



Neutral Citation Number: [2023] EWHC 2748 (Ch)

Case No: BL-2023-000708

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 02/11/2023

Before :

MR JUSTICE MILES

Between :

TIMOTHY MICHAEL LORD KC & Ors

Claimants

- and -

**SHARON ANGELA JEANETTE KINSELLA
& Ors**

Defendants

Tim Lord KC and Edward Hicks (instructed by Ashtons Legal) for the Claimants
Hugh Sims KC (instructed by Thompson Darwin Law Ltd) for the Seventh Defendant,
Slaley Hall Lodges Limited

The other Defendants did not attend and were not represented

Hearing dates: 18 October 2023

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30AM on 2 November 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

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MR JUSTICE MILES

Mr Justice Miles :

Introduction

1. This is an arbitration claim brought under ss. 68 and 69 of the Arbitration Act 2006. The arbitrator was Mr Terence Mowschenson KC. The claim form, issued on 6 December 2022, says (at least on the claimants' primary case) that the relevant award was dated 9 November 2022. The date of the award is in fact one of the contentious issues. The seventh defendant ("SHLL") says that the 9 November 2022 award simply reincorporated the text of an earlier award dated 11 August 2022, which was already final and binding between the parties. I shall resolve this issue below but shall at this stage simply refer to "the Award".
2. In the arbitration the current claimants were the claimants and the current defendants were the defendants.
3. The dispute concerned the validity of the purported dissolution of the Slaley Hall Owners Club ("the Club"), an unincorporated association of "Members" with timesharing rights (pursuant to 1,850 "Holiday Certificates" on a fixed week basis) to 37 "Holiday Lodges" at the old Slaley Hall estate near Hexham, Northumberland.
4. The administration of the Club is governed by a Constitution. This refers to a number of defined terms, which I shall adopt here.
5. There was to be a "Founder Member". This was originally the promoter of the timeshare scheme but since 20 November 2015 has been SHLL. The Constitution provides for a "Management Company" (to manage Club property at an operational level). Since 9 June 2017 this has also been SHLL. There was also a "Committee" of seven people (at present the 6th Claimant and 1st to 6th Defendants); and a "Trustee" (to hold club property, in particular various "Leases" of the Holiday Lodges expiring 31 December 2069); at present the Trustee is the 8th Defendant ("Hutchinsons"), appointed in 2021.
6. The Constitution also provides for the Club as a whole to pass resolutions at annual or special general meetings. Clause 24, which was key to the dispute, makes provision for resolutions to wind up the Club, including realisation of Club assets by the Trustee, and distribution of net assets between Members. I shall return to these provisions below.
7. Seasons Holidays PLC ("Seasons") owns and operates a number of holiday resorts. The directors of Seasons are Barry Hurley ("Mr Hurley"), and the First Defendant ("Ms Kinsella").
8. On 23 April 2019 Seasons acquired 100% of the shares in SHLL. Mr Hurley was appointed the sole director of SHLL, and Ms Kinsella company secretary in place of the existing officers.
9. On the same date SHLL acquired a 996 year headlease of the Holiday Lodges.
10. The claimants' case in the arbitration was that, following the acquisition of SHLL and the headlease, Seasons and SHLL, in particular by the actions of Ms Kinsella and her staff, commenced an aggressive campaign, using SHLL's position as Management Company in order to obtain several hundreds of Holiday Certificates from exiting

Members (in particular by marketing Seasons' own holiday products in return for a substantial premium and the transfer of the Member's Holiday Certificate) to bring its total holding to 1,445.

11. The Holiday Certificates so acquired were transferred to the 9th Defendant ("SHLTL") to hold on trust for Seasons.
12. In or around November 2021 SHLTL requisitioned a SGM to consider a resolution to dissolve the Club ("the Resolution"). A purported SGM was held via Zoom on 17 December 2021. In a poll SHLTL as a single member purported to cast 1,445 votes (one per Holiday Certificate) in favour of the Resolution. The majority of other Members abstained or voted against the Resolution.
13. The Claimants contended in the arbitration that Seasons and/or SHLL have made and stand to make a very substantial profit on the dissolution of the Club. They say that Seasons and/or SHLL is favourably positioned to purchase the Leases from Hutchinsons, which, together with the Headlease, will give them an unencumbered virtual freehold. They also say that Seasons has already profited by selling its "loyalty nights" packages to Members for substantial premiums, underpinned by the weeks it controls; and that acquisition of the Leases freed from the Members' timeshare rights will enable it to sell further such products.
14. The claimants contended in the arbitration that the Resolution to dissolve the Club was invalid. They argued (a) that the Resolution had not properly passed under the Constitution; (b) that in any case the meeting had not been properly convened; and (c) that Seasons had acquired Holiday Certificates as a result of breaches of fiduciary duty by SHLL as the Management Company (in particular by making an unauthorised profit) so that the Holiday Certificates were held by SHLTL on constructive trust for the remaining Members, and the votes attaching to those Certificates could not be exercised by SHLTL.
15. The most significant provisions about voting under the Constitution were these:
 - (1) There are provisions in clause 16 about Club Meetings. Materially these are:
 - (ii) All General Meetings other than Annual General Meetings shall be Special General Meetings. A Special General Meeting may be convened by the Committee or requisitioned by the Registered Holders of at least 10% of the issued Holiday Certificates.
 - (v) At a General Meeting of the Club each Member shall have one vote for each Holiday Certificate held subject always to clause 10(vi). In the case of Holiday certificates held in joint names the Holiday Certificate shall carry only one vote and that vote shall be the vote of the first named person on the Holiday Certificate.
 - (vii) In the case of an equality of votes the Chairman of the meeting shall have a casting vote.

