IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
[2022] EWHC 586 (Comm)

No. CL-2021-000340

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 9 February 2022

Before:

MR JUSTICE CALVER

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF A JAMS ARBITRATION

B E T W E E N :

WSB — Claimant

- and -

FOL — Defendant

ANNONYMISATION APPLIES

MR T. ROBINSON appeared on behalf of the Claimant.

MR J. BRIER appeared on behalf of the Defendant.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE CALVER:

1 By its application dated 10 November 2021 the claimant, WSB, applies to set aside an order ("the Order") made by Moulder J DBE on 3 November 2021 under CPR 3.3(4) without a hearing by which she dismissed on paper the claimant's challenge to an arbitration award ("the Award") dated 9 April 2021 (as amended). Moulder J DBE dismissed WSB's challenge to the award under s.67 and s.68 of the Arbitration Act and she refused WSB permission to appeal under s.69 of the 1996 Act.

2 In relation to the challenges under s.67 and - although she said 69 I think Mr Brier is right that she must have intended to refer to s.68 - Moulder J DBE expressly provided in the preamble to the Order at para.2: "Pursuant to CPR 3.34 and/or CPR 23.8(c) the court has determined it is appropriate to deal with the challenges by WSB under s.67 (and, as I say, I think that should read 68), without a hearing." WSB seeks an order that if the order is set aside its s.67, 68 and 69 applications be listed for an oral hearing a time estimate of four hours.

3 Dealing with the procedural issues first, by para. O.8.1 of the Commercial Court Guide (newly published in 2022) it is provided that on an application for permission to appeal against an arbitration award:

> *"(l) The Court will normally determine applications for permission to appeal without an oral hearing but may direct otherwise, particularly with a view to saving time, including court time, or costs.*
>
> *(m) Where the court considers that an oral hearing is required it may give such further directions as are necessary.*
>
> *(n) Where the court refuses an application for permission to appeal without an oral hearing it will provide brief reasons.*"

The guide further provides as follows in para.O8.6:

> "*The court has power under r.3.3(4) and/or r.23.8(c) to dismiss any claim without a hearing. It is astute to do so in the case of challenges to awards under s.67 or s.68 of the Act, where the nature of the challenge or the evidence filed in support of it leads the court to consider that the claim has no real prospect of success. If a respondent to such a challenge considers that the case is one in which the court should dismiss the claim on that basis:*
>
> a. *the respondent should file a respondent's notice to that effect, together with a skeleton argument not exceeding 15 pages and any evidence relied upon within 21 days of service of the proceedings on it;*
>
> b. *the applicant may file a skeleton and/or evidence in reply within 7 days of service of the respondent's notice*."

And at para.O8.7:

"*Where the court makes an order dismissing a s.67 or s.68 claim without a hearing pursuant to 08.6, whether of its own motion or upon a respondent's notice inviting it to do so, the applicant will have the right to apply to the court to set aside the order and to seek directions for the hearing of the application. If such a application is made and dismissed after a hearing the court may consider whether it is appropriate to award costs on an indemnity basis*."

4 In paragraph 5 of its skeleton argument, WSB contends that the court was wrong to determine that the challenges under s.67 and s.69 (it may be they mean s.68) should be dealt with without a hearing.

5 However, it is important to appreciate that as it states in paragraph 5 of its skeleton argument WSB does *not* seek to appeal against the Order, which would require the leave of the court under s.67(4), s.68(4) and s.69(6) of the 1996 Act respectively. Instead, WSB applies under CPR 3.3(5)(a), which provides:

"*Where the court has made an order under paragraph (4)*

- *(a) a party affected by the order may apply to have it set aside, varied or stayed*."

6 An application under CPR 3.3(5) involves a rehearing of the issue rather than a review of the decision made. The approach of the court on such applications should be to determine whether there is a real prospect of success such that the case should be allowed to go forward to a full hearing of the s.68 application (see Males J (as he then was) in *Midnight Marine v Thomas Miller* [2018] EWHC 3431 at [38]). Males J made some important observations in that case at paragraphs 38 to 39 as to the procedure to be adopted in respect of an application such as this which bears repeating and re-emphasising so far as practitioners are concerned:

"*38 … If the oral hearing for which paragraph O8.5 provides becomes effectively a full hearing of the section 68 application preceded by a further round of submissions and evidence, the objective of weeding out hopeless applications at an early stage by a prompt and economical procedure will have been frustrated.*

39. The procedure to be adopted for such hearings merits further consideration by the judges of this court. I would suggest that such hearings should be short, typically no more than 30 minutes; they should, where possible, be listed before the judge who has dismissed the application without a hearing; there should be no need for further written submissions in addition to those already provided by both parties save for the applicant to explain succinctly what is said to be wrong with the judge's reasons for dismissing the application without a hearing; and (bearing in mind the limited nature of the issue, i.e. whether the claim has a real prospect of success, and that respondents will already have made submissions on the point in writing) in general respondents should not attend or, at any rate, should not recover their costs if they do. In these
respects such hearings would be similar to the oral renewal of applications for permission to apply for judicial review after a refusal on

> *paper. No doubt there may be some cases in which something more is required, but a procedure such as I have suggested would in the general run of cases promote the objective which the court is seeking to achieve*."

