IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

No. CL-2017-000781

[2022] EWHC 3548 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 15 November 2022

Before:

THE HON. MR JUSTICE BRYAN

B E T W E E N :

EURAFRIC POWER LIMITED

Claimant/Respondent

- and -

(1) THE BUREAU OF PUBLIC ENTERPRISES
OF THE FEDERAL REPUBLIC OF NIGERIA
(2) THE MINISTRY OF FINANCE INCORPORATED
(3) THE FEDERAL GOVERNMENT OF NIGERIA

Defendants/Applicants

MR D. BAGSHAW (of Howard Kennedy LLP) appeared on behalf of Claimant/Respondent.

MR M. GREGOIRE (instructed by PCB Byrne LLP) appeared on behalf of the Defendants/Applicants

.

J U D G M E N T

MR JUSTICE BRYAN:

A. Introduction

1 The parties appear before the Court today on the hearing of the application (the "Application") made on 28 February 2022 and brought by the Applicants, who are various entities forming part of the State of Nigeria, applying to set aside the order of Popplewell J dated 15 January 2018 (the "Recognition Order") granting leave, under section 66 of the Arbitration Act 1996, to enforce in the same manner as a judgment an arbitration Award dated 28 September 2017 between the parties (the "Award") on the basis of an alleged failure by the Respondents, Eurafric Power Limited ("Eurafric") to give full and frank disclosure on a without notice paper application to enforce the Award made by Eurafric.

2 That without notice paper application was supported by a witness statement dated 20 December 2017 from a Joanna Bromhead of Womble Bond Dickinson LLP, the solicitors then acting for Eurafric. That witness statement did not contain any section addressing the obligation to give full and frank disclosure. Eurafric subsequently instructed Howard Kennedy LLP to act on their behalf in this action, including in opposition to this application and they appear by Duncan Bagshaw, a barrister and partner in the firm. The Applicants are represented by PCB Byrne LLP, with Matthieu Gregoire, of counsel.

B. Background, the SAA and the Arbitration

3 The Applicants are each part of the State of Nigeria. Eurafric is a company incorporated under the law of the Federal Republic of Nigeria.

4 The dispute arises out of the privatisation of generation and distribution companies in Nigeria. The substantive dispute between the parties arose out of a Share Sale Agreement dated 21 February 2013 (the "SSA") pursuant to which the Nigerian Bureau of Public Enterprise ("BPE") and the Ministry of Finance Incorporated ("MoFI") - being the first and second Defendants/Applicants, acting on behalf of the Federal Government of Nigeria ("FGN") the third Defendant/Applicant - agreed to sell and transfer to Eurafric the entire shareholding in a company called Sapele Power Plc (the "Sale Company"). Eurafric paid US $201 million as consideration for the purchase of the shares. Schedule 9 to the SSA includes a list of "core assets" of the sale company, which listed "site land" as one of the assets. The Information Memorandum described the Sale Company's assets as including "lands and buildings" and stated that there were no existing mortgages or encumbrances on the Sale Company's assets.

5 The dispute concerned whether or not the land on which a certain power plant ("Sapele II") was located ("the Land") formed a part of the assets of the Sale Company that were transferred under the SSA. The Defendants contended that the Land was owned by a separate entity, the Niger Delta Power Holding Company ("NDPHC") and was, therefore, not transferred under the SSA.

6 The SSA contained a dispute resolution clause, at clause 15.3, which provided for disputes to be settled by arbitration, in accordance with the UNCITRAL Arbitration Rules. Clause 18.1 of the UNCITRAL Arbitration Rules provides that

> "If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the Arbitral Tribunal having

> regard to the circumstances of a case. The Award shall be deemed to have been made at the place of the arbitration."

7 Clause 15.6 of the SSA provided that "[t]he place of the arbitration shall be in London, England". Eurafric invoked clause 15 by issuing a Notice of Arbitration against the Defendants and the National Council on Privatisation ("NCP") on 11 April 2014. The NCP is not a Defendant in these proceedings as no Award was made against it in the arbitration.