(x) Voting rights shall be exercised initially by a show of hands save that if any Member or proxy shall so require, any vote shall be taken by way of a poll and not by show of hands.”

(2) Clause 20 provides that:

“The Club shall have power:

i) To borrow money

ii) To grant securities and mortgages over its property

iii) To purchase lease or otherwise acquire additional property and

iv) To sell, lease, grant easements over or otherwise dispose of or deal with its property or any rights over its property.

Provided always that the foregoing powers shall be exercisable only with the approval of a resolution of the Club passed by a majority of not less than three quarters of the votes cast upon such resolution at a Special General Meeting of the Club.”

(3) Clause 24(i) provides that:

“i) The Club shall continue in existence for the Term unless earlier determined by not less than a three quarters majority of Members entitled to vote at a Special General Meeting called for such purpose. Should the Members so resolve the Club shall be wound up in accordance with the provisions of this Clause.”

(4) Clause 25 provides materially that:

“No alteration or addition of any nature whatsoever shall be made to this Constitution unless otherwise resolved by not less than a three quarters majority of those Members voting at a General Meeting ...”

16. At [14] of the Award, the arbitrator summarised the issues under four heads:

- (1) whether clause 24 of the Constitution requires three quarters of the Members eligible to vote in favour of the Resolution, i.e. one Member one vote, or whether Members were entitled to exercise one vote per Holiday Certificate held;
- (2) whether the SGM was procedurally regular; if not, did any breach of procedure affect the validity of the SGM;
- (3) whether and to what extent Holiday Certificates held by SHLTL for Seasons were validly acquired due to the alleged breach of fiduciary duty by SHLL;

- (4) if the Holiday Certificates were not validly acquired by SHLTL for Seasons can the claimants claim relief in relation to those Holiday Certificates and if so what relief?
17. In the Award the arbitrator determined these issues as follows.
18. As to issue (1), on the proper construction of Clause 24, a resolution under Clause 24 required a three quarters majority of votes eligible to be cast on the basis of one vote per Holiday Certificate, rather than a three quarters majority of Members eligible to vote.
19. As to issue (2), that the SGM on 17 December 2021 was procedurally irregular, because the Constitution did not allow for remote meetings. Accordingly the Resolution was invalid.
20. As to issues (3) and (4), that SHLL had not acted in breach of fiduciary duty in its role in the acquisition of Holiday Certificates, such that SHLTL did not hold them on a constructive trust for the Club. The arbitrator concluded that there was no overarching fiduciary duty to the Club in respect of the confidential information in the Club's registers [96]; that those members who responded positively to Seasons' offers were impliedly ratifying or acquiescing in any breach of duty owed to them by SHLL [97]; that there was no overarching contractual or fiduciary duty to the Club (i.e. all the Members) to keep the club in existence and any duty was owed to the Members individually and not to the Club as a whole [98]; had there been a breach of fiduciary duty by SHLL, any claim would only have been available to the Members whose information was wrongly used by or for the benefit of Seasons. There was no claim by exiting Members to reverse the disposal of their Holiday Certificates [99]. Accordingly Seasons acquired the Holiday Certificates validly.
21. In a separate award dated 13 September 2022 on the principles of costs the arbitrator determined that the costs of the arbitration should be borne as to 20% by SHLL and 80% by the Claimants. This was reached on an issue-by-issue approach. At [12] the arbitrator declined to give any weight to the claimants' contention that SHLL had unreasonably refused to mediate. He said that he was not aware that any such principle applies to arbitration and, furthermore, that mediation could not confer the degree of certainty that an award might confer as to the construction of the Constitution.

The challenges and appeals

22. The claim form raises challenges and appeals under ss. 68 and 69 of the Act.
23. The claimants contend that as follows:
- (1) Ground 1: On the true construction of Clause 24, a "one Member one vote" regime applies to dissolution resolutions, so that block voting is impossible, and the arbitrator manifestly erred in law in his contrary construction;
- (2) Ground 2: SHLL used its privileged and fiduciary position as managing agent for the Club to procure unauthorised benefits, which it arranged for Seasons to take, in flagrant breach of the "no profit" rule; there was (a) a serious procedural irregularity in that the arbitrator failed to properly address these issues, or he

obviously erred in law in failing to do so and, (b) insofar as he did, obviously erred in law in finding the contrary; and

- (3) Ground 3: The arbitrator obviously erred in law in refusing to take into account SHLL's refusal to mediate the dispute in reaching his decision on costs such that his costs award is obviously wrong.

24. By order of 21 March 2023 Foxton J, with the approval of the Chancellor, transferred the case to the Business List of the Chancery Division. On 26 July 2023 Zacaroli J ordered that the applications for leave to appeal and for an extension of time be listed for an oral hearing.

Was the claim form issued within time?