Indeed, that is the approach which the Commercial Court has essentially adopted in cases such as this since Males J gave that judgment.

7 The test has also been described as being "*to give due weight to the decision of the judge who dealt with the matter without a hearing and [for the order to be set aside the applicant] should be able to identify a good reason for disagreeing with his or her decision"* - see the judgment of Mostyn J in *Kuznetsov, R (on the application of) v London Borough of Camden* [2019] EWHC 2910 at [24].

8 WSB submits before me that there is "a good reason" for disagreeing with the decision in the Order and that, in fact, the challenges should be listed for an oral hearing. WSB states that having heard both sides' arguments the court may prefer to deal with more than simply setting aside the order and giving directions for a further hearing and that WSB would not object to the court proceeding to determine its application for permission to appeal under s.69 or even, if time allows, its challenges under s.67 and 68 and the substantive appeal under s.69. However, this approach is fundamentally at odds with the approach which Males J explained should be taken in a case such as this and it impermissibly seeks to sidestep the strict requirements upon applications for permission to appeal, particularly in the case of s.69. It is not, therefore, an appropriate course for me to adopt.

9 WSB has not sought permission to appeal and so this application is to be determined under CPR 3.3(5) and the Commercial Court Guide paragraph O.8.7. The court will only allow the s.67 and s.68 challenges to be heard orally if there is good reason to do so or a real prospect of success. The position is different with respect to s.69 and I make clear at the outset that in my judgment WSB is not entitled to seek an oral rehearing of the decision of Moulder J DBE to refuse permission to appeal under s.69 which is, I consider, why it is not referred to in paragraph O.8.7 of the Commercial Court Guide. The decision which was taken by Moulder J DBE was one taken under s.69(5) of the Act.

10 Indeed, ordinarily, an application under s.69 will be dealt with on paper. Section 69(5) provides in terms that the court shall determine an application for leave to appeal under s.69 *without a hearing* unless it appears that a hearing is required. Section 67 and 68 do not contain an equivalent provision. I agree with the submission of Mr Brier, for FOL, that the reason for that difference is that under s.67 and s.68 has an "as of right" hearing because the challenge is to the tribunal's substantive jurisdiction or on the ground of a serious irregularity affecting the tribunal's process. Where the court exercises its summary powers to determine challenges under s.67 - s.68 on paper, a claimant may seek an oral rehearing, albeit at risk of indemnity costs. However, there is no such right to a hearing under s.69. Under s.69, there is a threshold "permission" application (which must be passed before this court will hear the appeal), which is ordinarily determined without a hearing under s.69(5) of the Act. There is no right to a rehearing of that decision *orally*. This was the point made by Males J in Midnight Marine at [21], when the learned judge said as follows:

> "*So far as the refusal of permission to appeal under section 69 is concerned, there is no right of renewal to an oral hearing. The only further recourse available if permission is refused by this court without a hearing, the usual procedure for which section 69(5) provides, is an appeal to the Court of Appeal. However, section 69(6) provides that the*

> *leave of this court is required for any such appeal. I note that section 69(8), which deals with leave to appeal to the Court of Appeal from a decision of this court on a substantive appeal under section 69 provides that such leave can only be given if "the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal". Although not directly applicable to an appeal from a decision to grant or refuse leave to appeal in the first place, this underlines the exceptional nature of such appeals*."

11 I do not consider that this can or should be circumvented by seeking to set aside an order under s.69 which has been made on paper and then having the matter listed for a rehearing. In this case, Moulder J DBE was considering a permission application under s.69 which she determined on paper as it did not appear to her that a hearing was required under the Act. Having refused permission, she did not give permission to appeal against her order, the point not being one of general importance or one which for some other special reason should be considered by the Court of Appeal. No leave to appeal against the order has been sought or obtained by WSB.

