Neutral Citation Number: [2025] EWHC 61 (Ch)

Case No: BL-2022-001413

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

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

Date: 17/01/2025

Before :

MR JUSTICE MILES

- -

Between :

RABBI SAUL DJANOGLY

Claimant

- and -

(1) MR DAVID DJANOGLY
(2) MR AVROM DJANOGLY
(3) DAYAN DOVID DUNNER
(4) DAYAN DOVID COHN
(5) DAYAN MORDECHAI EISNER **Defendants**

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Angeline Welsh KC (instructed by **Asserson Law Offices**) for the **Claimant**
Elizabeth Weaver (instructed by **GSC Solicitors LLP**) for the **Second Defendant**

Hearing dates: 2, 3, 4 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Miles:

1. This is an arbitration claim brought by Rabbi Saul Djanogly ("SD") challenging an award made by the Golders Green Beth Din of the Union of Orthodox Hebrew Congregations (who have been joined as the third, fourth and fifth defendants (the "Tribunal")) dated 5 August 2022.

2. The claim is made under sections 67 and 68 of the Arbitration Act 1996 (the "1996 Act"). SD also seeks leave under s. 69 of the 1996 Act.

3. By paragraph 4 of an order dated 6 September 2023 Ms Shea KC, sitting as a Deputy High Court Judge, granted SD's application to determine certain threshold issues as preliminary issues. This is the trial of the preliminary issues.

4. The underlying arbitration is a family dispute which was referred by ad hoc agreement to the Tribunal.

5. The first defendant, David Djanogly ("DD"), is the father of SD and the second defendant, Avrom (known as Avi) Djanogly ("AD"). AD and SD are brothers.

6. In the arbitration there were claims by both DD and AD against SD and counterclaims by SD against DD and AD. By the award the Tribunal directed SD to pay £100,430.50 to DD.

7. The award only concerned claims advanced by DD against SD. The Tribunal decided that AD's claims would be determined in a later phase of the arbitration. The award against SD is relatively modest in value but the outcome of these proceedings may also affect AD's claims against SD. SD's counterclaims against DD and AD have not yet been decided.

8. The dispute has a very long history. In brief summary, it started with DD's claims against SD for financial maintenance and other matters under Jewish law. As well as alleging that he was in need due to poverty, DD alleged that he had historically made loans to SD and AD to enable them to undertake a business through a property development company called SAS Financial Services Limited ("SAS"). DD originally alleged that he had lent £125,000 to SD in around 1990 to establish SAS. SAS was owned 49% each by SD and AD. DD said that had also lent £125,000 to AD.

9. DD later came to allege that from about 1985 onwards he had lent about £610,000 to SAS itself and that SD, who assumed complete control of SAS from around 1992 onwards, wrongly contended that SAS had repaid DD, when that was not the case. DD alleged that SD was liable under Jewish law for the amounts that had been repayable to DD. He alleged that it was a reasonable inference that SD had taken these amounts for his own benefit.

10. SD alleges in his pleadings in these proceedings that he objected to these reformulated claims on three grounds: (a) that the reformulated claim was against SAS, which was not a party to the arbitration agreement (this has been called the "Non Party Defence"); (ii) the claim against SAS fell outside the scope of the dispute which the parties had agreed would be referred to arbitration (this has been called the "Out of Scope Defence"); and (iii) the monetary claims were time barred under the Limitation Act

1980 (the "1980 Act"), which applies on a mandatory basis under s. 13 of the 1996 Act (the "Limitation Defence").

11. SD now relies on the Non Party Defence and Out of Scope Defence to challenge the award under s. 67 (substantive jurisdiction) and s. 68 (serious irregularity) of the 1996 Act, and the Limitation Defence on the basis of s. 68. He also contingently seeks leave to appeal on a point of law under s. 69.

12. DD was not represented at the hearing. Instead AD has instructed counsel to oppose the claim. AD is potentially affected by some of the challenges, including the Limitation Defence. SD did not object to AD making submissions. I am satisfied that DD has been served with the proceedings and with notice of this application and has chosen not to participate; and that it is appropriate to proceed in his absence. I am also satisfied that in practice his position has been represented by the submissions of counsel for AD.

History of the dispute and the arbitration

13. The dispute started with DD seeking financial maintenance from SD. DD had historically been relatively wealthy and had settled substantial trusts on SD and AD. He had also advanced loans in connection with SAS, which was owned 49% each by SD and AD.

14. In the financial crisis of 2007/8 DD lost much of the value of his remaining assets. He looked for financial support from SD and AD. It is common ground that they both provided him with some financial support. Indeed between 2007 and 2020 SD provided a total of £170,000 odd to DD. DD however contended that he lacked the funds to maintain himself and he sought further support from SD on the grounds of poverty.

15. The parties were unable to agree about this and ultimately, in 2013, DD approached the Beth Din of the Federation of Synagogues for a resolution of his claims. One of the judges, Dayan Lichtenstein ("DL"), who knew the parties, considered that a formal hearing in the Beth Din would serve to increase the tension within the family. He suggested that the dispute should be handled informally by him and that he would issue a ruling or "Psak Din". DD, SD and AD agreed on this course. DL heard all the parties and issued a Psak Din on 28 July 2014.

16. The Psak Din of 28 July 2014 explained, under the heading "History", that DD had been a wealthy man with two sons. According to DD's account, he had supported SD's career as a stockbroker and had bought SD a house. He had also "handed Saul £125,000 to set up a property company together with premiums for 2 pensions". He had also set up a trust fund of £500,000 for SD and his children. He had set up similar trusts for AD and his children. After the 2007 crash, DD became dependent on AD and SD. In the next section, DL recorded some of the details of DD's financial position and living expenses. He found that both sons had assisted DD but SD had recently asked DD to put a mortgage on a house he owned for the amounts SD would have contributed throughout DD's lifetime. This is what had led to DD's approach to the Beth Din for a ruling.

17. Under the heading "Claims", DL explained that AD had sought a ruling about the maintenance of DD in the future. DD had asked DL to rule on "all of the above". SD wanted rulings on various questions about his obligation of maintenance of his father.

18. DL then set out his rulings. He said that the Halacha (Jewish law) is clear. An impecunious father is required to be supported by his children and the burden is to be shared according to their respective incomes. SD was in a better financial position than AD and had been for a number of years. DL addressed how much support was to be given.

19. He then went on to refer to DD's case that he had advanced loans to both sons and had asked for the return of the loans. They were described as follows:

> "£125,000 was lent to Saul to set up the property company SAS and 2 pension premiums were set up, approximately £20,000. So [DD] is asking for £145,000 back but would allow Saul to deduct £30,529 which Saul advanced from October 2011 - April 2013. Total of £114,471 (adjustment must be made from April 2013 - July 2014).
>
> £125,000 was lent to Avi for setting up SAS and 1 pension premium of £10,000 was advanced making a total of £135,000."

20. DL stated that these monies were given "as help for investment purposes to generate an income." DL ruled that the advances were in the nature of loans rather than outright gifts. He found that they were a loan "to help his sons in business". DD therefore had the right to call for the return of the monies. If the loans were repaid, he would lose his status as a poor person and his sons would not be required to support him further.

21. DL then ruled that AD had contributed far more to the maintenance of DD than SD (£250,000 and £57,000 respectively). This imbalance needed to be retrospectively adjusted. Under the heading "My Decision – Financial Issues", DL decided that DD should not seek more than £50,000 p.a. from his two sons. AD's larger share of past contributions towards DD's maintenance should be reflected in DD's will. DL also urged the parties to seek to resolve their family differences.

22. DL issued a second Psak Din dated 11 August 2015. Its purpose was to rectify certain matters in light of facts he had not previously understood. One concerned the ownership of a flat that he had previously thought was owned by DD but was in fact in the name of AD and his wife. Another concerned service charges on another flat. DL amended his rulings about the adjustments as between SD and AD. Nothing was said in this ruling about the loans concerning SAS.

23. DL gave a third and final Psak Din on 11 October 2016. Its purpose was to cover certain expenses that had arisen since the earlier rulings. DL found that SD had not paid his share of DD's expenses. He referred to part of the first ruling concerning the loan of £125,000 made to establish SD in business. He said that DD was entitled to be repaid immediately. He also said that if this sum was repaid DD would not be entitled to any further maintenance from either of the children. DL ruled that SD should now repay the £125,000 and certain other sums (coming to a total of £131,000 odd) and also pay £105,000 to AD. On payment of these sums DD and AD's claims against SD would be extinguished. DL noted that this was a very sad case of a family that has allowed a financial dispute to grow into a "broiges" (Yiddish for a bitter dispute or feud).