25. SHLL contends that the claim form was issued outside the 28 day time limit contained in s. 70(3) of the Act and that the claimants therefore require an extension of time.
26. The claimants contend that time only started to run from the Final Award of 9 November 2022 (provided on 18 November 2022) or a corrected version of that Award given on 19 November 2022, and that the claim form was issued therefore within the 28 day limit. They say that if this is wrong the court should extend time. SHLL disputes this.
27. I start with the procedural history.
28. The arbitrator signed an "Interim Award" on 11 August 2022. It was released to the parties on payment of fees on 19 August 2022. At [103] the arbitrator said "[s]ince this is an interim award it is open to the parties to request me to amend the terms of the declaration if they consider an amendment is required". [104] invited written submissions on costs. The declaration in this version said, "The SGM purportedly convened on 17 December 2021 was not validly convened and the Club has not been wound up".
29. The arbitrator released a further version of the 11 August 2022 award on 27 August 2022. This was still dated 11 August 2022. It made some typographical minor corrections and revised the declaration to, "The SGM purportedly convened on 17 December 2021 was not validly convened as it was held by Zoom and not at a place and in person and the Club has not been wound up".
30. On 2 September 2022 Raworths, the claimants' solicitors, wrote to the arbitrator saying that the document issued on 27 August 2022 was still described as an interim award and stating that it was their understanding that a final award would be issued once liability for costs had been established.
31. On 4 September 2022 the arbitrator responded:
- "I will issue the interim award as a final award when I have dealt with costs – it is a final award so far as the issues in the interim award are dealt with but I am concerned not to raise issues of what I am functus (sic).

If the parties agree that I can issue the Award as a Final Award but remain seized of the issues relating to costs, I can do so.”

32. On 15 September 2022 the arbitrator released an Interim Award dated 13 September 2022 relating to the principles on which costs should be awarded. The parties then negotiated the amount of costs.
33. During those negotiations the defendants’ solicitor, Mr Thompson, realised that the claimants were saying that they were intending to appeal the Award. He sent a long email to Raworths on 27 October 2022 saying that the appeal was already out of time. He referred to the time limit of 28 days contained in s. 70(3) of the Act and argued that the Award of 11 August 2022 triggered the running of time. There was no response to that email.
34. On 24 November 2022 Mr Mortimer of Raworths told Mr Thompson that his retainer had ceased.
35. The parties communicated their agreement over the amount of costs to the arbitrator and on 18 November 2022 he provided the parties with a document called “Final Award” dated 9 November 2022. The opening rubric stated,

“On 11 August 2022 I issued the award set out below in paragraphs 1 to 102 as an interim award and amended the form of the declaration (on 27 August 2022) and indicated by email dated 4 September 2022 that it was a final award so far as issues dealt in it were concerned and amended the terms of the relief awarded. I have been asked to include the interim award in the final award.”
36. [1] to [102] were verbatim the same as the version provided on 27 August 2022. [103] referred to the interim award on costs and [104] recorded that the parties had reached agreement about the amount of costs on about 4 November 2022.
37. SHLL then asked for further corrections to be made and another version, which corrected some typos and made other small amendments, was issued on 19 November 2022.
38. The issue is whether, as SHLL contends, the “Interim Award” of 11 August 2022 was an award for the purposes of s. 70(3) or, as the claimants contend, there was no award for that purpose until the “Final Award” of 9 November 2022.
39. The relevant principles were helpfully summarised by Butcher J in *France v London Steam-Ship Owners Mutual Insurance Association* [2023] EWHC 2474 (Comm) at [17] and [18] and I shall apply them.
40. I am in no doubt that the Interim Award of 11 August 2022 was an “award” so that time then started to run for the purposes of s. 70(3). My reasons follow.
 - (1) The Act does not distinguish between final awards and partial or interim ones. Section 47(1) states that the tribunal may make more than one award at different times on different aspects of the matters to be determined. Section 58(1) states that unless agreed between the parties, an award is final and binding on the parties. Section 70(3) requires appeals to be brought within 28 days of the award.

None of these provisions distinguishes awards labelled “final” from other awards using different labels.

- (2) The Interim Award met with the formal requirements of s. 52 of the Act.
- (3) The terms of the Interim Award showed that it was intended to deal finally with the matters determined in it. It was called an “award” and it addressed the substance of the dispute. It set out the reasoning of the tribunal. It was not a procedural direction or order. It specified the only matters left open as the terms of the declaration (which was resolved shortly thereafter) and costs. In short, it had all the characteristics of an award.
- (4) An award which leaves open the precise terms of the order still counts as an award for the purposes of s. 70(3): see e.g. *France v London Steam-Ship Owners Mutual Insurance Association* [2023] EWHC 2474 (Comm) at [19].
- (5) In my judgment the arbitrator’s 4 September 2022 email was unambiguous. He stated that the existing interim award of 11 August 2022 (as corrected) would be reissued as a final award once costs were dealt with and then said “it [sc. the (corrected) 11 August award] is a final award so far as the issues in the interim award are dealt with”. He made it clear that he was concerned not to become functus as regards costs. The email shows that the arbitrator considered the interim award to be binding between the parties.
- (6) This position was repeated by the arbitrator in the rubric to the Final Award. That award simply repeated (“reissued”) [1] to [102] of the Interim Award. That was unnecessary but it adds nothing.
- (7) Taking these features in the round, a reasonable recipient of the Interim Award would have regarded it as an award for the purposes of the Act.
- (8) Counsel for the claimants submitted at one point that the fact that the solicitors for SHLL had proposed various amendments to the awards showed that the awards were not to be treated as final and binding. I am unable to accept this submission. The corrections proposed by SHLL’s solicitors were immaterial and no difference of substance to the awards. Therefore time ran from the date of the original awards and not from the date of the corrections: see *Daewoo v Shipbuilding v Songa Offshore Equinox* [2018] EWHC 538 (Comm). Counsel for the claimants submitted at one point that that decision was wrong and suggested that it should not be followed but did not give any cogent grounds for the submission. I reject that suggestion.

Should the court extend time?