12 Whilst the context was different, I consider that FOL is right to say that the same approach as was adopted by Arden LJ (as she was) in *BLCT (13096) Limited v J Sainsbury Plc* [2003] EWCA Civ 884 at [35] should be adopted in this case. She said:

> "*I do not consider that there is any real prospect of success on the argument that an application determined on paper under section 69(5) can be reconsidered at an oral hearing. That proposition would require a provisional determination on paper before a final determination at a hearing. That is not the way in which section 69(5) is drafted. It is drafted on the basis that the court shall "determine" the application on paper unless it makes the positive decision that a hearing is required. If an oral hearing is required by Convention jurisprudence, then it is surely "required" for the purpose of section 65(5) on its true interpretation. But it is too late to ask for an oral hearing once the application has been determined on paper*."

13 The Court of Appeal further referred to the fact Pumfrey J held that the CPR 52 provision[1] had no application for arbitration and that arbitration appeals were governed solely by s.69(5) of the 1996 Act and CPR Part 62. I agree with FOL's submission that this reasoning should also apply to CPR 3 in the context of a s.69 challenge[2]. It is important that challenges to arbitrator's awards are resolved without protracted litigation and unnecessary delay or expense. This is something which Males J reiterated in his judgment in *Midnight Marine* at [4]. I would add that it would, however, be beneficial for the Rules Committee to make this conclusion express going forwards in the Rules.

14 The s.69 challenge is, in my judgment, accordingly, bound to fail. Even if that had not been so I would have found that there was no good reason to set aside the order so far as the s.69 challenge is concerned for the reasons which I shall come to shortly.

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[1] CPR 52.3(4) as then was: "*where the appeal court without a hearing refuses permission to appeal the person seeking permission may request the decision to be reconsidered at a hearing*" – which is now the wording relied on by WSB at CPR 52.4(2)

[2] See also *The Arbitration Act* (Merkin/Flannery), 6th edition §69.11 at p.750. And see further Arden LJ in *HMV UK v Propinveset Friar Limited Partnership* [2011] EWCA Civ 1708 at [39] ("*these applications should normally where possible be dealt with on paper*").

15 Turning to a brief summary of the factual background against which the s.67, s.68 and s.69 applications fall to be determined, WSB is the lender under a Securities Loan Agreement that it entered into with FOL as borrower on or around 2 April 2020 ("the SLA"). The SLA is governed by English law. It contains an arbitration clause providing that any disputes arising out of the SLA should be settled by arbitration conducted by JAMS of London.

16 The amount of the loan to be advanced under the SLA was set by reference to the value of certain shares in a Chinese company (which I shall call CMRU) that FOL had agreed to lodge with the Custodian Broker as collateral for the loan under a Custodian Management Pledge Agreement ("CMPA") which governed dealings with the collateral whilst it was within the custodian's broker's control .

17 Clause 2.1.1 of the SLA provided as follows:

> *"Borrower [FOL] hereby grants onto Lender [WSB] for duration of Loan Lien rights over the Pledged Collateral to be deposited with Borrower's account at Custodian Broker. In return the Lender hereby agrees to lend Borrower the Principal, which shall be a maximum amount of FORTY-FIVE MILLION United States Dollars (USD) ($45,000,000) and a minimum amount of FIVE MILLION United States Dollars ("USD") ($5,000,000). The Principal Loan Amount is sixty percent (60%) loan-to-value ("LTV") of the Fair Market Value ("FMV") of [CMRU] hereinafter the "Collateral" as of the Effective Date. Lender will disburse the Proceeds to Borrower's account with Custodian Broker within two (2) Business Days of the Closing Date*."

18 The arbitrator found by paragraph 9.14 of his award that clause 2.1.1 of the SLA provided that the sum that was to be advanced was USD 13.356 million as one lump sum on 19 May 2020. The lender was not obliged to advance the loan until the three pre-requisites listed in clause 1 of the SLA were fulfilled. It is common ground that the first two were satisfied after 12 May 2020. FOL argue that the third of the pre-requisites was also satisfied or, alternatively, that WSB had waived it, with the effect that WSB was obliged to advance the loan on 19 May 2020 and was in breach of the SLA in not doing so. WSB argued that this pre-requisite was never satisfied and that is the reason why the loan was not advanced.

19 The third pre-requisite was set out at clause 1.3 of the SLA and it provided as follows:

> *"Lender will not fund the Loan until: That all matters, due-diligence, facts, representations, documentation, announcements, fillings, regulatory compliance and instruments with respect to the Collateral, Borrower, the Issuer and the Loan have been met and are in form and substance satisfactory to Lender and its general counsel and compliance group*."