8 The evidence of Ms Drenth of Howard Kennedy in her third witness statement, and in opposition to the application, is that on information from Eurafric's Nigerian lawyers, Obla & Co, during the substantive arbitration it was never disputed that the arbitration was seated in London. Indeed, the Revised Terms of Appointment, dated 26 January 2016 and Procedural Order No.22, which are before me, stated expressly at para.19 that the reference in the Arbitration Agreement to "London"

> "signifies the Parties' agreement that London is the place and juridical seat of this arbitration within the meaning of Article 18(1) of the UNCITRAL Rules and Section 3(a) of the Arbitration Act 1996 of England & Wales."

9 It appears in this regard that the Revised Terms of Appointment were signed by Eurafric, the three arbitrators and the BPE, NCP and FGN. Although the MoFI does not appear to have signed the Revised Terms of Appointment, the evidence before me is that it never raised any objection to them (as far as Eurafric is aware) and continued to participate in the arbitration thereafter. The evidence before me, accordingly, leads to the conclusion that the seat of the arbitration was London.

10 The Applicants participated throughout the arbitration and were represented by Nigerian lawyers. On 28 September 2017, the Tribunal, consisting of Mr Makhdoom Ali Khan (of Pakistan), and Samson Uwaifo J and Chief Bayo Ojo San (each of Nigeria) rendered the Award, which was in favour of Eurafric, declaring, amongst other matters, that the Land was transferred to Sapele Power Plc, that Eurafric (through Sapele Power Plc) was "entitled to full, undisturbed and unencumbered right of ownership of [the Land]" and that the Defendants were restrained "from transferring, pledging, alienating or encumbering" the Land. In addition, the Applicants were also ordered to pay Eurafric US $2.5 million in legal costs, £215,930.68 as advance paid on costs, and disbursements denominated in Naira, GBP and USD, collectively, totalling approximately £124,770 sterling. The evidence before me is that to date, none of these sums have been paid.

11 None of the Applicants brought an application in the courts of England and Wales seeking to Challenge the Award under the Arbitration Act 1996 ("Act") and the time for doing so expired on 8 November 2017 (being the date 28 days after the Award was communicated to the parties).

C. The Recognition Order and Associated Subsequent Events

12 On 20 December 2017, Eurafric made a without notice application on paper to recognise the Award pursuant to section 66 of the Arbitration Act 1996 ("the Recognition Application").

13 Section 66 of the Arbitration Act 1996 provides,

> "66. Enforcement of the Award

> (1) An Award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> (2) Where leave is so given, judgment may be entered in terms of the Award.
>
> (3) Leave to enforce an Award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the Award. The right to raise such an objection may have been lost (see section 73)."

14 As already noted, the Recognition Application of 20 December 2017 was supported by a witness statement of Joanna Bromhead of Womble Bond Dickinson (UK) LLP, Eurafric's then English solicitors, of the same date. It did not have a section addressing the obligation of full and frank disclosure on the application, nor did it identify any matter by way of full and frank disclosure.

15 On 15 January 2018, Popplewell J granted the Recognition Order on paper. By way of summary of the Recognition Order, it:

> (1) Gave the respondent leave to enforce the Award in the same manner as a judgment, pursuant to section 66 of the Arbitration Act 1996;
>
> (2) Entered judgment against the Applicants substantially in the terms of the Award;
>
> (3) Ordered that the Applicants pay the costs of the application, summarily assessed as £10,505;
>
> (4) Permitted the Applicants to set aside the Recognition Order within 30 days after service of the same;
>
> (5) Ordered that the Recognition Order could not be enforced until after the end of the aforementioned 30-day period, or until any application made by any of the Applicants within that period had been finally disposed of.

16 It took time for the Defendants/Applicants to be served with the Recognition Order. On 3 April 2018, the first Applicant (BPE) received a letter dated 29 March 2018 from the Ministry of Foreign Affairs Office of the Legal Advisor of Abuja. That correspondence enclosed a letter dated 13 March 2018 from the British High Commissioner in Abuja, Nigeria, to the Ministry of Foreign Affairs, Legal Department, Abuja, which enclosed a copy of the Recognition Order. Pursuant to section 12(1) of the State Immunity Act 1978, service is deemed to have been effected when the documents were received at the Ministry of Foreign Affairs (i.e. on 13 March 2018).