41. There was little dispute about the principles. They were summarised by Popplewell J in *Terna Bahrain Holdings Company v Bin Kamil al Shamshi* 2021 EWHC 3283 (Comm) (“*Terna*”) at [27] to [34], which in turn referred to *Kalmneft JSC v Glencore International* [2001] 2 All ER (Comm) 577 (“*Kalmneft*”).
42. A small point of dispute was whether Popplewell J was right to call the first three *Kalmneft* factors primary (see *Nigeria v Process and Industrial Development* [2020]

EWHC 7787 (Comm). As to this, *Kalmneft* does not pretend to be anything more than a helpful checklist of the most relevant considerations and is to be read as a statute. There can be little doubt that in many cases the first three *Kalmneft* factors are likely to be of significant weight. And Popplewell J does not suggest they were decisive. But in the end I agree with the claimants that it is better to avoid any a priori weighting of the factors. Each case turns on its facts.

43. Subject to this I shall follow the guidance in *Terna* without setting it out here.
44. The first factor is the seriousness and significance of the delay. The starting point is that s. 70(3) requires challenges to be brought within 28 days in the interests of speed and finality. It is for the claimants to justify an exceptional departure from the statutory timetable. The claim form was issued 117 days after the date of the 11 August 2022 award and 108 days after it was released to the parties. The costs award was dated 13 September 2022 (and issued on 15 September). The claim form was issued 84 days later. The delay beyond the 28 day periods from those awards is to my mind serious and significant when measured against the 28 day yardstick.
45. The second factor is whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so.
46. The claimants relied on evidence from one of their number, Ms Sylvester-Evans, that they genuinely believed that time would only run from the date of the final award. She said that the claimants read the 4 September 2022 email as confirming this understanding. They therefore waited until the final award was released and believed that time would only then start to run against them. The claimants said that that the rubric to the Final Award took them by surprise and that it was inconsistent with 4 September 2022 email. The claimants also emphasised that this was not a commercial arbitration – it is concerned with the rules of a timeshare property club. It involved personal litigation between a group of like-minded individuals who did not previously know one another and who were acting out of their deep-felt attachment to the Estate. They also said that until the amount of their liability for costs was determined they were unable to make a final decision about challenging the award. The claimants submitted that any delay was based on a genuine mistake and that this is not a case of deliberately ignoring statutory time limits.
47. I have concluded that the claimants did not act reasonably in allowing the delay to occur:
 - (1) Like any party seeking to challenge an arbitration award the claimants were bound by the provisions of the Arbitration Act. The requirements of the Act, including as to the timing of appeals, apply to this arbitration as they do to commercial ones. Speed and finality are aims of all arbitrations, including ones affecting clubs or associations.
 - (2) It is a basic principle of arbitration law that there may be a series of binding awards. Labels such as interim, partial, or final do not matter. The question is whether there is an award. The claimants were legally advised by counsel and solicitors and several of the claimants are practising professional lawyers. The claimants' case came close to saying that they misunderstood the law, though they

did not quite say that. But ignorance of the law could not reasonably explain the delay.

- (3) It was clear on the face of the Interim Award that it was dealing substantively with the disputes between the parties other than costs.
 - (4) The arbitrator's 4 September 2022 email said in terms that the Interim Award was final as between the parties. The arbitrator's only reason for not issuing it marked final was to avoid becoming functus regarding costs. The email cannot to my mind reasonably be read as saying essentially the opposite – which is how the claimants said they understood it.
 - (5) SHLL explained in the email of 27 October 2022 that it considered time to run from the Interim Award. The email explained the reasons for this conclusion, citing well established principles of law. The claimants did not respond. Nor did they then issue a claim form. The claimants offered no explanation for this further period of delay or their failure to engage with the email.
 - (6) The rubric at the start of the Final Award reflected the contents of the 4 September 2022 email. I do not think it can reasonably be read as departing from the email, as the claimants suggested.
 - (7) I am unable to accept that it was reasonable for the claimants to delay until the quantum of the claimants' costs liability was determined. First it is well known that where a party to an arbitration wishes to challenge a determination in an award they must do so within time and, if needs be, make more than one challenge. Second the claimants were aware of the principles on which costs were going to be awarded by 15 September 2022. The claimants knew from then that they were facing a large bill, though the amount had not been fixed. But they did not issue the claim until 6 December 2022.
 - (8) Counsel for the claimants also submitted that the fact that the solicitors for the defendants had proposed various amendments to the awards showed that the awards were not to be treated as final and binding; or that it was at least reasonable for the claimants to think this. The underlying legal point is answered by *Daewoo* (see above). As to the question of reasonableness, there is nothing in the chronology to suggest that the claimants were influenced by the timing of the corrections. Indeed the corrected Interim Award was issued quickly, on 27 August 2022 and the claimants did not respond by appealing then. There is nothing in this suggestion.
 - (9) I accept the claimants' evidence that they did not deliberately disregard the statutory time limits. This is of some weight but the ultimate issue under this heading is whether they delayed reasonably.
48. The third factor is whether the respondent to the application or the arbitrator caused or contributed to the delay. I have largely covered this already. SHLL did nothing to encourage the claimants to delay. In fact they wrote on 27 October 2022 pointing out that the appeal was already out of time. The arbitrator did not contribute to the delay. The 11 August Interim Award set out what was and what was not being decided. In his email of 4 September 2022 the arbitrator explained that the interim award was final in

relation to the matters decided therein. Though they say in evidence that they were surprised by the opening rubric to the Final Award I do not think that they had any proper grounds for surprise. It simply repeated the 4 September 2022 email.