20 The arbitrator found that FOL had deposited its collateral in the form of 60 million shares in CMRU with the custodian broker by 12 May 2020. Notwithstanding that the collateral was lodged by FOL in accordance with the SLA, the loan was never advanced. The arbitrator referred to the fact that on 17 May 2020 "*a report was published an analyst firm called [HR] which concluded that CMRU was a zombie company and cast doubts on its legitimacy, suggesting that its principal shareholder had engaged in market manipulation*". The arbitrator found that it was "*striking that on learning of the [HR] report rather than immediately sharing with FOL their concerns raised by the report and asking for any*

assistance in addressing them. The Respondent [WSB] issued the closing statement without any covering explanation. It was also presented to say it was compliant with the SLA."

21 The arbitrator further found that "it would appear to be the case that but for the publication of the [HR] report on 17 May 2020 [WSB] would have advanced the full loan [USD 13.3 million] on 19 May 2020. He found that at the time of receiving the information WSB concluded that it needed to conduct more due diligence on the collateral and the issuer. At the time, pre-requisite 1.3 had not been satisfied. For that reason, WSB did not proceed with the loan.

22 As a result of receipt of the [HR] report, instead of advancing USD 13.3 million WSB offered USD 500,000 on 19 May 2021, when FOL received WSB's Closing Statement. This was despite the fact that the arbitrator had already referred to the fact that the USD 13.3 million should be issued in one lump sum. The arbitrator referred to FOL's argument that the pre-requisite must have been satisfied on 19 May 2020, as on that date WSB issued a closing statement which (i) established that the pre-requisites in cl.1 must have been satisfied and (ii) it was not qualified with any concerns in that respect or about due diligence. However, in para.9.47 of his Award, the arbitrator found that the right to assert that pre-requisite 1.3 had not been satisfied was not waived by the issue of the Closing Statement without any explanation or qualification. Accordingly, the failure to advance the loan on 19 May 2020 was not a breach of clauses 2.1.1 and 2.9 of the SLA.

23 On 29 May 2020 and following, WSB started asking questions about the ownership of the shares and asked FOL to provide a legal opinion as to the genealogy of the shares. This was followed by further wide-ranging requests for further information under, it was said, s.5.5 and s.5.8 of the SLA. FOL responded that it was only a shareholder and did not have access to the information sought.

24 On 25 June 2020, WSB served a notice of default on FOL, terminating the SLA but for eight different reasons. There was, in particular, a dispute between the parties as to whether FOL had breached clauses 5.5 and 5.8 of the SLA by failing to respond to requests for information regarding FOL's collateral.

25 WSB also argued that FOL was not entitled to the return of the collateral because it failed to satisfy the conditions required for funding to occur and repeatedly breached the SLA, leading to events of default and the forfeiting of the collateral. FOL maintained that there had been no event of default and the collateral was not forfeited.

26 In particular, clause 5.5 of the SLA provided as follows:

> "Further co-operation.
> Borrower shall at all times act in good faith and expeditiously, take any actions and execute any documents reasonably necessary to effect the transactions contemplated in this agreement, including providing Lender with any additional information (however described) that Lender deems reasonably necessary to consummate the transactions described herein. Lender is hereby authorised to perform any due diligence reasonably necessary on Borrower, Collateral or Issuer."

Clause 5.8 read as follows:

"Full disclosure.

> Borrower represents and warrants that any information (written or otherwise) provided by or on behalf of Borrower to Lender with respect to this agreement is complete and accurate and borrower has provided and disclosed and will continue to voluntarily provided and disclosed all relevant and ongoing material information which may impact underwriting prudency or which may be required in order to quality the collateral and the loan."

27 At cl.9.1 the SLA provided for events of default. In particular, it read as follows:

> "Events of Default.
> This section 9.1 sets forth events of default. Failure by Borrower in the performance of or observance of any covenant or provision contained herein or default in any other loan document or addendum. If an event of default is not remedied during the applicable cure period (if any) lender shall terminate this agreement and take permanent title to the collateral. The following are events of default; 9.1.1 Borrower fails to make any timely payment or transfer cash or securities when required or requested or defaults on any other obligation hereunder which, if curable, remains uncured beyond the cured period…"

9.3 of the SLA further provided as follows:

> "Forfeiture.
> If Borrower fails to cure any event of default within the applicable cure period (if any) Lender shall terminate this agreement and all amounts due hereunder shall be immediately due and payable and Borrower's right to receive the transferred collateral shall be forfeited."

The cure period is a defined term under clause 13, in particular, clause 13.8, which provides as follows:

> "A 'cure period' is the five consecutive business days during which Borrower may cure an event of default under this agreement."

28 As Mr Robinson says in his skeleton argument and as he identified in his attractive submissions before me, the relevant issues for the arbitrator were threefold; 1) whether there had been an event of default; 2) whether the appliable cure period (if any) had expired; and 3) if so, whether the equitable doctrine of relief against forfeiture would have applied.