17 However, due to a mistake made by Eurafric's then solicitors, service did not include service of a copy of the Recognition application itself, including the arbitration claim form and Miss Bromhead's witness statement or any acknowledgement of service form, as is required by CPR r.23.9. In addition, no permission to serve out of the jurisdiction under CPR r.62.18(4) had in fact been applied for or obtained and the arbitration claim form had not been served.

18 Some considerable time later on 10 August 2021, the Applicants applied for an order (the "Variation Application") varying the order of Popplewell J to permit (a) the Applicants to vary or set aside the Order within 2 months and 22 days of service of documents that the respondent relied upon in order to obtain the Order and (b) service of such documents on PCB Byrne LLP.

19 On 1 October 2021, Eurafric's new solicitors, Howard Kennedy, served copies of the arbitration claim form and the Recognition Application upon the Applicants by service on their solicitors (as had been agreed). In the covering correspondence, it was noted that.

> "as Nigeria is now in possession of the evidence upon which [the Respondent] relied on in making the [Recognition Application], it should be able to now determine whether or not it considers it has any grounds for seeking to have the [Recognition Order] set aside".

20 Extensive correspondence between the parties followed leading to consent to the Variation Application, as recorded in an order of Andrew Baker J, on 12 January 2022, which included Eurafric being granted an extension of time for service of a copy of the arbitration claim form until 1 October 2021 (the parties having agreed that the claim form was served on that date).

21 On 28 February 2022, the Applicants issued their application seeking to set aside the order of Popplewell J of 15 January 2018, asserting that there had been a failure to give full and frank disclosure of two matters on the application before him, as identified below.

22 As a preliminary point, it should be noted that, by the Application, the only basis upon which the Applicants seek to set aside the order of Popplewell J are the two alleged non-disclosures. The Application does not allege that the tribunal lacked substantive jurisdiction to make the Award (see section 63(3) of the 1996 Act) or advance any other reasons why the order should not have been made (or should not be continued or remade) other than those relating to the alleged non-disclosures.

D. The Nigerian Proceedings

23 The alleged failures to give full and frank disclosure relate to two separate sets of proceedings commenced in Nigeria. In this regard, it is important to bear in mind the chronology of events relating to (1) the date of the application to the Commercial Court (20 December 2017); (2) the date of the Order of Popplewell J (15 January 2018); and (3) when the Applicants were served with the Recognition Order (during March 2018). As will be seen, events were occurring immediately before and throughout this period, as have further events since.

24 In relation to the first of these sets of proceedings, on 22 December 2017 (i.e. two days after the Recognition Application but before the Recognition Order was made on 15 January 2018), the Applicant issued an originating motion on notice (the "Applicants' Award Challenge") in the Federal High Court of Nigeria in the Lagos Judicial Division, Holden at Lagos (the "Nigerian Court") seeking to set aside the Award and an injunction restraining execution or enforcement of the Award pending hearing and determination of the Applicants' Award Challenge. The Applicants' Award Challenge set out 12 grounds for the application, including in relation to the substantive jurisdiction of the arbitral tribunal to determine certain issues (in relation to land and forgery), it being said that the Award went

beyond the scope of the issues submitted to the arbitral tribunal and as the *locus standi* of Eurafric to initiate the arbitration proceedings and also questions of law.

25 On 16 January 2018 (i.e. the day after the Recognition Order was granted but some time before the Recognition Order was served on the Defendants/Applicants) Eurafric was served with the Applicants' Award Challenge. On 23 January 2018, Eurafric filed a Notice of Preliminary Objection to the Applicants' Award Challenge which, amongst other things, raises a dispute as to the seat of the arbitration. On 4 April 2019, the Nigerian Court struck out the Applicants' Award Challenge (the "April 2019 Judgment") on the basis that it was an abuse of process. The April 2019 Judgment determined the Applicants' Award Challenge to be an abuse of process because the day before the Applicant's Award Challenge was filed at the Nigerian Court, the same Nigerian counsel acting for the Applicants filed on behalf of the Niger Delta Power Holding Company Limited ("NDPHC") a similar application at the High Court of Lagos State on the subject of the same Award (the "NDPHC Challenge"). It is clear from Eurafric's notice of preliminary objection to the Applicants' Award Challenge that Eurafric had also become aware of the NDPHC Challenge by 23 January 2018.