49. The fourth factor is whether the respondent would by reason of the delay suffer irreparable prejudice in addition to the mere loss of time if the application were permitted to proceed. I do not think that SHLL has established any such prejudice. Counsel for SHLL referred to the uncertainty concerning the winding up of the club and said that this was continuing as long as there were legal challenges. The relevant period to consider here is the period of the delay and I do not consider that anything arose during that period which has led to material prejudice. I give weight to the lack of prejudice in the overall assessment, while noting that it is not necessary for the respondent to establish prejudice in order to resist an extension of time.
50. The fifth factor is whether the arbitration has continued during the period of the delay and, if so, the impact of the delay. This does not arise.
51. The sixth factor is the strength of the application. The relevant applications are, in the case of the s. 68 challenge, the challenge itself and, in the case of the s. 69 appeals, the application for the leave of the court under s. 69(b): see *France v London Steam Ship* at [37].
52. In relation the s.68 challenge I was reminded of general statements of the highest authority concerning the limited circumstances in which courts will intervene in arbitral processes and the high threshold that must be overcome for a successful challenge or appeal: see e.g. *Lesotho Development v Impregilo SpA* [2006] 1 AC 221, and Russell on Arbitration at [8-085]. Among other things these sources show that the policy of the Act was to reduce drastically the extent of intervention of the courts in the arbitral process and that s. 68 is a long stop only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in the section that justice calls out for it to be corrected; and that s. 68 is about whether there has been due process, not whether the tribunal got it right.
53. The present challenge is that there has been a serious irregularity within s. 68(1)(d) namely the failure of the tribunal to deal with all the issues that were put to it.
54. There was no dispute between the parties about the principles. They are helpfully summarised in Russell at [8-015]. The phrase “all the issues” means those issues which the tribunal has to resolve. The issue must be a fundamental or important one. There is also a difference between a failure to deal with an issue and a failure to provide sufficient reasons for a decision on that issue. The award is to be given a reasonable and commercial reading rather than one looking for faults. If an issue has been dealt with in any way that is the end of the inquiry and it does not matter whether the tribunal has dealt with it well, badly or indifferently.
55. Russell at [8-106] explains that there is no need to deal with every point or argument. Rather the tribunal has to decide the points relevant to the ultimate decision. An award does not have to set out each step by which the conclusion is reached.

56. The challenge concerns the relief based on the allegations of breach of fiduciary duty by SHLL. The claimants made wide-ranging submissions but they may be summarised in the following way.
57. The claimants' case was that SHLL, as the Management Company, owed fiduciary duties to the Club. More fully, that:
- (1) SHLL was obliged to promote the Club over its own interests or those of anyone else. This included ensuring that the Club Members could continue to enjoy the Club Property under the timeshare arrangements.
 - (2) These fiduciary duties covered SHLL's holding and use of the Registers of Members and the confidential information contained in them. However it was not restricted to the holding and use of information. It included other aspects of the use of Club Property. It also covered the way that SHLL communicated with Members and others.
 - (3) SHLL in fact assisted Seasons in its campaign to obtain Holiday Certificates from Members. It disclosed confidential information to Seasons about the Members and the weeks which they had booked. It allowed Club premises to be used to assist Seasons in seeking to persuade Members to transfer their Certificates to Seasons and also allowed Seasons to make representations about service charges and financial information.
 - (4) This conduct constituted a breach of SHLL's duties not merely to the individual Members who chose to exit and transfer their certificates to Seasons. Rather the duty (including the duty not to make a profit) was owed to the Members as a whole. If individual Members chose to leave that did not mean that SHLL's had properly performed its duties to the other Members.
 - (5) SHLL's conduct moreover allowed Seasons to make a profit and thereby SHLL placed Seasons interests above those of Members. Seasons has thereby profited by acquiring the Certificates. It has benefited from an opportunity which SHLL only had by reason of its fiduciary position. Seasons participated in the breach of fiduciary duty.
 - (6) The appropriate remedy is a constructive trust in favour of the remaining Members other than Seasons or SHLTL. It is only in this way that Seasons (and therefore SHLL) will be deprived of the wrongful benefits it has acquired. SHLTL should therefore vote according to the instructions of those other Members.
58. The claimants accepted that the tribunal had dealt with some aspects of the fiduciary duty claims. But, they submitted, he focused too narrowly on the allegations concerning the misuse of confidential information and did not address the broader allegations of breach, or more fundamentally, their case that SHLL had wrongfully conducted itself to assist Seasons (its parent company) in making a profit from the opportunity that SHLL only had by reason of its fiduciary position. The tribunal therefore failed to deal with all the important issues.

59. How then did the tribunal address the issues in the Award? As already explained the arbitrator identified issues 3 and 4, which were a summary of the breach of fiduciary duty case. There is no reason to suppose that the arbitrator was not familiar with the parties' pleaded cases as he was directed to them. He turned to the third and fourth issues at [62]. From [64] ff he addressed the evidence about the approach adopted by Seasons to acquire Holiday Certificates. This passage went beyond the use of the information contained in the Registers. The arbitrator described how Seasons sought to persuade Members to exit. This included negative comments on the members of the Committee and the use of the Lodge (Club property) to meet Members. The arbitrator then said at [90] that data was provided to Seasons in breach of confidence. The arbitrator then addressed at [92] to [97] that SHLL did not owe a fiduciary duty to keep the Registers confidential. Any duty to maintain confidence was contractual.
60. The arbitrator did not stop there. He went on to say at [98]:
- “I do not consider that there was some overarching contractual or fiduciary duty on SHLL to “the Club” (i.e., to all the Members) to keep the Club in existence to the extent that its existence was threatened by exiting Members. The decision to exit was one for each Member to take in his own self-interest. I also do not consider that SHLL owed a fiduciary duty to the Club as a whole. The Club was an unincorporated association and any duty was owed to the Members individually”.
61. At [99] he said,
- “Furthermore even if I had held that SHLL had a fiduciary duty in relation to a Member's personal details, that would not have led to the conclusion that any Holiday Certificates were acquired by SHLL or Seasons on trust for the remaining Members. If it existed, the fiduciary duty would have been owed to the Member whose information had been allowed by SHLL to be used by Seasons. There is no claim by exiting Members to reverse the disposal of their Holiday Certificates; such a claim might face obstacles if it [was] based upon the use of their email addresses by Seasons to contact them or indeed on the grounds of any misrepresentation made to them in the course of persuading them to dispose of their Holiday Certificate.”
62. The hearing before me was not a rolled-up hearing of the challenge, so I shall express my provisional views about the s. 68 challenge.
63. I have concluded that the court hearing the full challenge would be significantly more likely than not to conclude that the arbitrator had not failed to deal with all the fiduciary duty issues for the purposes of s. 68(1)(d).
- (1) The arbitrator summarised the relevant issues. Though he concentrated on the alleged misuse of the confidential information, his conclusions in [98] and [99] were more general.