24. DL's rulings in the Piskei Din did not resolve matters. On 24 January 2017 AD wrote to the London Beth Din on behalf of himself and DD referring to the dispute, described as "regarding the care of [DD], and other financial dealings between the parties." This document, called "the Reference" by the parties before me, included the following:

    i) It referred to the process that had taken place before DL, including his Psak Din.

    ii) It described the history in some detail. This included, materially, that DD lent SD and AD £125,000 each "to help set up a property company and to enable payment of premiums for two pensions". Appendix 1 set out the statement of DD's support of his son "to the best of [DD's] recall". Appendix 1 listed the loan of £125,000 as a "loan to set up SAS Financial Services (Property Company) 1990".

    iii) Under the heading "[DD's] Claim" it explained that DD wanted to be clear above all about the amount of his maintenance and care in the years to come. He also wanted SD "to repay to him the original loan provided to set up SAS Financial Services".

    iv) Under the heading "[AD's] Claim" it stated that AD contended that he had paid a greater share of DD's maintenance than SD. He therefore claimed the £106,000 set out in DL's rulings. It also stated, "SAS Financial Services. This company was set up with a £250,000 loan as detailed above, £125,000 from each brother. It was [DD]'s intention that all assets in this company be divided equally between each brother, and this was their understanding too." It then alleged that in 2007 SD had persuaded AD to assign to SD "the use of the company's profits" for tax reasons, but on the understanding that the assets would continue to be divided 50/50. AD signed a document sought by SD. In 2009 SD asked AD to sign a document winding up SAS at which point the surplus after paying creditors would be divided between the shareholders. AD alleged that, in the event, he did not receive his share of the assets. AD then alleged that SD and his wife had had the benefit of two pensions "in the company" whereas AD and his wife had only had one. AD believed that the pensions would be worth about £100,000 each.

    v) AD claimed the contribution of £106,000 for maintenance, half the value of one of the pensions (ie £50,000) and other smaller sums. He then said "(Avi is currently doing research on SAS Financial Services and reserves the right to take future action against Saul with regard to the non-distribution of assets in the proper manner.)".

25. On 4 July 2018 the Registrar of the Golders Green Beth Din sent an email to SD referring to the claim submitted by AD and DD. The email referred to the Psak Din and said there were some additions as set out in the attached document, i.e. the Reference of 24 January 2017.

26. On 2 August 2018 the parties entered an ad hoc arbitration agreement appointing the Tribunal. It was headed "Arbitration Agreement under the Arbitration Acts". The parties stated that they:

> "agree to refer to arbitration the following claim and any related claim or counter-claim regarding: Compliance with Piskei Din issued by [DL] and related issues to be determined by this Beth Din."

27. The Tribunal was empowered to give its decisions in accordance with its understanding of Jewish Law; and to determine the extent of the reasons given for its decisions. The parties also agreed that the Tribunal would not be limited to strict law but would be absolutely entitled to use its discretion.

28. There were initial hearings of the arbitration in September and October 2017.

29. On 19 January 2018 AD sent an email to the Registrar saying that SD had expressed a concern that he and DD were bringing up new matters. He confirmed on behalf of himself and DD that the claim was confined to the facts in the Reference.

30. There was another hearing on 23 January 2018. The second defendant alleges in his pleading that one of the members of the Tribunal said that SAS and the dealings of the parties were central to the case brought by DD and AD and were part of the case on which the Tribunal would rule. This is not admitted by SD.

31. On 22 February 2018 the Tribunal directed SD to disclose documents relating to SAS as sought by AD and DD. These included documents concerning the distribution of SAS's assets and all of SAS's books and records including bank statements and cheque books. The last request was in these terms:

> "At the last hearing Saul denied that our father had loaned us money with regard to purchasing properties for SAS claiming instead that there was 100% bank finance. As he had full control of the company he should therefore provide documentary evidence of these alleged 100% bank loans and any subsequent bank loans and details of the properties purchased."

32. On 26 February 2018 SD responded. He said that he did not have the information requested and had had no legal obligation to retain it.

33. On 4 March 2018 the Tribunal wrote to SD about disclosure and hearing dates. As to the former, it required production of documents in SD's possession about SAS and, if he did not possess them, he was required to make every attempt to obtain them.

34. On 6 March 2018 Mr Roy Hayim signed a letter stating that between 1985 and 1989 SAS had borrowed money from banks to buy various properties and that his recollection was that any shortfall was funded by DD. He explained that he had been joint senior partner in a firm of chartered surveyors, Moss Kaye and Roy Frank (which had worked for SAS).

35. On 27 May 2018 SD emailed the Registrar making various information requests. These included proof of AD's assertion that he had repaid £125,000 to DD "in relation to the £125k loaned to my brother for the establishment of SAS". The Registrar passed these requests on to AD.

36. On 27 May 2018 AD answered these requests and in turn made various requests of SD. AD's request [4] concerned the funding of SAS. AD recorded that SD had alleged that the properties in SAS were 100% funded by bank loans. He asked for an explanation of the 1991 accounts of SAS and asked about the funding of the balance over and above the bank lending. He referred to equity of £658,000 odd funded by DD and said that DD alleged that £250,000 came from his inheritance and the balance was his own cash.

37. SD answered this by saying, "Irrelevant. The 1st set of accounts of the co. only shows other creditors of circa £107,000 contradicting [DD's] assertion that he introduced £250,000 of capital by way of a loan".

38. On 30 May 2018 Mr Hayim signed a second letter saying that the properties identified by AD had been bought by SAS between 1985 and 1991. He also said that SD took over the portfolio in 1992. He also said that DD had put hundreds of thousands of pounds into SAS as per the 1991 accounts.

39. On 31 May 2018 SD submitted further questions to DD and AD. These included a request for proof that DD had advanced to SD "or the company" £125,000 in his name when it was originally set up. He asked whether this was a personal loan to him or directly to SAS. He also asked why the first set of accounts showed "other creditors" of £107,000, when according to DD it should have shown £250,000. In his answer AD said that the only source of the "other creditors" (i.e. non-bank creditors) shown in the accounts from 1987 onwards was DD. AD said that it was SD's argument based on the figures in the accounts which had led AD to examine the accounts.

40. Also on 31 May 2018 Mr David Colson signed a letter which was submitted to the Tribunal. Mr Colson explained that he had worked for DD as an accountant from the mid-1970s. He explained that DD had asked him to set up a company for his two sons in early 1983. DD wanted Mr Colson to have a 2% shareholding and all three of them were appointed as directors. Mr Colson resigned as company secretary on 1 January 1990. Mr Coulson explained that he generally managed all the accounts and books for SAS covering the accounting periods ended 30 June 1985 to 30 June 1991. He believed that DD had injected hundreds of thousands of pounds of his own monies into SAS to part finance the purchase of properties. The other finance came from the bank. He explained that by the year end June 1988 the "other creditors" had risen to a figure of £676,000. He said that as far as he was aware DD was the only person actively involved with the company who would have injected these monies into SAS. Mr Coulson said that in 1992 he had stopped working for DD, and had resigned as a director of SAS but retained his 2% shareholding. He said that he had not heard from SD, AD or DD since 2004.

41. There were further hearings in June and August 2018.

42. On 8 August 2018 SD provided a Briefing Note to the Tribunal. Under the heading "Repayment of £125,000 alleged loan to me", SD referred to DD's case and cited the "other creditors" figures in SAS's accounts for 1985 and 1986. He said that these did not tally with a figure of £250,000. He also said that by 2001 other creditors had been paid off almost in full. He described the accounts of SAS as "hard evidence". He went on to say that if the Tribunal held that he was personally liable for these amounts, he had almost entirely repaid them as result of his ongoing financial contributions.

43. Later in the document under the heading "My brother's claims arising against me re SAS Financial Services Limited" he referred to AD's allegations that SD had wrongfully misappropriated the assets of SAS after 2007. He said, "I respectfully request that all matters pertaining to the company and any claims my brother may have as a result are fully and finally settled at this Din Torah in line with the original arbitration agreement we signed."