29 Turning to the challenges to the Award, the application to set aside the order so far as it concerns the s.69 challenge is, as I have already indicated, bound to fail for the reasons that I have given. I therefore only deal briefly with the substance of the s.69 challenges, but I do so by reason of the fact that the parties have addressed me fully on them. I do not consider that any of the s.69 arguments have a real prospect of success or provide good reason for setting aside the order of Moulder J DBE. I do not consider that there is any obvious error of law on the part of the arbitrator in relation to each of them.

30 So far as the first is concerned, which concerns clause 5.5, which I have already recited, Mr Robinson submitted as follows. The arbitrator concluded in para.10.31 to 10.32 of the Award that on a proper construction of clauses 5.5 and 5.8 of the SLA WSB had no contractual right to request due diligence information from FOL if the loan that formed the

subject of the SLA was no longer achievable because of legitimate due diligence concerns or if there was no reasonable prospect of WSB funding the loan. Mr Robinson submits that this is a restriction on WSB's ability to request due diligence that is found nowhere in the SLA and he submits that this gives the clause an uncommercial construction because if the loan is claimed to be no longer achievable because of due diligence concerns he says that is precisely the circumstance when WSB should be entitled to perform due diligence in order to resolve the concerns.

31 WSB alleges that FOL breached these obligations when it failed to respond to requests for information regarding ownership of its collateral and Mr Robinson submits that the arbitrator fell into error by misquoting the relevant words of clause 5.5. He says that they are not that the information must be reasonably necessary to effect the transactions contemplated in this agreement, as the arbitrator says in 10.31 of his Award, but that rather, they cover any additional information, however described, <u>that Lender deems reasonably necessary</u> to consummate the transactions described herein."

32 Mr Robinson submits that this mistake appears to have led the arbitrator to a construction of the clauses that reads in the following qualification to WSB's entitlement to information *"for so long as those transactions have a reasonable prospect of being achieved*", and he submits there is no legitimate reason to read in that qualification.

33 I do not accept these submissions, attractively as they were put. In my judgment, when the award is properly read the arbitrator was saying two separate things. Yes, the pre-requisite in clause 1.3 was not fulfilled because the lender was not satisfied with due diligence as a result of receiving the [HR] report. However, it is clear from clauses 10.27 and 10.31 of the Award that the arbitrator also found that the documents which the lender sought from the borrower, purportedly by way of due diligence, were not reasonably necessary to consummate the loan transaction and that the lender could not deem it reasonably necessary to require this material to consummate the transaction. That was because, as the arbitrator found, the lender had already decided not to consummate the transaction because of its own legitimate due diligence concerns arising out of the receipt of the [HR] report. So what he found on the facts WSB then did was, as he says in paragraph 10.27 of his Award, to build a case that the claimant had committed an event of default so that the collateral would be forfeited to it. However, he makes it clear that after receipt of the [HR] report the lender, WSB, determined that the transaction was no longer an attractive one and it had already decided, as a result of its own due diligence, that the transaction was too risky.

34 Accordingly, not only do I consider there is no obvious error of law in the arbitrator's findings in relation to clause 5.5, but I do not consider there is an error of law at all. I accordingly agree with Moulder J DBE that it is not arguable that the conclusion on clause 5.5 was an error of law.

35 I should add, for what it is worth, that I do not consider that, as FOL submits, there is, in fact, a further threshold reason why the court should not entertain the s.69 challenge, namely, that the parties excluded the right to appeal by clause 10 of the SLA, which provides for the award to be final, unappealable and legally binding on the parties. The parties are entitled to agree to exclude s.69 appeals (see s.69(1) of the 1996 Act) and, as was stated in *Shell Egypt West Manzala GmbH & Anor v Dana Gas Egypt Limited* [2009] EWHC 2097, a judgment of Gloster J DBE (as she then was), at para.39.

> "*…I conclude that the use of the words 'final and binding', in terms of reference of the arbitration are of themselves insufficient to amount to an exclusion of appeal. Such a phrase is just as appropriate, in my*

> *judgment, to mean final and binding subject to the provisions of the Arbitration Act 1996*."

36 Mr Brier points out that that does not dispose of the point because the clause with which we are concerned does not simply use the words "final and binding" but uses the words "final, unappealable and legally binding on the parties". However, WSB point out that the arbitration was conducted under the JAMS International Arbitration Rules, but the Comprehensive Arbitration Rules were also available under the arbitration agreement, which provide an optional right of appeal as follows:

> "The parties may agree at any time to the JAMS optional arbitration appeal procedure. All parties must agree in writing for such procedure to be effective."

