be neutralised, by the charge of tax on damages.

69. I reach the following conclusions in respect of the corporation tax point. One, I am persuaded by the recent submissions of Ms Banks, which I received this morning, and permitted overnight after the very late development of this point by the Defendant, that the Claimant was not electing against a s.68 challenge to the Arbitrators, but was relying upon the fact, time not having yet run for the making of an appeal, that no allowance had been made for tax, in order to reduce the interest. It would plainly have been better if the Claimant had said that this was without prejudice to any case that may be made under s. 68, but I do not conclude that they thereby elected against their later reliance on the alleged failure in the arbitration claim form, some very few days later.

70. Two, I am not however persuaded that the failure by the Arbitrators to deal with the half-hearted point made in paragraph 54 of the Tax Appendix, and never pursued, either by way of investigation or argument, was a breach of s.68. It is perhaps indicative that it is plain that if I were to remit the issue back to the Arbitrators, it would now need a tranche

of disclosure and investigation before the Arbitrators could be in a position to deal with the point.

71. Three, there is in any event, in my judgment, no case made out of substantial injustice by virtue of the fact that any tax benefit to the Defendant is likely to be neutralised as described.

72. In those circumstances, I dismiss the application by way of s. 68. Remission does not arise, and I enforce the Award and the Final Award both as to the liquidated damages for £1.5 million in respect of the repudiation, and also in respect of the £2.276 million damages for deceit plus the interest and costs awarded.