44. On 26 August 2018 DD commented on SD's Briefing Note. In his comments DD referred to the "other creditors" in the accounts. He referred to the letters from Mr Hayim and Mr Colson. DD said that until recently he had thought that the amount invested was only £250,000. The accounts showed that the "other creditors" were in fact far higher. It was because AD had recently been able to locate the SAS accounts that the actual scale of the loans had become clear. DD went on to allege that in later sets of accounts the figure for "other creditors" reduced to zero. He said that SD had however accepted that no money went from SAS to DD. DD said that he had lent the money to SAS and it was then taken from the company; it was unaccounted for and SD was therefore accountable for it. DD distinguished this from a case of bankruptcy. DD alleged that it was not acceptable for SD to say that he could not remember what had happened to over £500,000. It is SD's position that he did not have sight of DD's comments on SD's Briefing Note until 16 November 2023, during the course of these proceedings.

45. There was another hearing on 6 November 2018. The Tribunal made an interim decision giving SD the choice of paying £125,000 to DD, in which case he would not be obliged to make further payments towards supporting him at present (pending further decision of the Tribunal), or not paying that amount, in which case the obligation to support him would continue at a higher rate than previously calculated, to be decided by the Tribunal. The Tribunal directed that SD's decision on this option should be communicated within one week. The Tribunal gave a written explanation for this ruling on 3 August 2020.

46. On 12 November 2018 SD emailed the Tribunal to say that he would not be making the payment of £125,000. He said, "DD has made his claim on the basis of guesswork on the company accounts. As you know, the very same accounts show that all other creditors have been paid off. And so the basis of his case is totally unfounded and unproven allegations of fraud on my part."

47. On 29 January 2019 the Tribunal embodied its direction of 6 November 2018 in an interim award. It required SD to pay DD £550 a week until the full sum of £125,000 had been paid.

48. On 12 December 2019 Solomon Taylor and Shaw ("STS"), the then solicitors for SD, wrote a letter to the Tribunal complaining about the interim award. The letter referred to the 1996 Act and contended that the Tribunal had breached its obligations of fairness under s. 33. STS said (among other things):

> "b) You have ignored the fact and the evidence which demonstrates that our client has transferred well in excess of £125,000 to his father since October 2011 and that to the extent that our client ever owed his father anything, as a result of him lending £250,000 to SAS Financial Services Limited at some

> time between April 1983 and June 1985, this indebtedness has been repaid in full."
>
> c) The accounts of SAS Financial Services Limited support our client's position;
>
> …
>
> e) Even if, which is denied, [DD] is still due to be repaid any part of his loan to SAS Financial Services Limited, this would be a matter between [DD] and SAS, and not our client."

49. The Tribunal did not accept these criticisms.

50. There was a further hearing on 14 January 2020. There is a note headed "Summary of questions and evidence produced by Saul Djanogly at the hearing on 14 January 2020". It was produced by SD on 21 January 2020 and was submitted to the Tribunal. Among other things:

    i) It referred to the claims of DD regarding the loans to SAS. It said that the claim was for £551,716. It said that this was based on Mr Colson's letter. It said that the claim should be reduced to £11,000 odd as by 1990 the other creditors had fallen to £292,000 odd, and certain deductions were to be made.

    ii) It said that this "new increased claim" was not made at the last hearing, where DD had insisted the loan was £250,000. It said that this was indeed the third version of DD's story. DD had started by saying that the money was a personal loan to SD, then there was a loan of £250,000 to the company; and now it had increased to £676,000 odd.

    iii) It said that there were other problems with the claim. These included that DD had not explained why SD should be 100% liable for this amount; that he had not asked for repayment of it; that he had not provided written evidence about it; and the company accounts contradicted his earlier case that it was a loan made in one tranche.

    iv) It said that the claim was in any case against SAS and not against SD. SD could not be liable unless he had committed wrongdoing and there was no case of that. In any case SD denied that he had been guilty of any wrongdoing.

    v) It said that the accounts as of 30 June 2004, which showed that DD was no longer a creditor of the company, showed the true position.

    vi) It said that there was no evidence of false accounting or the stealing of monies from SAS that were due to DD.

    vii) It concluded, "[i]n summary, both my father's and brother's claims against me do not have any supporting written evidence. All they have done is seek to blacken my character without any basis. On the contrary all the written evidence supports my testimony. As such, they have wasted everybody's time and resources and I therefore claim for all my costs against them."

51. In a later document served by his solicitors, by now Asserson, dated 22 August 2022, SD said that the 14 January 2020 hearing was the first time DD had contended that the loan was for more than £250,000.

52. On 29 March 2020 DD sent a letter to the Registrar to be passed to SD. This included the following:

    i) It referred to DD putting money into SAS from 1984 to 1989.

    ii) It said that from 1997 onwards the figures for "other creditors" had reduced, but the sums were unaccounted for and should either have been paid to DD or the shareholders.

    iii) SD had conceded during cross-examination that DD had put money into SAS. He had also admitted that SAS had paid nothing back to DD.

    iv) DD was the "other creditor" in SAS's accounts.

    v) SD had obtained the money from him by misappropriating it from SAS.

    vi) The arbitration was taking an eternity and this was unfair.

53. On 3 August 2020 the Tribunal explained the reasons for its interim award of 29 January 2019. It said (among other things) that though it was not conclusive at this stage it appeared to the Tribunal that DD had lent £125,000 to SD and AD, who were each liable to repay it to DD.

54. There was a further hearing on 1 December 2020. AD submitted a long document called "AD Submission". SD did not attend the hearing. The AD Submission document set out DD and AD's case at length. Among other things:

    i) It stated that SD had appropriated DD's loans to SAS for himself and that DD had not received anything from SAS.

    ii) It alleged that SAS was set up by DD and financially supported by him and was in reality a quasi-partnership between SD and AD, albeit in the form of a limited company. It was clear that money was missing and unaccounted for. The narrative put forward by SD was untrue and depended on showing that the audited accounts were inaccurate.

    iii) It took issue with evidence provided for SD by Mr Leboff (an accountant) about the accounts.

    iv) It said, "it is manifest that [SD's] whole narrative of 100% bank finance/huge bank indebtedness was a smokescreen that allowed him to take the monies in SAS at that time for his personal use … This all supports my contention that [SD] took the money owed to [DD] for his own purposes under the guise that [DD] had been repaid and that [SD] told the SAS Accountants that this family money had been repaid." It went on to allege misappropriation by SD; these sums should have been paid to DD.

55. The AD Submission document was provided to SD by the Tribunal on 2 December 2020. The Tribunal sought SD's response to the evidence.

56. SD wrote to the Tribunal on 23 December 2020 saying that he was unable to respond to the documents because he had not been told what the complaints were or what they went to. He said that the documents related to SAS. He then referred to some of the SAS accounts and said that they contradicted AD and DD's claims. He contended that the evidence referred to in the AD Submission was not new. He then said, "[t]here can be nothing in these claims at all no matter how they are put. Any claim about money paid to or by SAS would be against SAS and require the company to be party to the arbitration, but it is not. The claims are also out of time by years. Under the Arbitration Act 1996, time limitation must be applied (see s13)". He complained that his solicitors had been sidelined or ignored and that he had not had the opportunity to understand the case against him or been informed of the actual sums claimed. He said that his counterclaims had not been fairly taken into account. He also said that he had already paid more than £172,000 to DD and that DD had acknowledged this. He then said that the First Interim Decision was also inaccurate in that it referred to a personal loan of £125,000, "but [DD's] claim as he presented it to the Tribunal (and not to [DL] where he said he lent the money to me see Psak 1 Section 10A) is that he made a loan of this sum or an even greater sum to SAS. For reasons explained, this claim cannot possibly succeed."

57. On 3 March 2021 DD and AD submitted a long document called "Closing Submissions" to the Tribunal. It referred to the fact that there had already been nine oral hearings. It described the claims. In para 7.1 DD claimed £610,000 as the balance of the loans DD made to SAS to fund property acquisitions. None of this had been repaid, though £125,000 had been paid by AD from his own funds. Once SD had paid the sum of £610,000, DD intended to repay AD the £125,000. The claim was predicated on the basis that SD had misappropriated or wrongly used these monies in breach of the agreement whereby SAS was set up as a vehicle for property investment. In para 58 DD said that the Tribunal should rule that DD had injected more than £610,000 into SAS and that it should infer that these sums had been paid to SD and should now be repaid by SD to DD.