26 The NDPHC Challenge is the second set of proceedings which it is also said should have been disclosed on the Recognition Application. It is said that NDPHC held a Certificate of Occupancy and exclusively occupied the piece of land in which Sapele II was located and that it had remained in undisturbed possession of the land for many years. Its position, therefore, was that it had a proprietary interest which was adversely affected by the Award.

27 On 9 April 2019, the Applicants issued an appeal of the April 2019 judgment in the Court of Appeal, Holden at Lagos. That appeal is based on two grounds: first, that the judge at first instance erred in law when dismissing the Applicants' Award Challenge as an abuse of process in light of the NDPHC Challenge (given that the Applicants were not party to the NDPHC Challenge and the fact that the Applicants and NDPHC had common counsel did not qualify as a ground for finding an abuse); and a failure by that judge to consider all the issues submitted for adjudication by the Applicants which, therefore, breached their right to a fair hearing (given that the judge simply dismissed the Applicants' Award Challenge as an abuse without considering the merits of the Applicants' case otherwise).

28 NDPHC (which was not party to the Award although it had sought to join in the arbitration but had been refused permission to do so by the Arbitral Tribunal) had written to Eurafric on 14 December 2017, received on 19 December 2017 (i.e. the day before the Recognition Application was made) stating its intention to issue the NDPHC Challenge. The NDPHC Challenge was issued on 21 December 2017. It sought a declaration that NDPHC as a non-party to the Share Sale Agreement that gave rise to the Award had no right or obligation under the said agreement and was consequently not bound by the provisions of that agreement. It also sought a declaration that the Award was not binding on NDPHC (as a non-party to the arbitral proceedings between the Applicants and Eurafric) and, consequently, unenforceable by Eurafric or any person whatsoever against NDPHC, it's properties, it's privies and agents. It further sought a declaration that the Award violated NDPHC's constitutional right to a fair hearing and, consequently, was null and void and unenforceable against NDPHC and its properties and also sought an order of perpetual injunction restraining Eurafric, its servants, agents or any person acting on its instruction or claiming through it or in trust for it from taking any step to enforce the Award against NDPHC and/or its proprietary interest. As noted above, Eurafric was aware of the NDPHC

Challenge by 23 January 2018. On 13 June 2019, the NDPHC Challenge succeeded, and that decision is being appealed by Eurafric.

E. Applicable Legal Principles

29 When a party makes an application without notice, it is under a duty to make full and frank disclosure, or duty of fair presentation of "all material facts": *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514 per Scrutton LJ. The leading statements of principle were set out by the Court of Appeal in *Brinks Mat Ltd v. Elcombe & others* [1998] All ER 188. The applicable principles have been repeated and summarised in a number of recent judgments in this court, including by Carr J (as she then was) in *Tugushev v. Orlov* [2019] EWHC 2013 (Comm.) at [7], by Cockerill J in *W Nagel (A Firm) v Pluczenki & Others* [2022] EWHC 1714 (Comm.) at [45] to [51], and by Butcher J in *General Dynamics United Kingdom v. The State of Libya* [2022] EWHC 501 (Comm.) at [23] to [26], to each of which I have had regard.

30 I consider that the summary set out by Butcher J in *General Dynamics,* supra*,* is a useful summary of many of the applicable principles:

> "23. There is no doubt that the obligation on a party seeking relief *ex parte* to make full, frank and fair disclosure is of the greatest importance. It is necessary to allow the Court to fulfil its obligations under Article 6 of the European Convention on Human Rights, and is the corollary of the Court's being prepared to depart from the ordinary position that it should hear both sides before making a decision. As it was put by Popplewell J in *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199, at [51], 'It is a duty owed to the court which exists in order to ensure the integrity of the court's process'.
>
> 24.The essential principles were stated in *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350 by Ralph Gibson LJ at 1356-1357 as follows:
>
> > 'In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.
> >
> > (1) The duty of the Applicant is to make 'a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.
> >
> > (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the Applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and

Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

(3) The Applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the Applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the Defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92-93.

(5) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an *ex parte* injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:' see per Donaldson L.J. in *Bank Mellat v. Nikpour*, at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners' case* [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the Applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the Applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:' per Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms.'"