- (2) He held in [98] that even if there was a breach of any fiduciary duty it was owed not to the Members as a whole but to the individual Members; the Club as he saw it was simply an association made up of the individuals and was not a separate entity.
 - (3) In my judgment, if he had expressly addressed the broader case about breach of fiduciary duty, he would have reached the same conclusion that any such duty was only owed to the individuals. He held in [99] that, in any event, any complaint about any breach of duty would have been actionable by the individual Members and not by the remaining Members. Exiting Members were making no claim for relief. On that basis there was no basis for equitable relief (including a constructive trust) for the benefit of the remaining Members.
 - (4) As explained above, a tribunal is not required to address every issue and argument where, on the basis of its findings, other points do not arise. The tribunal is required to deal with the main points, and where a decision on one point is logically decisive of others, the tribunal is not required to deal separately with those others. It appears to me that the general propositions contained in [98] and [99] would have defeated any of the ways the claimants had put their claims. In the light of those conclusions the arbitrator was not required to address each of the ways it was alleged SHLL had acted in breach of duty.
 - (5) The question is not whether the tribunal was right or wrong and it is not whether the reasons given were good or bad. It is whether the tribunal has dealt with the issues in any way. I think a court considering the full challenge would conclude that he adequately dealt with the case advanced by the claimants for the purposes of the Act and that there was therefore no relevant irregularity.
 - (6) Moreover, by s. 70(2)(a), before an application may be made under s. 68 the party concerned must have exhausted any available recourse under s. 57 of the Act. That includes the right to ask the tribunal to make an additional award in respect of any claim which was presented to the tribunal but was not dealt with in the award. The claimants did not take that course and were unable to explain to my satisfaction why recourse under s. 57 would not have been available. It appears to me that this is further reason for concluding that the challenge under s.68 would probably fail.
64. I turn to the proposed s. 69 appeals. On the main appeal these relate to two areas of the case: the interpretation of clause 24 of the Constitution and the claims for breach of fiduciary duty. The claimants say that the tribunal erred on a question of law in relation to both.
65. As to the costs award the claimants say that the arbitrator erred in law in giving no weight to SHLL's refusal to mediate.
66. There was no suggestion that any of these questions of law are of general importance. So the claimants would have to show that the decision of the tribunal on the question of law is "obviously wrong" (see s. 69(3)(c)(i)). As the Court of Appeal explained in *HMV Ltd v Propinvest Friar LP* [2011] EWCA Civ 1708 rights of appeal from an arbitration award are severely restricted. It is not enough to show that there is an arguable error on a point of law. The judge considering the appeal does not ask whether

they would have reached the same conclusion. At [8] Arden LJ found the “phrase major intellectual aberration” useful as a touchstone. But in the end the test is statutory one – is the decision of law obviously wrong?

67. The first ground of appeal concerns the interpretation of clause 24.
68. In the Award the arbitrator summarised the legal principles (derived from the series of cases of the highest authority culminating in *Wood v Capita Insurance* [2017] AC 1173. He took the well-known summary given by Popplewell J in *Lukoil Asia Pacific v Ocean Tankers* [2018] EWHC 163 (Comm) at [8]. The arbitrator recited clauses 16, 20, 24, and 25. He then summarised the parties’ arguments. At [37] he said,

“There are a number of matters to consider. First, clause 16 (v) is not expressed to be subject to any other contrary provision other than clause 1 (vi) relating to the Founder Member’s Holiday Certificates retained for maintenance purposes; i.e., it does not anticipate any other exceptions to counting votes by reference to Holiday Certificates held. Secondly the constitution appears to be professionally drafted albeit different wording is used in relation to the voting in clauses 16 (v), 20 and 25. Thirdly, if the draftsman wished a vote to wind up the Club to be determined by reference to Members with the largest economic interest in the Club, i.e., by reference to Holiday Certificates, it is noteworthy that he did not use the same expressions as are used in clause 20 where the drafter of the Constitution expressly referred to a requirement for three quarters of the votes to be cast in relation to resolutions the subject of 20 which is four clauses before clause 24 (i). Fourthly a winding up involves termination of the club which was intended to endure until the termination of the term and may fairly be described as a momentous decision. Fifthly, it is not illogical to consider that the future of the club should be determined by those with the most economic interest in the club and bear the largest liability to fund it. Sixthly, it would be discordant if a SGM to consider winding up the club could be requisitioned by the holders of 10 per cent of the Holiday Certificates but the voting on the resolution for which the meeting was requisitioned was on a different basis.”