58. On 7 April 2021 Asserson wrote to the Tribunal. In para 6 they identified certain "new claims" in the Closing Submissions. These did not include the claims concerning the loans to SAS. In para 10 they said this:

> "Further, it seems that underlying many of the claims as they are set out in the Closing Submission document, is the allegation that SAS Financial Services Limited was a quasi-partnership and that its independent legal personality can be ignored. In particular, we note that a number of the claims that are made (including some claims not listed above as new) are now predicated on this quasi-partnership argument when in fact (insofar as they are proper claims at all) they are really claims of the company and not the claimants. [SD] notes that this quasi-partnership construct has never been presented or canvassed at any of the previous hearings and it has been common ground between the parties that SAS Financial Services Limited was a properly constituted legal entity. The quasi-partnership construct was first

> presented by GSC in a letter of 11 November 2020. It is not known whether this was canvassed as an alternative claim at the hearing at which [SD] was not in attendance, although it does not appear from the contemporaneous submission to have been addressed there but it has now been repeated in [AD's] Closing Submission document and endorsed by [DD's] email. This is plainly a core issue that should be canvassed at a hearing."

59. On 12 April 2021 the Tribunal emailed SD with directions about the submission of documents.

60. On 19 April 2021 SD submitted a "Summary of Counterclaims".

61. On 20 April 2021 AD submitted a response to the Summary of Counterclaims.

62. On 28 May 2021 SD submitted his "Reply to Closing Submissions". This was signed by Mr Lister of Asserson. It addressed the scope of the arbitration. It did not contend that the claims concerning the payments to SAS were outside the scope of the arbitration. It then addressed the defence of limitation and said that, by virtue of s. 13 of the 1996 Act, the Limitation Acts apply to arbitrations governed by the Act. Para 27 said that the loan claim had changed during the arbitration and was now for £610,000 as the balance of the loans made to SAS. Paras 28 and 30 pointed out that the events underlying that claim concerned entries in accounts predating 1992 and that DD himself relied on his memory losses to explain the change of case. It said that this exemplified why the limitation periods under the 1980 Act are applicable. Para 36 said that the claims were out of time and that until DD and AD could prove that their claims were in time SD should not be required to answer the claims. Para 38 went on to address the points that SAS was not a party to the arbitration, and that SAS had a separate legal personality (by reference to English caselaw). SAS was not a party to the arbitration agreement. Para 45 said that under Jewish law limited liability applies as in English law. Para 47 addressed the contention that SAS was a quasi-partnership company. This was denied on the facts but, under Jewish law, it would not make a difference anyway. Para 48 said that SAS had been dissolved and had not been restored and that the Tribunal had no jurisdiction to restore SAS "and it therefore follows that it has no jurisdiction in this regard under Jewish law. The claims relating to [SAS] are therefore entirely outside the jurisdiction of the [Tribunal]." Para 49 said,

> "In the premises, the only claims that can persist in the arbitration are the claims and counterclaims directly between the parties. The claims summarised at paragraphs 7.1 and 8 of the Closing Submission would be claims of the Claimants against the company or claims to be brought by the company against Rabbi Djanogly."

63. The letter went on to say that the Tribunal therefore lacked jurisdiction and that SD reserved the right to apply under s. 67 of the 1996 Act.

64. On 11 June 2021 AD and DD responded to SD's Reply document. Limitation was addressed at paras 45 onwards. AD and DD contended that under the Foreign Limitation Periods Act 1984 (which was incorporated by s. 13 of the 1996 Act) Jewish law applied. Para 49 went on to contend that if the 1980 Act applied, time can be

extended by reason of fraud or deliberate concealment. They said that concealment had been dealt with in the Closing Submissions.

65. On 16 August 2021 the Tribunal emailed the parties about a further hearing. It explained that the Beth Din does not operate in the same way as a secular court. It also explained that the hearing would only address SD's counterclaim and the "new evidence" as requested by SD. A hearing was arranged for 1 September 2021.

66. On 28 August 2021 Asserson objected to the directions for the hearing of 1 September 2021. They specifically raised a notice of objection under s. 73 of the 1996 Act that the proceedings had been improperly conducted and that there had been a failure to comply with the arbitration agreement.

67. The hearing that had been arranged for 1 September 2021 took place, attended by solicitors for both sides.

68. There was a further hearing on 25 November 2021. According to Asserson's note of the hearing, Mr Lister and SD asked AD about the evidence. Mr Lister raised the question of section 13 and the status of SAS in the proceedings, as it was not a party and did not exist. He referred to s. 13 of the 1996 Act. He asked whether the Tribunal had gone through the document supplied by SD. He submitted that the vast majority of the claims were statute barred. One of the arbitrators said that in Jewish law there is no idea of limitation. Mr Lister said that s. 13 made the UK Limitation Acts mandatory and asked whether the Tribunal would not follow the Act. One of the arbitrators said they had the power to do this but that it was for further discussion. The Tribunal said that the question was not going to be addressed at that stage.

69. On 9 December 2021 the Registrar sent an email to SD saying that the Tribunal was reviewing the correspondence generated by the case. It also gave directions about further disclosure of documents. These included the information held by Cameron Baum (a firm of accountants) and required SD to give them an appropriate letter of instruction. It concerned SAS's documents. The Tribunal sent a further email on 19 December 2021 requiring compliance with the email of 9 December 2021.

70. On 20 December 2021 Asserson wrote to the Tribunal referring to the instructions of the Tribunal about disclosure. Asserson repeated that all the claims in respect of SAS were time-barred. They also invited the Tribunal to arrange a hearing to address the various complaints that they had raised about limitation and the position of SAS in the proceedings.

71. On 20 December 2021 the Registrar replied to Asserson. He explained that the Tribunal applied Jewish law procedures. He said that the Tribunal had considered all the points raised "numerous times before (time-barring, fishing exercises, non-specific requests for documentation, sections 13, 33 and 43 of the Act etc.) and nevertheless require your client's compliance as set out below. It is therefore obvious that [the Tribunal] have not accepted the points raised." SD was therefore required to give the instructions to Cameron Baum without delay.

72. Asserson responded on 21 December 2021. They complained again about s. 13 of the 1996 Act and the mandatory provisions concerning limitation. Asserson also raised another objection under s. 73.

73. On 14 January 2022 Asserson wrote to the Tribunal concerning disclosure by Cameron Baum. In para 8 they noted again the limitation defence and the contention that SAS fell outside the Tribunal's jurisdiction. They complained about the failure to convene a hearing to address these defences.

74. On 5 March 2022 the Tribunal emailed AD and his solicitors seeking further documents and information.

75. On 7 March 2022 the Tribunal emailed SD and his solicitors seeking further documents and information.

76. On 22 March 2022 Asserson wrote to the Tribunal raising SD's preliminary points, namely, whether (a) the Tribunal had assumed jurisdiction over SAS despite its not being a party to the Arbitration Agreement and (b) whether the Tribunal would comply with the mandatory provisions of s. 13 of the 1996 Act. They asked the Tribunal for directions about how these issues would be addressed.

77. On 30 March 2022 the Registrar responded by email. The email stated that they could "advise the parties of the following". It said the Tribunal "is advised that it is operating within the parameters of the Arbitration Act and that it has halachic [sc. Jewish law] and legal jurisdiction over this case, including the claims relating to SAS. The [Tribunal] is proceeding to rule on all claims submitted in accordance with Halacha/Jewish law".

78. Asserson wrote to the Tribunal on 7 April 2022 seeking a copy of any advice on which the Tribunal was basing its decision. It relied on s. 37 of the 1996 Act. It also sought a hearing to address SD's preliminary defences (including limitation and the status of SAS). The letter again objected under s. 73.

79. Asserson wrote to the Tribunal again on 28 April 2022. They referred again to the issue of limitation and s. 13 of the 1996 Act. They also said that it was unclear whether the Tribunal was intending to convene a further hearing to consider limitation and the status of SAS, as well as the new claims raised in the Closing Submissions. SD asked for a further hearing.

80. Asserson wrote a similar letter to the Tribunal on 11 May 2022. They said that their letters of 7 April and 28 April 2022 had not been answered. They repeated SD's limitation defence and referred to s. 13 of the 1996 Act. They asked the Tribunal to clarify whether there would be a further hearing to determine the preliminary defences raised by SD. The letter again objected under s. 73.

81. Asserson wrote to the Tribunal again on 10 June 2022. The letter repeated SD's reliance on s. 13 of the 1996 Act and the 1980 Act, and the contention that the Tribunal lacked jurisdiction in respect of SAS. They asked for a hearing to address these points. The letter again objected under s. 73.

82. On 26 June 2022 the Registrar emailed Asserson (cc. the other parties) saying that the recent correspondence was noted, the Tribunal was preparing its ruling, and no further assistance was required at present.