37 I accept Mr Robinson's submission that the wording of clause 10 is capable of referring to the JAMS optional arbitration appeal procedure and it is unnecessary to extend its scope to s.69 appeals. Accordingly, I do not accept the submission of Mr Brier that the only meaningful way in which the Award could be unappealable is if the right of appeal under s.69 of the Act is excluded.

38 I turn next to s.68 and "serious irregularity", tracking the order of the submissions that were made by Mr Robinson. Section 68(1) provides as follows:

> "A party to arbitral proceedings may… apply to the court challenging an award in the proceedings on the grounds 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
>
> > (a) failure by the tribunal to comply with s.33, which is the general duty of the tribunal to act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent."

It is important to remember that s.68 is "*not to be used as a means of launching a detailed inquiry into the manner in which the arbitrator considered the various issues*" and "*it is axiomatic that the issue in any s.68 application is not whether the arbitrator reached the right conclusion*" (see *JD Wetherspoon Plc v Jay Mar Estates* [2007] EWHC 856 at [9] *per* HHJ Peter Coulson QC (as he then was).

39 The onus falls upon WSB to establish two key requirements under s.68, namely, "serious irregularity" and "substantial injustice".

40 The starting point for analysis of the "serious irregularity" requirement is that plainly a high threshold must be satisfied, *per* Lord Steyn in *Lesotho Highlands Development* [2005] 3 WLR 129 at [28] "*a serious irregularity must fall within the closed categories in s.68(2)*" and, as I have said, WSB relies on 68(2)(a).

41 WSB contend as follows, taking this from para.45 of their skeleton argument:

> "*The argument in para.10.30 to 10.31 of the Award depends on the Arbitrator's finding that from 19 May 2020 onwards there was no reasonable prospect of the respondent funding the USD 13.3 million loan, yet this was not an argument advanced by FOL in the arbitration, nor raised at any time before the issue of the Award*."

42 WSB says that it had no opportunity to respond to this argument and they say that amounts to a serious irregularity which has caused substantial injustice to them. In her reasons in her Order, Moulder J DBE disagreed with this and said as follows:

> "*There was no serious irregularity as alleged by WSB. The issue was clearly in play for the reasons set out in the respondent's skeleton. The issue was whether the respondent had failed to comply with cl.5.5 of the Securities Loan Agreement. The finding was that in the circumstances WSB had no contractual right to demand the information and assistance. The conclusion that WSB had a change of heart was open to the arbitrator as part of his reasoning in reaching his finding*."

43 I consider that to be clearly correct. This point has no real prospect of success. If the first sentence of para.10.27 was in play, as it was, namely, that it was apparent from the closing statement that shortly before it was issued the respondent had had a serious change of heart over the attractiveness of the transaction, then the finding in para.10.30 was also, it seems to me, clearly in play. There was no reasonable prospect of the respondent funding the loan as from 19 May 2020 because of the damage inflicted to the issuer by reason of the [HR] report.

44 It must be borne in mind that it will not amount to a serious irregularity if a tribunal decides a case on the basis of a point not strictly argued or pleaded by a party. It is enough, as Moulder J DBE noted, that the issue was in play or, as is sometimes said, "in the arena" in the proceedings. It is only if a point was not raised at all during the proceedings which deprived a party of the opportunity to address the arbitrator on it and the arbitrator proceeds to base his decision on that point that this head of complaint might be triggered. However, it seems to me perfectly plain from the factual findings of the arbitrator that, looking at para.10.21 of the Award, WSB had not adduced any evidence that cast doubt on the veracity of FOL's assertion that matters relating to CMRU were not within its knowledge as they were only shareholders; there was no evidence to contradict Mr [Q]'s evidence; and the respondent did not disclose a copy of the Hindenburg report or the subscription agreement or other information that they said they had uncovered. Moreover, the arbitrator accepted Mr [Q]'s evidence that as a shareholder he did not have access to the information that the Respondent was requesting and the arbitrator moved on from that finding to refer to the fact that it was only after the receipt of the [HR] report that WSB then began to issue further requests for information in the light of the fact that the attractiveness of the transaction from their point of view had dimmed. Having previously agreed to advance USD 13.3 million in one lump sum, the most they would offer, just two days after receipt of the [HR] report, was USD 500,000. In the light of all of these findings, it was perfectly reasonable for the arbitrator to find that there was no reasonable prospect from 19 May of FOL ever funding the loan they had contracted to provide and that issue was clearly, it seems to me, in play and required to be addressed by WSB.

45 It follows, in my judgment, that the allegation that WSB had a change of heart and that there was no reasonable prospect, therefore, of WSB ever funding the loan which it had

contracted to provide of USD 13.3 million was, indeed, squarely in play regardless of any position on the pleadings. This point accordingly has no real prospect of success.