25. *In Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, at para. 180, Lawrence Collins J [as he then was] gave the following summary:

> 'On an application without notice the duty of the Applicant is to make a full and fair disclosure of all the material facts, ie those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the Applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the Applicant but also additional facts which he would have known if he had made proper enquiries … But an Applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present'.

26. Furthermore, if the duty has been breached, the court retains a discretion to continue or re-grant the order if it is just to do so. In *Millhouse Capital UK Ltd v Sibir Energy plc* [2008] EWHC 2614 (Ch), Christopher Clarke J said, at [105]-[106]:

> '[105] As to the future, the Court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non-disclosure, the Court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.
>
> [106] As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the Court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose.'"

31 As to what facts are material, Cooke J stated as follows in *Alliance Bank v. Zhunus* [2015] EWHC 714 at para [65]:

> "…The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. **A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made.**" (emphasis added)

32 In *Union Fenosa Gas SA v. Arab Republic of Egypt* [2020] 1 WLR 4732 at [125], Jacobs J emphasised that

> "Allegations of non-disclosure are concerned with points which might have a real consequence for the judge who is asked to make an order on a without notice basis."

33 In *Alliance Bank*, Cooke J, went on to say at [68] that:

> "The authorities show that the interests of justice must be paramount and that a due sense of proportion is required in relation to the assessment of the seriousness of the breach."

34 In this regard, as was said in *National Bank Trust v. Yurov* [2016] EWHC 191 (Comm.) at [20] (itself quoting from Toulson J in *Crown Resources AG v. Vinogradsky*) (15 June 2001) which was adopted by the Court of Appeal in *Kazakhastan Kagazy plc v. Arip* [2014] EWCA (Civ.) 381; [2014] 1 CLC 451 at [36] it is not appropriate to base a non-disclosure case on disputed facts and a sense of proportion must be maintained. As it was put in that cited passage:

> "… issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely. Speaking in general terms, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself …
>
> Secondly, where facts are material in the broad sense in which that expression is used, there are degrees of relevance and it is important to preserve a due sense of proportion. The overriding objectives apply here as in any matter in which the Court is required to exercise its discretion …
>
> I would add that the more complex the case, the more fertile is the ground for raising arguments about non-disclosure and the more important it is, in my view that the judge should not lose sight of the wood for the trees …
>
> In applying the broad test of materiality, sensible limits have to be drawn. Otherwise there would be no limit to the points of prejudice which could be advanced under the guise of discretion …'

35 The applicant must make proper enquiries before making the application. The duty of disclosure, therefore, applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such enquiries. In *Dar al Arkan Real Estate Development Co and another v. Majid Al-Sayed Bader Hashim Al Refai and Others* [2012] EWHC 3539 (Comm), Andrew Smith J confirmed that the duty on the applicant on a without notice application is to make a fair presentation to the court of the material facts. This means that the applicant has a responsibility before making its application to make proper enquiries of all relevant parties who may have information which could assist.

36 The applicant's duty extends to making a fair presentation to the judge of the law, and not just the facts: *Irish Response Ltd v. Direct Beauty Products Ltd* [2011] EWHC 37 (QB). It is a continuing duty: *Commercial Bank Of The Near East PLC v. A* [1989] 2 Lloyd's Rep 319. It is also well established that the continuing duty of full and frank disclosure applies to set-aside cases where permission has been granted but service not yet effected: *Network Telecom (Europe) Limited v. Telephone Systems International* [2003] EWHC 2890 (QB) at [48] to [76] per Burton J.

37 And non-disclosure of certain facts may lead to the setting aside of the order obtained without an examination of the merits: *Sloutsker v. Romanova* [2015 EWHC 544 (QB) at [51] per Warby J:

> 'Non-disclosure of material fact in an application made without notice may lead to the setting aside of the order obtained without examination of the merits. It is important to uphold the requirement of full and frank disclosure'. However, 'the court has a discretion to set aside or to continue the order whether the fact not disclosed in sufficient materiality to justify or require the immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important although not decisive consideration.'

38 Where there has been a substantial failure to disclose a material fact, the court's starting point is likely to be the immediate discharge of the order: see *National Bank Trust v. Yurov* [2016] EWHC 1913 (Comm) at [18].