83. The final award was dated 5 August 2022. As already noted, it only covered the claims of DD against SD. It referred to the Closing Submissions. The Tribunal stated that it had considered all the evidence placed before it at hearings and in correspondence. The award included the following.

    i) Under the heading "A. Claim for repayment of funds injected into company", the Tribunal reasoned as follows. DD had set up SAS. The 1989 accounts showed that £610,000 odd was owed to "Other Creditors" at that time. SD initially claimed these were bank loans. DD provided written testimony of Mr Colson and Mr Hayim, who confirmed that DD had injected hundreds of thousands of pounds into SAS. Mr Colson put the amount at £676,000 odd. The accounts showed that in 1990 the Other Creditors reduced from £610,000 odd to £292,000 odd. From 1992 until it was closed SAS was run solely by SD. The accounts show that at some point from 1992 onwards the sum of £292,000 odd was repaid to the Other Creditors. The Tribunal had asked SD to clarify to whom these sums were paid. SD had not done this. DD said that he had not received anything and this was not contested by SD. DD contended that the only conclusion to draw was that SD had removed these funds from SAS and therefore made a claim for their return. Since he had been in charge from 1992 onwards, the onus was on SD to explain to whom the money had been paid.

    ii) Under the heading "B. Claim to reduce award due to maintenance payment", the Tribunal rejected SD's submission that the amounts paid by him to DD as maintenance should be deducted from any liability to DD. However, under the heading "C. Reduction of award due to partial compliance with Interim Award", the Tribunal concluded that £41,000 odd paid by SD under that award should be deducted from SD's liability to DD.

    iii) Parts D to G are not relevant here, save that SD was entitled to deduct £4,600 odd for burial fees he had paid.

    iv) Under the heading "H. Final award", the Tribunal found that SD was liable to pay £100,000 odd to DD. This was calculated by taking the sum of £292,000 shown as payable to Other Creditors in 1990, and dividing it by two, to represent SD's share; and deducting the sums of £41,000 and £4,600.

84. On 22 August 2022 Asserson served a 10-page document called "Application for Additional Award and Correction and Clarification of the Decision/Award of 5 August 2022". It sought an additional award addressing the counterclaims. In relation to the award it raised a series of questions, paragraph by paragraph, asking for further reasons to be given. The document stated that SD intended to bring proceedings in court to challenge the award. Among other things, it complained about the Limitation Defence and the fact that the Tribunal had taken jurisdiction in respect of SAS despite its not being a party to the arbitration.

85. The Tribunal acknowledged receipt of the 22 August 2022 request. Asserson sent a chasing letter on 31 August 2022. The Tribunal did not issue another award or answer the questions contained in the 22 August request.

86. The claim form was issued on 30 November 2022. There were challenges under s. 67, s. 68 and s. 69.

87. The challenge under s. 67 was framed as follows: "The Tribunal lacked substantive jurisdiction to determine any the Claimant's [sic] claims in relation to loans made to SAS, SAS not being a party to the applicable arbitration agreement."

Evidence of Jewish law

88. The parties served expert evidence of Jewish law, being a report of Dayan Copperman for SD and a report of Dayan Hool for AD. A Joint Expert Report sets out a broad measure of agreement on relevant issues. In the event there was no cross-examination. It was agreed that the evidence of Jewish law had little material bearing on the issues to be decided at this hearing. The parties agreed that the claims for repayment of the loans were either a claim in contract or tort and that a contract claim would have had to be made against SAS.

The preliminary issues

89. These are: "Whether the First Defendant's claim for repayment of funds injected into SAS Financial Services ("SAS") (i) is time-barred (ii) fell outside the jurisdiction of the Tribunal by reason of being a claim against a non-party to the arbitration agreement or (iii) fell outside the jurisdiction of the Tribunal as it fell outside the ad hoc arbitration agreement and specific reference to arbitration and for any one of these reasons the Award should be set aside under ss. 67, 68 or 69 of the 1996 Act as applicable."

Legal principles

The 1996 Act

90. Section 1(a) provides that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. Section 1(b) provides that the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

91. Section 4 states that the mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

92. Section 13(1) provides that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings. By s. 13(4)(a) "the Limitation Acts" means the Limitation Act 1980, the Foreign Limitation Periods Act 1984 and any other enactment (whenever passed) relating to the limitation of actions.

93. Schedule 1 lists s. 13 as a mandatory provision.

94. Section 31(2) provides that any objection that in the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to go beyond its jurisdiction is raised.

95. By s. 33(1) the arbitral tribunal shall act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

96. By s. 37 the tribunal may appoint experts or legal advisers to report to it and the parties. The parties shall be given a reasonable opportunity to comment on any advice offered by such person.

97. Section 46 provides as follows:

> "(1) The arbitral tribunal shall decide the dispute—
>
> > (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
> >
> > (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
>
> (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
>
> (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

98. Section 52(4) provides that the award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

99. Section 67(1)(a) allows a party to apply to the court to challenge the substantive jurisdiction of the arbitral tribunal. On an application under this section the court may confirm the award, vary it, or set it aside in whole or in part.

100. Section 68(1) allows a party to apply to the court challenging an award on the ground of serious irregularity affecting the tribunal, the proceedings, or the award. A party may lose the right to object (see s. 73).

101. By s. 68(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.

102. The grounds relied on by SD were "(a) failure by the tribunal to comply with section 33 (general duty of tribunal)"; "(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see s. 67)"; and "(d) failure by the tribunal to deal with all the issues that were put to it".

103. By s. 68(3) where there is shown to be a serious irregularity, the court may remit the award for reconsideration, set it aside or declare it to be of no effect. The court shall not set aside the award or declare it to be of no effect unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

104. By s. 69, unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's

jurisdiction under this section. By s. 69(2) an appeal shall not be brought under this section except with the agreement of all the other parties to the proceedings, or with the leave of the court. Section 69(3) places limits on the court's power to give leave.

105. By s. 70(4), on an application or appeal under ss. 67, 68 or 69, if it appears to the court that the award (a) does not contain the tribunal's reasons, or (b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

106. Section 73(1) provides:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
> (a) that the tribunal lacks substantive jurisdiction,
> (b) that the proceedings have been improperly conducted,
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

The 1984 Act

107. Section 1 of the Foreign Limitation Periods Act 1984 provides (materially) that:

> "(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—
>
> (a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings, subject to section 1ZA and section 1B; and
>
> (b) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.
>
> (2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

Caselaw

(i) Arbitration Act

108. Starting with substantive jurisdiction, the words used in the arbitration agreement will be the starting point for determining the types of disputes falling within the scope of the arbitrators' jurisdiction. The trend is against drawing fine distinctions, hair-splitting or fussy distinctions: see Russell on Arbitration (24th ed) para 2-096 and *Fiona Trust v Primalov* [2007] UKHL 40. Nevertheless the parties are entitled to object to a tribunal assuming jurisdiction over a dispute which falls outside what the parties have agreed in their arbitration agreement to refer. The question is one of the true construction of the agreement: *Econet Satellite Services Ltd v Vee Networks Ltd* [2006] EWHC 1664 (Comm).

109. The court favours a broad interpretation of arbitration agreements: Russell para 2-099.

110. Challenges under s. 67 are by rehearing rather than review: see *Gulf Azov v Baltic Shipping* [1999] 1 Lloyd's Rep 68.

111. Turning to challenges under s. 68, there is a helpful general summary in *K v P* [2019] EWHC 589 (Comm) at [5]:

> "I need not refer to the many authorities relating to section 68 to which reference was made in the skeleton arguments. There was little or no dispute about the relevant law and the high hurdle which it is necessary for a claimant to overcome in showing a "serious irregularity". The court will only interfere in an extreme case where "the tribunal has gone so wrong in its conduct of the arbitration and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls for it to be corrected". Section 68 is designed to deal with procedural unfairness and not with mistakes of either law or fact. The tendency to dress up, in section 68 garb, complaints which are in reality criticisms of the findings or holdings of the arbitrators is to be denigrated. Moreover, a reasonably generous margin of appreciation is granted to arbitrators in the discharge of their functions and the question of substantial injustice is determined by asking whether the tribunal was caused by adopting inappropriate means to reach one conclusion whereas, had they adopted appropriate means, they might well have reached another conclusion favourable to the applicant."

112. Russell at para 8-105 explains that there is an overlap between grounds (a) and (d) of s. 68(2).

113. Russell at paras 8-089 to 8-094 describes the general approach of the courts to ground (a). The relevant principles include these: the hurdle is a high one; a case may come within this ground if the tribunal decides a central issue which was not in play and without giving any notice to the parties; the tribunal is master of its own procedure; a tribunal need not adopt court procedures; bias may be a species of serious irregularity.