46 I turn next to the second s.69 argument under clause 5.9 of the SLA which is recited at para.10.57 of the arbitrator's award and that clause reads:

> "*Interferences. Borrower will not interfere or seek injunctive relief from any court of law, regulatory body, central depository or stock exchange requesting to invalidate, suspend, limit, impede, terminate or restrict this agreement. Injunctive relief applications in any court of law initiated by Borrower or any interference by Borrower or central depository agency with custodian broker or sub-custodians shall not be permissible. Borrower will not interfere in any way or challenge the validity or enforceability of this agreement or assert forum non conveniens*."

47 The submissions of WSB in this respect are summarised in paras. 60 to para.64 of Mr Robinson's skeleton argument, where he states as follows:

> "*WSB also alleges that FOL committed an event of default by asking the custodian broker to freeze the collateral on 31 May 2020*."

That is a reference back to para.8.46 of the Award and, in particular, 8.46 and 8.47, where it is recorded that there was a request to freeze the shares on 31 May. On 1 June 2020 the custodian broker replied saying that it had issued dealing restrictions of freeze on shares of CMRU.

48 The argument of Mr Robinson is that the arbitrator wrongly construed the second sentence of clause 5.9 as being directed to injunction proceedings against the custodian broker. That is a reference to para.10.67 of the Award where the arbitrator says this:

> *"I have considered cl.5.9 carefully. The first sentence contains a ban on court action that is qualified in its breadth of application; the second sentence contains a similar ban without any qualification but it is directed to injunction proceedings against the custodian broker or sub-broker. I have decided there is no ambiguity in cl.5.9 and that it does not prohibit the proceedings brought by the claimant to enforce the terms of the SLA. Accordingly, I have decided that the claimant's inquiries of the custodian and the injunction were not seeking to invalidate, suspend, limit, impede, terminate or restrict the SLA but, rather, to enforce the SLA*."

Mr Robinson submits that the reasoning there is fallacious because the second sentence is not confined to injunction proceedings against the custodian broker, but is wider and covers any interference with that broker, including telling it to freeze the collateral that it held, which FOL did a month before any injunction proceedings were obtained. He accordingly argues that FOL's "freeze order" to the custodian broker on 31 May 2020 was a breach of cl.5.9 of the SLA and an event of default under cl.9.1.1 of the SLA.

49 Mr Brier takes issue with that and argues that on a true reading of 5.9 the injunction/interference with the broker which is prohibited is where the borrower is seeking to "invalidate, suspend, limit, impede, terminate or restrict the SLA" as set out in the first sentence of that paragraph of that clause and it cannot be that cl.5.9 prohibits injunctions or

interference to enforce the actual terms of the SLA because that would be a highly uncommercial reading.

50 In my judgment, Mr Brier is right about this. FOL was seeking to enforce the agreement, not to invalidate it, and I consider that the second sentence of cl.5.9 takes its context from the first sentence of that clause and, indeed, the third sentence of that clause. The arbitrator, in fact, when one reads para.10.67 of the award as a whole, was addressing a situation which not only concerned the obtaining of an injunction but also the earlier inquiries that were made by FOL of the custodian at the end of May 2020, because he stated in terms: "*Accordingly, I have decided that the claimant's inquiries of the custodian and the injunction were not seeking to invalidate, suspend, limit, impede, terminate or restrict the SLA but rather to enforce it.*" That was a finding, it seems to me, which was open to the arbitrator in the light of his findings of fact. Once again, I do not consider that there is here an obvious error of law or, indeed, an error of law and I do not consider there is any good reason to set aside the order of Moulder J DBE in this respect.

51 Because there was no event of default, therefore, as Moulder J DBE held, the construction of the cure period is irrelevant to the outcome, as given the findings that there had been no event of default, that issue became redundant. So far as the issue of forfeiture is concerned, the arbitrator's remarks on this topic were accordingly *obiter* and accordingly this cannot be said to be a determination that will substantially affect the rights of one or more of the parties. Again, in my judgment, there is no good reason to set aside the Order of Moulder J DBE in that respect either.

52 Accordingly, I turn next to WSB's application to set aside the order in respect of its s.67 challenge. In my judgment, WSB has failed to identify a good reason for setting aside the judge's decision in this respect as well and there is no real prospect of it succeeding and overturning the judge's decision. The basis for WSB's s.67 challenge is set out in paras.9 to 18 of its "remedies claim", and there are two grounds relied on being relief from forfeiture and costs.

53 So far as relief from forfeiture is concerned, again, I agree with the reasons of Moulder J DBE in her order, where she says that: "*WSB's submission that the arbitrator lacked jurisdiction to grant relief from forfeiture has no real prospect of success since the arbitrator did not need to decide the point in order to make his award, given the findings that the collateral had not been forfeited and remained the property of the claimant*."