69. At [39] the arbitrator said:

“Taking all the factors into account and giving clause 24 (i) its ordinary meaning in its context, I consider that the expression “three quarters majority” in the expression “a three quarters majority of members entitled to vote at a Special General Meeting” is referring to three quarters “majority” of votes cast, as opposed to the number of Members entitled to vote. One has to count the votes by reference to the Holiday Certificates held by voting Members as provided for in clause 16 (v) to ascertain whether there is a three quarters majority.”

70. The claimants made detailed submissions in the hearing before me. I will here give only a short summary. The Constitution was professionally drafted. Clause 16 deals with meetings and resolutions generally. There are then further provisions of the Constitution with specific requirements for resolutions or authorisations. These are clause 20 (powers to borrow etc.), clause 24 (dissolution), and clause 25 (amendment). The drafter distinguished those cases where the relevant majority depended on votes cast (e.g. clause 20) and others where it depended on the number of Members voting in favour (clauses 24 and 25). The drafter had also drawn a distinction between the

relevant denominators under those clauses – clause 24 required the relevant majority of Members entitled to vote while clause 25 required the relevant majority of Members attending a meeting. Where a contract uses different phrases for separate clauses, this should be given effect. Moreover where a clause deals with a specific subject-matter and this is inconsistent with a more general clause the specific wording should prevail. Clause 24 is clear in its wording in requiring the requisite majority of the Members entitled at that time to vote. It should not be read as being subject to the voting provisions of clause 16. This reading accords with commercial sense as there are good reasons for thinking that Members should have an equal voice in the momentous decision whether to wind up. The alternative reading could have led to the commercially surprising result that the Founder Member of the Club could have wound up the Club at an early stage against the wishes of other members.

71. Counsel for the claimants criticised the reasoning in [37]. He said that most of the factors identified by the arbitrator favoured the claimants' reading and that the others were neutral or irrelevant.
72. I have concluded that the arbitrator's reading of clause 24 was within the range of possible interpretations available to a tribunal properly applying the relevant legal principles.
73. Some of the points in favour of the reading favoured by the arbitrator include these:
 - (1) A reader of the Constitution could reasonably suppose as a starting point that the general provisions concerning voting at meetings, including SGMs, governed by clause 16, would apply to all meetings unless there was some contrary wording. That clause governed what was to happen at any general meeting, including a SGM and stated how votes would be counted.
 - (2) The claimants did not dispute that at least parts of clause 16 (including those concerning quorums and requisitioning meetings) applied to meetings called for the purpose of clause 24.
 - (3) A reader of the Constitution could reasonably anticipate that those with a greater economic interest and therefore greater potential liability for service and other charges would have a greater say in winding up the Club.
 - (4) A reasonable reader could also think that it was surprising that the Holders of 10% of the Holding Certificates could requisition an SGM under clause 24 but that voting would then take place by counting heads rather than Certificates.
 - (5) A reasonable reader of clause 25 (read with clause 16) could also reasonably anticipate that three quarters of those Members with the greatest interest and potential liabilities should be able to resolve to amend the constitution of the Club Constitution. Clause 25 refers to a three quarters majority of those Members voting at an SGM. In this regard, clause 16(x) says that voting rights shall be exercised by a show of hands unless a Member demands a poll. One reasonable reading is that on a poll votes shall be counted under clause 16(v) on the basis that each Member shall have one vote for each Holiday Certificate held. That is the phrase "three quarters majority of those Members voting" simply means three quarters majority counted under clause 16(v).

- (6) Similarly, clause 24 can reasonably be read together with clause 16(v) to reach the conclusion set out by the arbitrator in [39] of the Award.
74. While the case advanced by the claimants in support of one-Member-one-vote is reasonably arguable I do not think that it can be said that the arbitrator's interpretation was obviously wrong. It appears to me that, as with many questions of interpretation, there are arguments to be made on both sides.
75. As to [37] of the award, I agree with the claimants that some of the factors identified by the arbitrator favoured the claimants' case. I do not agree that the other factors were either irrelevant or neutral. The weight to be given to the various factors was part of the iterative process described in the authorities.
76. In my judgment the conclusion reached by the arbitrator cannot be said to be unarguable or outside the reasonable range of interpretations. On the contrary I consider that the conclusion he reached was within the range of available readings of clause 24. There is to my mind no obvious error of law. The parties agreed that they would submit their disputes, including about the meaning of the Constitution to the arbitrator and they must overcome the high threshold for leave under s. 69 before they can upset his determination.
77. The second ground of appeal concerns the reasoning of the arbitrator concerning the fiduciary duty claims.
78. A party seeking to contend that there has been an error on a question of law is required to identify the question of law in the claim form. The claimants contend that the arbitrator "had erred in law in finding that SHLL did not owe a fiduciary duty to the Members not to profit (or arrange for any third party to profit) from its position as Management Company, whether in respect of its control over information relating to the Club Members or otherwise."
79. I have already set out the arbitrators' reasoning in relation to the case that there was a breach of fiduciary duty.
80. The claimants again advanced wide-ranging criticisms of the reasoning in the Award. I shall again provide the following brief summary. The law is clear: a fiduciary owes a single-minded duty to its principal and may not use its position to make a profit for itself or another. SHLL stood in a fiduciary position in relation to the Members of the Club and was obliged to act in their interests. SHLL in fact acted contrary to the interests of the Members by assisting Seasons in its campaign to acquire Holiday Certificates from some of the Members. This included but was by no means limited to the provision of confidential information to Seasons. Other breaches included allowing Seasons to use Club Property to make presentations to Members. This was done to allow Seasons to make a profit by acquiring Holiday Certificates. Since the duty was owed to all Members, it is no answer for SHLL or Seasons to say that the exiting Members have acquiesced or not complained about SHLL's conduct. Seasons and SHLL have benefited from SHLL's wrongful abuse of its fiduciary position. On general equitable principles the remedy is a constructive trust over the Holiday Certificates held for Seasons as that is the only way of depriving them of the wrongful profit they have obtained through participating in SHLL's breaches of duty.