114. For cases to fall under s. 68(2)(d), as Russell explains at paras 8-105, the "issue" must be important or fundamental, for only a failure to deal with such an issue could cause

substantial injustice. There is a difference between a failure to deal with an issue and a failure to provide sufficient reasons for a decision on that issue. In the latter case the court may require the tribunal to amplify the reasons for the award. The court will not nit-pick through the award. Once the tribunal has dealt with an issue in any way that is the end of the enquiry. It does not matter for the purposes of ground (d) whether the tribunal has dealt with it well, badly or indifferently. As Russell explains at para 8-106, there is no need for the tribunal to deal with every point. It has only to decide matters relevant to its ultimate decision on the claims or defences raised. If an award expresses no conclusion at all as to a specific claim or defence then that is a failure to deal with an issue.

115. As to s. 68(2)(b), as Russell explains at para 8-102 an error of law does not amount to an excess of powers. There is a difference between an erroneous exercise of power which the tribunal has and a purported exercise of a power which it lacks. This ground cannot be used as a backdoor way of appealing an error of law.

(ii) Other relevant caselaw

116. In *Halpern v Halpern* [2007] EWCA Civ 291 the Court of Appeal was concerned with a compromise of an arbitration before a Beth Din, which mainly took place in Zurich. The dispute concerned an inheritance and property dispute to be resolved in accordance with Jewish law and custom. The claimants applied for summary judgment. An issue arose as to the applicable law of the compromise agreement. The judge, applying the provisions of the Rome Convention 1980 (given effect by Sch 1 to the Contracts (Applicable Law) Act 1990), held that English law was the applicable law. The Court of Appeal decided that, under English conflict of law principles, there was no question of Jewish law being agreed either expressly or by implication as the applicable law of the contract. The applicable law was English law. Jewish law might however have relevance as part of the contractual context when construing the contract. This approach was consistent with the Rome Convention. Waller LJ explained at [21]-[24] that the Rome Convention concerned a choice between the laws of two different countries, and that Jewish law was not the law of a country.

117. In *Musawi v Musawi* [2007] EWHC 2981 (Ch) there were a number of agreements which the parties had contended were governed by Shia Sharia law. The parties accepted at trial that Sharia law could not be the applicable law under the Contracts (Applicable Law) Act 1990. They accepted that under that Act all the agreements made after the 1990 Act came into force on 1 April 1991 must be governed by the law of a country and that this was English law. The claimants contended nonetheless that at common law the contracts made before that date were governed by Sharia law. The defendants took issue with that. David Richards J held at [19] that at common law as well as under statute the applicable law of a contract must be the law of a country. At [22] he noted that s. 46 of the Arbitration Act 1996 drew a distinction between "the law chosen by the parties" in subsection (1)(a) and the "other considerations as are agreed between them" in subsection (1)(b). The former must be the laws of a country whereas the latter need not and may include rules which do not in themselves constitute the legal system of a country.

118. At [81] the judge addressed a separate agreement under which the parties had appointed an arbitrator. He held that the applicable law of the agreement, as opposed to the law or principles to be applied by the arbitrator, was English law. He held that although the

Rome Convention did not apply to arbitration agreements, the common law rules referred to earlier applied to the agreement itself. Accordingly, issues concerning the arbitration agreement itself were governed by English law. It was common ground however that the arbitrator was required by agreement to apply Sharia law to the subject matter of the dispute and its resolution. This followed from s. 46(1)(b) of the 1996 Act.

The challenges under s. 67

119. SD relies on two grounds under s. 67. He contends that (a) the claim established in the award was a claim against SAS and SAS was not a party to the arbitration agreement (the Non Party Defence); and (b) the claim against SAS fell outside the scope of the dispute which the parties agreed would be referred to arbitration (the Out of Scope Defence).

120. I start with the Non Party Defence. SD argues that the claim established in the award was against SAS and not against him personally. SAS was not a party to the arbitration agreement. Indeed it was dissolved in 2010 and the Tribunal had no power to restore it.

121. I reject this challenge. It was clear to the parties and the Tribunal that SAS was not a party to the arbitration agreement. They knew that SAS was dissolved in 2010. DD did not frame his claim for repayment as a claim against SAS. It was always framed as a claim against SD.

122. DD originally said that he had lent £250,000 to his sons to set up SAS. The case changed as more information came to light, in particular SAS's accounts and the evidence of Mr Colson and Mr Hayim. On 26 August 2018, in his comments on SD's Briefing Note, DD referred to the "other creditors" in the accounts. He said that until recently he had thought that the amount invested was only £250,000. But the accounts showed that in fact other creditors were far higher. It was because AD had recently been able to locate the accounts that the actual scale of the loans had become clear. DD went on to allege that in later sets of accounts the other creditors reduced down to zero. He said that SD had accepted that none of the money went to DD. DD said that he lent the money to SAS and it was then taken from the company; it was unaccounted for and SD was therefore accountable for it.

123. In my judgment it was clear to the parties and the Tribunal that DD was alleging that SD was personally accountable to him for these amounts. That this was the parties' understanding of the position was clear from the note produced by SD on 21 January 2020, after the hearing on 14 January 2020.

124. In the Closing Submissions of 3 March 2021, the case advanced was that DD had advanced at least £610,000 to SAS (recorded as Other Creditors in its accounts) and that SD, who had been in control of SAS, had caused SAS to repay these amounts (purportedly in discharge of the Other Creditors) but that DD had received no part of this. DD alleged that SD had received the payments instead, and that this was a misappropriation. DD claimed that SD was therefore liable to him, DD, for those amounts. There was never a claim against SAS itself.

125. In the award the Tribunal did not find that SAS was liable to DD. It found that SD was liable to pay DD. The Tribunal applied Jewish law to the dispute. The reasons in the award were brief and the legal basis for SD's personal obligations to account to DD

were not spelt out in any detail. But this is not a challenge on a point of law, it is a point about the parties to the arbitration agreement.

126. Counsel for SD referred to *Peterson Farms Inc v C&M Farming Limited* [2004] EWHC 121 (Comm), where the court set aside an award against a party to an arbitration for losses suffered not by the claimant but by other claimant group entities, on the basis that the tribunal did not have jurisdiction to entertain claims against entities not named as parties to the agreement. Counsel submitted that this is analogous to the present situation. She said the Tribunal had no jurisdiction to make an award against SD in respect of a loan claim against SAS. I do not accept this. In *Peterson* the tribunal had awarded damages for amounts suffered by third parties. The court held that as they were not parties to the arbitration (whether under as agents or under a "group of companies" theory), there was no jurisdiction in respect of those parties' claims. There is no helpful analogy with the present case. The case formulated by DD was that SD was personally liable to account to him in respect of the amounts that DD had previously lent to SAS because (so DD alleged) SD had taken for himself the sums purportedly paid by SAS in discharge of those loans.

127. For these reasons I reject the Non Party Defence.

128. I turn to the Out of Scope Defence. As expressed in the Claim Form it is hard to see that the s. 67 challenge goes beyond the Non Party Defence ("The Tribunal lacked substantive jurisdiction to determine any the Claimant's [sic] claims in relation to loans made to SAS, SAS not being a party to the applicable arbitration agreement." (emphasis added)). The two are expressly linked. Despite this I shall address the arguments advanced at the hearing.

129. As explained above the scope of an arbitration agreement is a question of interpretation. *Musawi* shows that the law of the arbitration agreement must be the law of a country, though the law governing the arbitration itself may be a system of principles, such as Jewish law, which are not such a law. Neither party ultimately suggested that the applicable law of the arbitration agreement was other than English law. *Halpern* shows that Jewish law (as the principles chosen by the parties to govern the arbitration) may be relevant as part of the contractual context. However, neither party suggested here that there were any special phrases or concepts of Jewish law or practice which might affect the interpretation of the agreement.

130. SD relied on *Westland Helicopters Ltd v Al-Hejailan* [2004] 2 Lloyd's Rep 528 for the proposition that a reference made under an arbitration agreement may further confine the scope of the tribunal's jurisdiction. Counsel contended that the Reference of 24 January 2017 restricted the scope of the jurisdiction of the Tribunal. In the present case the Reference came before the arbitration agreement. It was therefore the reverse of the usual position as described in *Westland*. In my judgment the Reference is part of the contractual context in which the arbitration agreement falls to be construed.

131. By the arbitration agreement the parties agreed to refer to arbitration "the following claim and any related claim or counter-claim regarding: Compliance with Piskei Din issued by Dayan YY Lichtenstein and related issues to be determined by this Beth Din".