54 So far as the second of these two issues is concerned, costs, this relates to clause 10 at p.106 of the bundle, the dispute resolution clause which reads:

> "*The parties hereto agree that any dispute arising out of this agreement shall be settled by arbitration conducted at and by JAMS of London… Regardless of the outcome of the arbitration, all arbitration, arbitrator tribunal and legal costs will be borne by the Borrower*."

Furthermore, clause 9.4 on the previous page reads, under the heading "Borrower Liability":

> *"Borrower hereby agrees to pay all Lender's reasonable attorneys' fees, costs and any expenses arising from Lender's enforcement of its rights pursuant to this agreement and Lender's sole recourse for such costs, fees and expenses is the collateral, with the exception of liquidated*

damages provision, which Lender may seek to recover outside of the collateral."

55 The arbitrator dealt with this question of costs at para.12.20 to 12.22 of his Order, where he said as follows:

"*12.20 Section 61 of the Arbitration Act provides:*

1) *The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.*

2) *Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.*

12.21 As to whether the parties have any agreement as to costs (other than that contained in the SLA dealt with above) I need to consult the JAMS International Arbitration Rules, which govern this arbitration."

He then referred to Article 37.4 of those rules, which provides:

"*The Tribunal will fix the arbitration costs in its award. The Tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case."*

He concluded at 12.22:

"I am satisfied I have the parties' agreement, as per the agreement to arbitrate under the JAMS International Arbitration Rules, and the power to award costs as I determine appropriate according to the circumstances of the case."

He then found that in the light of all of the circumstances of the case WSB was not entitled to an award in its favour for arbitration costs.

56 WSB submits that the arbitrator lacked jurisdiction to award costs and Mr Robinson says the question of how the arbitrator should allocate costs is a different question to whether costs should be determined by the arbitrator at all.

57 Section 60 of the Arbitration Act provides that:

"*An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen."*

Section 61 of the Act, as I have said, provides:

"*The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties."*

Article 37.4 of the JAMS International Arbitration Rules, as I have already said, provides that the tribunal will fix the arbitration costs in its award and the tribunal can apportion such costs between the parties if it determines that apportionment is reasonable.

58 WSB seeks to enforce clauses 9.4 and 10 of the SLA, which provide for the costs to be borne by FOL. However, as Mr Brier submits, those clauses were agreed *prior to* a dispute having arisen and I agree, therefore, that they are invalid under s.60 of the Arbitration Act as the arbitrator held at his dispositive para.6, and I consider that his analysis of this issue, at paras.12.18 to 12.22, is not to be faulted. Moulder J DBE also recognised this in her order, stating that:

> "*WSB's submission that the arbitrator lacked jurisdiction to award costs is contrary to the express provisions of the 1996 Act, referring to para.12.18 to 12.20 of the Award, and she considered that the arbitrator was entitled to conclude that the agreement for costs is governed by the JAMS International Arbitration Rules, 12.21 to 12.22 of the Award being the rules under which they agreed to conduct their arbitration*."

59 Insofar as it is now said by Mr Robinson that cl.9.4 and 10 may be invalid for the purposes of s.60 but can still be valid in the sense that they are evidence of the parties' agreement under s.61, I do not consider that that dictates a different conclusion to this issue. The agreement between the parties under s.61, which was expressly agreed between them, is, I consider, that which one finds in the JAMS Rules, not the invalid agreement which was reached prior to the dispute in the SLA.

60 In all the circumstances, I consider there is no good reason to set aside the order of Moulder J DBE on this point. The point has no real prospect of success and the s.67 challenge accordingly fails.

61 In all these circumstances, I dismiss the application.

LATER

62 I need to rule on costs of both this application and also the application that was before Moulder J DBE because by para.3 of her order she ruled that the applicant WSB shall pay the respondent's (FOL'S) costs of the application to be summarily assessed on paper if not agreed. Ordinarily, I would take quite a hard line on the costs of the Defendant on an application such as this because, as I have already said, the Respondent very often does not attend on this sort of hearing or if it does it limits its submissions in terms of length. However, I bear in mind that the Claimant raised a significant number of substantial issues which it invited the court to actually determine fully without any further hearing taking place and in those circumstances it seems to me that the Respondent was bound to attend and cannot be criticised for preparing fully for the hearing.

63 Having said that, I do need to bear in mind that I should not encourage lengthy applications of this nature and I also bear in mind that the rates charged by the Respondent's solicitors are somewhat higher than the guideline rates. In all the circumstances, I think the right figure on a total bill of around £70,000 is £50,000 payable to the Defendant FOL.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.