81. The claimants contended that the arbitrator had failed to apply well-established principles of equity, including the basic rule that a fiduciary may not profit from its position at the expense of its principal and that a constructive trust will be imposed to remove any profits made by a wrongful fiduciary or any participant in the wrong.
82. Having heard argument I am not persuaded that the tribunal has made an obvious error on a question of law. My reasons are these:
- (1) Section 69 is concerned with questions of law, not the application of the law to the facts. There may be cases where it can be shown that no tribunal instructed as to the relevant law could have come to the conclusion reached, so that a mistake of law must have been made. But the legislative intent is that parties should not be able to dress up questions of fact as ones of law (see Russell at [8-139]).
 - (2) It appears to me that the challenge here is to the arbitrator's application of the law to the facts. It is well established that the decision whether a person is in a fiduciary position depends on a close analysis of the facts; and that a person may be in a fiduciary position quoad some duties but not others. Deciding whether a particular person owes a particular duty is therefore highly fact sensitive.
 - (3) On the particular facts the arbitrator concluded that SHLL did not owe an overarching fiduciary duty concerning the disclosure of information to Seasons. One of his reasons was that Members had potentially conflicting interests with one another. There were some Members who were potentially keen to exit (and avoid liabilities) and others who were keen to remain. As the arbitrator explained the leavers would potentially have been content for Seasons to approach them with an exit proposal. The arbitrator concluded that SHLL owned no overarching fiduciary duty to the Club as a whole (in the sense of one owed to every member in respect of SHLL's treatment of each member). It appears to me that this conclusion was based on his application of the law to the facts and his decision does not disclose an obvious error on a question of law.
 - (4) The arbitrator also held that even if there was an overarching duty it would not be open to remaining Members to rely on it in order to seek relief in respect of the Holiday Certificates of exited Members who were not themselves complaining or seeking any relief. In other words there was no basis for the claimants (as a group of remaining Members) to seek constructive trust over the Certificates acquired by Seasons. I consider again that this conclusion was based on his application of the law to the facts and it does not disclose an obvious error on a question of law.
83. As to the appeal against the costs award, the claimants contended that there was an obvious error on a question of law: namely, the conclusion that a party's refusal to mediate had no role to play when it came to the costs of the arbitration.
84. As already explained the arbitrator discounted conduct in relation to the mediation for two reasons. The first was that he was not aware that conduct in relation to a mediation was relevant to the costs of an arbitration. The second was that a mediation would not have brought the same certainty as an award concerning the construction of the Constitution.

85. Hence even if the claimants were right on the first point, they would have to show that the arbitrator was obviously wrong on the second. An appeal on an error of law will only be permitted to proceed where the determination of the question will substantially affect the rights of the parties (s. 69(3)(a)).
86. On the first point the claimants did not provide any authority concerning the treatment of mediation when it came to the costs of an arbitration. It seems to me that the relevance of mediation to the costs of an arbitration is likely to be sensitive to the facts and context. Arbitration is expected to be expeditious and less formal than court proceedings and there may well be little opportunity in the arbitration timetable for mediation. Like mediation it is a form of extra-judicial dispute resolution and the parties to an arbitration agreement have by definition agreed that their disputes shall be determined by an arbitral tribunal. On the other hand, I see no reason of principle why the parties' conduct in relation to mediation should always be discounted entirely when the tribunal considers costs of an arbitration. One should never say never.
87. On the second point counsel for the claimants submitted before me that while a mediation could perhaps not realistically have determined the issues of interpretation of the Constitution (where the parties were far apart and the outcome was binary), a mediation process could have served the narrow the issues to be decided in the arbitration. I found this hard to follow. The issues in the arbitration were reasonably narrowly defined and the hearing took three days. The interpretation issues were short. The fiduciary duty issues were introduced into the case by the claimants and they were the reason why the tribunal heard evidence from witnesses. If there had been a genuine concern about the scope of the issues and the scale of the arbitration these could have been discussed between the solicitors, and if there was disagreement, raised with the arbitrator, who could have given procedural directions. I find the suggestion that the parties should have sought to mediate in order to define the issues for the arbitrator far fetched on the facts of this case.
88. I am therefore unable to accept the claimants' argument that there was any error in the second of the arbitrator's reasons for giving no weight to the parties' conduct in relation to the mediation.
89. For these reasons I am not persuaded that (were time to be extended) the claimants would be granted leave for any of their proposed appeals under s. 69.
90. In short on the sixth factor I consider the claim has low chances of success.
91. The seventh *Kalmneft* factor is whether in the broadest sense it would be unfair to deny the applicant the opportunity of having the application determined. This factor is not a free-floating catch-all which supersedes the first six. It has to be considered in the light of the court's conclusions about those. More generally considerations of overall fairness and justice must always be viewed in the particular context that Parliament and the courts have repeatedly emphasised the importance of finality and time limits for any court intervention in the arbitration process: see *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147 at [42]. In the light of my conclusions about the earlier issues I am unable to conclude that it would be unfair to the claimants be denied the opportunity to proceed with the application.

92. In the light of my consideration of the various factors set out above, I have concluded I should not extend time for the issue of the claim form.

Disposal

93. For these reasons the claim is dismissed.