132. The first ruling of DL referred to the background and history of the dispute. It referred to DD's contentions that he had lent £125,000 each to SD and AD. This was "to set up

the property company SAS". DL found that this had been a loan advanced to help his sons in business. DL's first ruling also went into other complaints made by the parties about the financial transactions between them.

133. As already stated, the Reference is part of the contractual context. I have summarised the document at [24] above. The dispute was "regarding the care of [DD], and other financial dealings between the parties." As explained above, DD said the loans of £125,000 each were made to set up SAS in 1990. DD wanted the loan to SD to be repaid. It referred to AD's complaints about the distribution of assets from SAS. It reserved AD's rights to take future action against SD with regard to the non-distribution of assets in the proper manner.

134. Counsel for SD submitted that the scope of the arbitration agreement included claims or counterclaims relating to the sums personally loaned by DD to SD, and SD's liability to contribute towards his father's maintenance. The arbitration did not cover any of DD's claims against SAS.

135. It is clear from the detailed history set out above that the repayment claims made by DD against SD changed as the arbitration progressed. A brief recap is helpful. Initially DD contended that he had made personal loans of £125,000 each to his sons to set up them up in business through SAS. He claimed repayment from SD. SD then contended that the business had been funded by bank finance. He relied on the accounts of SAS. This led DD to investigate further and to seek information from Mr Colson and Mr Hayim. He then contended that he had lent far more than £250,000 and that this had happened earlier than he had originally thought. He relied on the references to "other creditors" in the accounts, and said that it referred to loans injected by him (there being no other source). SD then responded by saying that the Other Creditors had been paid off. DD then contended that he had not received any repayment, and that if SAS had paid these sums they must have been made to SD himself. In the Closing Submissions DD alleged that SD had misappropriated the monies and was obliged to account to DD. The Tribunal accepted this case in part, but limited recoveries to 50% of the amounts supposedly repaid to Other Creditors after 1992 (when SD was in sole control of SAS).

136. In my judgment the claims advanced by DD in the Closing Submissions (which formed the basis of the award) fell within the scope of the arbitration agreement.

i) The parties had already been involved in the process before DL in an attempt to resolve their family disputes. DL had reviewed the financial dealings of the parties, including the long history. This had included setting up SAS as a property business for the two sons and DD's advances of funds for that purpose.

ii) The Reference also referred to the loans made by DD to help set up his sons in business through SAS. It erroneously put the date of the start of SAS's business in 1990. In fact, it was incorporated some years earlier. But the Reference was referring to loans by DD for the purposes of setting his sons up in business through SAS.

iii) The context shows that the purpose of the arbitration was to resolve the disputes between DD and AD on the one hand and SD on the other about their financial liabilities to one another. They had sought to do this over some years and these efforts had failed. They therefore agreed to the arbitration.

iv) The parties referred in the agreement to the first Psak Din of DL and agreed to arbitrate "the following claim and any related claim or counter-claim regarding: Compliance with Piskei Din issued by Dayan YY Lichtenstein and related issues to be determined by this Beth Din" (emphasis added).

v) The authorities show that the court should read arbitration agreements in a common sense way and avoid unnecessary pedantry. Taking this approach I consider that the claims and issues advanced by DD against SD in the course of the arbitration are related to the matters covered in the first Psak Din. The claims concern loans made by DD for the purposes of setting up SD and AD in the property business through SAS. As already explained the claims were reformulated as the arbitration progressed – the amounts were increased and the factual basis of the claims included the new assertion that the advances were made to SAS itself rather than to SD and AD (with those sums then being injected by them into SAS). But despite these changes, the claims relate to the financial dealings between DD and SD concerning the way in which DD set SD and AD up in business through SAS. These reformulated claims concern issues which are related to the original claims. They are therefore claims which "relate to" the matters identified in the Piskei Din or are claims regarding "related issues".

137. Counsel for SD specifically referred to the email from AD dated 19 January 2018. AD sent an email to the Registrar saying that SD had expressed a concern that he and DD were bringing up new matters. He confirmed on behalf of himself and DD that the claim was confined to the facts in the Reference. I do not think that this can reasonably be said to confine the scope of the arbitration to something narrower than the arbitration agreement itself.

138. In case this is wrong, I would in any case have concluded that SD, who participated in the arbitration, had failed to object to the Tribunal addressing the reformulated claims. I have set out the history in detail above. The following stages are material:

i) The comments made by DD on 26 August 2018 on SD's Briefing Note, show that he was alleging that he had lent the money to SAS and that it was then taken from the company; it was unaccounted for; and that SD was therefore accountable for it. Hence the reformulated case was set out by this stage. As noted above, SD's case is that he did not see this until the present proceedings. I cannot resolve this issue so shall not place any weight on this stage.

ii) On 12 November 2018 SD emailed the Tribunal to say that he would not be making the payment of £125,000. He said, "DD has made his claim on the basis of guesswork on the company accounts. As you know, the very same accounts show that all other creditors have been paid off. And so the basis of his case is totally unfounded and unproven allegations of fraud on my part." SD was therefore engaging with the merits of the reformulated claim.

iii) On 12 December 2019 SD's then solicitors, STS, wrote to the Tribunal complaining about the interim award. The letter referred specifically to the allegation made by DD that he had made loans to SAS between April 1983 and June 1985. It also said that the accounts of SAS supported SD's position. The letter also said that even if, which was denied, DD was still due to be repaid any

part of his loan to SAS, this would be a matter between DD and SAS, and not our client." SD was again engaging with the merits of the claims and did not object to the Tribunal's jurisdiction to determine them.

iv) The note produced by SD on 21 January 2020 was submitted to the Tribunal. It referred to the contentions of DD concerning the loans to SAS, based on Mr Colson's letter. It said that this "new increased claim" was not made at the last hearing. It described it as the third version of the history. The note concluded, "[i]n summary, both my father's and brother's claims against me do not have any supporting written evidence. All they have done is seek to blacken my character without any basis. On the contrary all the written evidence supports my testimony. As such, they have wasted everybody's time and resources and I therefore claim for all my costs against them." Again SD engaged on the merits and did not object to the Tribunal's jurisdiction over the claims.

v) AD's submission of 1 December 2020 set out the reformulated claims. It stated that SD had appropriated DD's loans to SAS for himself and that DD had not received anything from SAS. It said that the evidence "all supports my contention that [SD] took the money owed to [DD] for his own purposes under the guise that [DD] had been repaid and that [SD] told the SAS Accountants that this family money had been repaid." It went on to allege misappropriation by SD; these sums should have been paid to DD.

vi) SD wrote to the Tribunal on 23 December 2020 saying that he was unable to respond to the documents because he had not been told what the complaints were or what they went to. He said that the documents related to SAS. He then referred to some of the accounts and said that they contradicted AD and DD's claims. He said that the claims could not succeed. He also referred to his limitation defences. He said that any claim against SAS would be against SAS and that it was not a party. Though he made this point about the parties, he did not object to the Tribunal exercising jurisdiction over the reformulated claims because they were different from those originally made.

139. This history establishes that, while SD contended that the reformulated claims were in reality against SAS and not himself personally (a point already addressed), he did not object as soon as possible to the Tribunal exercising substantive jurisdiction over the reformulated claims on the separate basis that they did not fall within the scope of the arbitration agreement. He is therefore prevented by reason of s. 31(2) and s. 73 of the 1996 Act from objecting to its substantive jurisdiction.

The challenges under s. 68

140. I start with the Non-Party Defence. Counsel for SD submitted that there was a serious irregularity under s. 68(2)(d) because the Award does not mention the Non Party Defence. I am unable to accept this. The history shows that by the time of the Award, SD had repeatedly contended that there was a fundamental flaw in the case advanced by DD, namely, that it was in reality a case against SAS, which was not a party to the arbitration, and indeed did not exist. DD's case was as summarised above: namely that he claimed an account from SD and was not seeking repayment from SAS. That indeed would have been pointless, as SAS did not exist.

141. I consider that, though it did not expressly address the Non Party Defence in the precise way it was formulated by Asserson in the many submissions they made in correspondence, the Tribunal dealt with the issue by ruling that SD was liable to pay DD an amount calculated (in part) by reference to the sums advanced by DD to SAS. It is a necessary entailment of the Tribunal's reasoning that under Jewish law SD could be personally liable to account to DD by reason of the facts described in the award. The Tribunal was (as already explained) aware that SAS was not a party to the arbitration. By concluding that the claims brought by DD against SD succeeded, the Tribunal necessarily rejected the contention that the claims must fail because SAS was not a party. As long as a point has been dealt with by the Tribunal it is immaterial whether its conclusion was right or wrong.