39 Every case will ultimately turn on its own facts, but the *Nagel* and *General Dynamics* cases are illustrations of cases that fell on different sides of the line:

(1) In *Nagel* Cockerill J set aside an order granting permission to serve the claim form outside the jurisdiction because England was not the *forum conveniens*. Had she not done so, Cockerill J would have set the order aside on the basis of material non-disclosure due to the claimant's failure to disclose the existence and content of a Belgium judgment on jurisdiction in related Belgium proceedings. The breach was found to be serious and deliberate.

(2) In *General Dynamics,* Butcher J rejected an application to set aside an order for permission to enforce an Award and for judgment in terms of the Award under section 101 of the Arbitration Act 1996 by failing to inform the court that there was only one recognised Government in Libya and that Libya had adjudicative and enforcement immunities under the State Immunity Act 1978 ("SIA"). Butcher J did not consider that the failure to refer to the immunity of s.1 of the SIA to be of significant importance.'

40 Turning to section 66 of the Arbitration Act 1996, and the exercise to be performed, orders under s. 66 of the Arbitration Act 1996 are discretionary. The court has a discretion not to grant leave to enforce an Award summarily. Discretion will be exercised in an appropriate case in the interests of justice. It is not an administrative rubber-stamping exercise.

41 In this regard, the Applicants refer to what was said by Toulson LJ in *West Tankers Inc v. Allianz SPA* [2012] EWHA (Civ.) 27 *per* Toulson J at [38]:

> 'I use the words "in an appropriate case" because the language of the section is permissive. It does not involve an administrative rubber-stamping exercise. The court has to make a judicial determination whether it is appropriate to enter a judgment in the terms of the Award. There might be some serious question raised as to the validity of the Award or for some other reason the court might not be persuaded that the interests of justice favoured the order being made, for example because it thought it unnecessary. But in this case the Defendants have not Challenged before this court the propriety of the exercise of the judge's jurisdiction, if he had any, to make an order under section 66. Their argument has been limited to contending that he had no jurisdiction to do so.'"

42 The operation of section 66 of the Arbitration Act 1996 (and in a context involving land) was recently considered by Foxton J in *Franek Jan Sodzawiczny v. Simon John McNally* [2021] EWHC 3384 (Comm.) and in particular at [13], [14(ii) to (iv)], [29] and [39] to [40]. In this regard at [13], Foxton J summarises the guidance as to the criteria by reference to which the discretion was to be exercised. He said at [13]:

> "The guidance as to the criteria by reference to which that discretion is to be exercised (so far as relevant to the present application) can be summarised as follows:
>
> i) Leave should readily be given to enforce an Award as a judgment (*Middlemiss & Gould v Hartlepool Corporation* [1972] 1 WLR 1643, 1646H, rejecting the more cautious approach previously suggested by Scrutton LJ in *In re Boks & Co and Peter Rushton & Co Ltd* [1919] 1 KB 491, 497).
>
> ii) Despite some suggestions to the contrary (see e.g. *Margulies Bros Ltd v Dafnis Thomaides & Co (UK) Ltd (No 2)* [1958] 1 Lloyd's Rep 205, 207 and *Tongyuan (USA) International Trading Group v Uni-Clan Ltd* 19 January 2001, transcript pages 19-20), it is now clear that a declaration made by the arbitrator can be the subject of an order under s.66: see *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] 2 CLC 761,[20]-[22]; *The Front Comor* [2011] EWHC 819 (Comm) [28]; [2012] EWCA Civ 312, [36]-[37].
>
> iii) If the relief granted by the Award is not sufficiently clearly stated, that will be a reason to refuse a s.66 order. This was the position in Margulies

Bros Ltd, where the Award was intended to identify an amount payable by one party to the other but did not identify sufficiently clearly the amount or how it was to be calculated (as that decision has been explained in Tongyuan, p.8 and African Fertilizers, [21]). That includes cases in which the effect of the Award cannot be framed in terms which would make sense 'if those were translated straight into the body of a judgment' (*Tongyuan,* p.8) or where the operative parts of the Award which would fall to be enforced are inconsistent or ambiguous (*Moran v Lloyd's* [1983] QB 542, 550: 'the executive power of the state to enforce an Award is not to be invoked in an inconsistent or ambiguous form').