142. SD also contended that the Tribunal failed to comply with its duty under s. 33 because by the email of 20 December 2021 the Registrar indicated that the Tribunal had not accepted the points raised, including the Non Party Defence. I am unable to accept this. At this stage in the arbitration evidence was still being gathered. The Registrar explained that the Tribunal had considered all of the points raised by Asserson. Asserson had raised the Non Party Defence several times in correspondence. The Tribunal then ordered SD to make further disclosure by instructing Cameron Baum to release the files relating to SAS. I do not consider that this amounted to a failure to comply with s. 33.

143. SD also relied on the email of 30 March 2022 in which it indicated that the Tribunal "is advised that it is operating within the parameters of the Arbitration Act and that it has halachic and legal jurisdiction over this case, including the claims relating to SAS". SD alleges that the Tribunal determined the point on the basis of advice. I do not think that the evidence establishes that external advice was taken. The wording of the email is consistent with a statement of the Tribunal's own view about the scope of its jurisdiction. It is also important to note that the process of the Tribunal was inquisitorial and comparatively informal. Though SD's lawyers repeatedly requested hearings, I do not consider that the Tribunal was obliged to convene hearings. In any case, as I have already explained, to my mind it was clear to the Tribunal by the time it gave its award that SD was contending that the claims in respect of SAS were fundamentally flawed because SAS was not a party. Asserson had made that contention repeatedly and it is inconceivable that the Tribunal was not aware of the point.

144. Even if there had been a breach of s. 33 in the manner alleged, I am not satisfied that there would have been a serious irregularity in relation to the Non Party Defence. The point was clearly raised with the Tribunal and in my judgment the Tribunal understood it (indeed the terms of the 30 March 2022 email refer to the claims relating to SAS, which shows that the Tribunal appreciated the point). It seems to me that in reality this is a s. 69 argument dressed up in the garb of s. 68. I do not think that it can realistically be said that had the Tribunal adopted another means (i.e. convening another hearing) they might have reached another conclusion favourable to the applicant.

145. SD also contends that there has been substantial injustice because the Tribunal ought to have concluded that SAS is the proper party to the claim. I am unable to accept this. This is a repackaging of the points addressed above. It is in reality a complaint about the decision reached, rather than one about the procedure adopted by the Tribunal.

146. SD also submitted that there was a serious irregularity because the Tribunal had not addressed the Out of Scope Defence. Counsel for SD repeated the same arguments as SD had made in relation to the Non-Party Defence. For the reasons already given, I do not think that there is anything in this challenge. Indeed, since I have decided that the Tribunal had substantive jurisdiction, this challenge cannot succeed - there is no realistic basis for supposing that the Tribunal might have reached a different view on this point.

147. I turn to the s. 68 challenge concerning the Limitation Defence.

148. SD argued in summary as follows:

i) By s. 13 of the 1996 Act, the Limitation Acts apply to the arbitration.

ii) This is a mandatory provision of the 1996 Act. There are good public policy reasons for this.

iii) The Foreign Limitation Periods Act 1984 does not disapply English limitation law because Jewish law is not the law of any other country applicable in accordance with the rules of private international law.

iv) It follows that the Tribunal was bound to apply the 1980 Act. Under its provisions DD's claims for payment in respect of the loans to SAS would be statute barred. In particular that claim cannot be regarded as a maintenance claim.

v) The Tribunal did not deal with the Limitation Defence. This was a serious irregularity within s. 68(2)(d).

vi) The Tribunal also breached is duty of fairness under s. 33 by failing to give SD a reasonable opportunity to deal with the point and instead predetermined that English limitation law did not apply. This was a serious irregularity within s. 68(2)(a).

vii) The Tribunal also exceeded its power by determining a claim which was time barred. This was a serious irregularity within s. 68(2)(b).

viii) There has been substantial injustice because the Tribunal might well have reached a different conclusion had they adopted the appropriate means.

149. AD submitted in summary as follows:

i) DD's claim before the Tribunal was fundamentally a claim for financial support and maintenance under Jewish law. DD's claim for repayment from SD was an aspect of that claim because DD's need for future maintenance would be determined by his financial position. That, in turn, would depend on whether he could recover funds from SD.

ii) SD's challenge is based on a mischaracterisation of the claim. It is not a claim in contract or tort.

iii) The court should conclude that by a combination of s.13 of the 1996 and the Foreign Limitation Periods Act, Jewish limitation law applies. There is no authority directly on the point. However, *Halpern v Halpern* [2008] held that Jewish law, not being the law of a country, could not be the governing law of a compromise agreement under the Rome Convention, albeit the Convention does not apply to arbitration.

iv) Even if that is wrong and the 1980 Act applies, it is clearly arguable that the claim is not statute-barred on the basis of concealment or because the claim would fall within s. 21 (being one in fraud or fraudulent breach of trust).

v) There was no procedural irregularity and, even if there was, it was not serious.

150. The first issue is whether the 1980 Act applies to the arbitration. I agree with SD that it does. Section 13 of the 1996 Act is mandatory. The parties cannot contract out of it. Based on the case law I conclude that Jewish law is not the law of "any other country" applicable in accordance with the rules of private international law of the English courts. Therefore, English law is not disapplied under s. 1 of the 1984 Act. I consider that the provisions of section 1 of the Foreign Limitation Periods Act 1984 are clear and cannot include laws other than those of a country. *Halpern v Halpern*, which was about closely analogous statutory wording, is powerfully persuasive.

151. The next question is whether there was a procedural irregularity. The history shows that SD raised limitation as a defence. He repeatedly referred to s. 13 of the 1996 Act and the 1980 Act. AD addressed the arguments in his documents. It was also clear that SD was advancing the Limitation Defence as an answer to the repayment claim in its various reformulated incarnations. The defence became one of the key issues in the dispute. Nothing at all was said in the award about the Limitation Defence. There was nothing to suggest that the Tribunal considered it. I am satisfied that the Tribunal failed to deal with the issue in the sense provided for in s. 68(2)(d).

152. The next question is whether this failure has caused a substantial injustice to SD. I am satisfied that had the Tribunal adopted a different means, and addressed the Limitation Defence, they might well have reached a conclusion favourable to SD. As to this:

i) It is seriously arguable that the repayment claims were not maintenance claims. Throughout the documents they are presented as alternatives. DD was entitled to be maintained because he was impoverished; but if he recovered from the amounts he had loaned in relation to SAS he would no longer be impoverished. It is seriously arguable that the repayment claims would have been characterised for the purposes of the 1980 Act as either contractual or tort.

ii) It is seriously arguable that the various provisions relied on by DD to extend or disapply the 6 year limitation period for contract or tort would not avail DD. The court on this challenge is not concerned to decide the point.

iii) In relation to both i) and ii) above, I emphasise that the question is whether the Tribunal might well have decided the point favourably to SD. I do not express a more concluded view.

153. I conclude that the failure of the Tribunal to address the Limitation Defence was a serious irregularity within the meaning of s. 68(2)(d) of the 1996 Act.

154. It is unnecessary to consider the other grounds relied on by SD under s. 68(2). I shall therefore address them briefly.

i) If I had been satisfied that the Tribunal had addressed the point, I would not have found that there was a breach under s. 33. I consider that SD had an opportunity to raise the Limitation Defence and did so repeatedly. The Tribunal's procedure was inquisitorial. SD became frustrated by the apparent refusal of the Tribunal to call for a hearing or hear oral submissions. But that was a matter for the Tribunal. It was the master of its own procedure. I do not accept that the Tribunal closed its mind to the Limitation Defence or predetermined it against SD.

ii) I do not need to decide whether the irregularity under s. 68(2)(d) was also a separate breach under s. 68(2)(a).

iii) I do not consider that it can be said that the Tribunal has exceeded its powers. It had the power to rule on the disputes and it has done so. This is really a complaint that it has exercised them wrongly (by failing to accept the Limitation Defence).

155. The alternative application for leave under s. 69 of the 1996 Act does not arise.

Conclusions

156. The challenges under s. 67 fail.

157. The s. 68 challenges based on the Non-Party and Out of Scope Defences fail.

158. There was however a serious irregularity in the award within the meaning of s. 68(2)(d) in respect of the Limitation Defence.

159. The alternative application for leave under s. 69 does not arise.

160. The parties have agreed that relief should be addressed at a further hearing if not agreed.