iv) That applies to an Award of injunctive as well as declarative relief (e.g., *Birtley & District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No 2)* [1960] 1 QB 1, 19).

v) In the event of such ambiguity or inconsistency (and by analogy with the position under s.100 and following of the Arbitration Act 1996), for the reasons explained in *Norsk Hydro ASA v State Property Fund of Ukraine and others* [2002] EWHC 2120 (Comm) [17]-[18], the court is 'neither entitled nor bound to go behind the Award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions.' If, therefore, the terms of the Award are such as to render enforcement by the court's processes inappropriate without some form of elaboration or refinement, then, save in cases of true slips or changes of name, enforcement will be refused. To do otherwise 'necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal.' However, 'the court should not … be astute to find difficulties of construction of Awards or, for that matter, judgments, where none really exist' (*Tongyuan,* 11).

vi) As is clear from the terms of the DAC Reports quoted at [12] above, an application under s.66 will be refused to the extent that the Award concerns a dispute which, under English law, is not arbitrable. This is one manifestation of the court's power to refuse enforcement on public policy grounds, as to which see *Soleimany v Soleimany* [1999] QB 785.

vii) As noted above, the DAC reports also make it clear that an order may be refused where it 'would improperly affect the rights and obligations of those who were not parties to the arbitration agreement'. It is not necessary to determine the precise scope of this ground but it must include those cases in which the courts would refuse injunctive relief or specific performance because of the existence of a prior third party right the impact of such an order would have on third parties (see *Snell's Equity* 34th para.

17-035 and the reference to this principle of equity in the s.66 context by Clare Ambrose in *Sterling v Rand* [2019]EWHC 2560 (Ch), [80]).

viii) The court will not itself enter a declaratory judgment under s.66(2) in the terms of a declaration already made by the arbitrator if it is not in the interests of justice to do so, for example because such a declaration is not necessary: *The Front Comor,* [28] (Field J), [38] (CA)."

43 I note that at [13] Foxton J highlights, in particular, that "leave should readily be given to enforce an Award of the judgment" (see para.i): "Despite some suggestions to the contrary … it is now clear that a declaration made by the arbitrator can be the subject of an order under s.66" (para.ii). "If the relief granted by the Award is not sufficiently clearly stated, that will be a reason to refuse a s.66 order" (see para.iii as elaborated upon in paras.iv) and v) - it is not suggested that applies here). "An application under s.66 will be refused to the extent that the Award concerns a dispute which, under English law, is not arbitrable." (para. vi) - again it is not suggested that that applies here. The "order may be refused where it 'would improperly affect the rights and obligations of those who were not parties to the arbitration agreement'." (para.vii) See further, [39] and [40] of the judgment and "The court will not itself enter a declaratory judgment under s.66(2) in the terms of a declaration already made by the arbitrator if it is not in the interests of justice to do so, for example because such a declaration is not necessary" (para.viii).

44 At paragraph [14] of his judgment, Foxton J addressed the situation where the relief granted by the arbitrator was itself discretionary. In this regard, he stated, amongst other matters, at [14 iii)] and [14 iv)] as follows:

"iii) The granting of declaratory relief is also discretionary, albeit the factors conditioning the exercise of that discretion are essentially those of whether there is a 'live dispute', the utility of any declaration and fairness as between the parties …

…

There is scope for debate as to whether that requires the court to determine for itself whether a court declaration is appropriate at all (e.g. whether there is a sufficiently live controversy) or whether, as I think is likely to be the case, the issue for the court is the rather different one of whether there is any need for (in effect) a second declaration. …

iv) In approaching these questions **it is also necessary to have regard to the principle of non-intervention enshrined in s.1(c) of the Arbitration Act 1996, and the strong English public policy which favours the enforcement of arbitration Awards** (*IPCO (Nigeria) Limited v Nigerian National* [2005] 1 CLC 613, [25]). Clearly the s.66 application is not

intended to allow an Award debtor, in general terms, to re-open battles which were (or should have been) fought in the arbitration." (emphasis added)

45 Another point made by Foxton J at [29] is that :-,

"Given the discretionary nature of the s.66 jurisdiction, I can see no reason why it should not be open to the court to grant a s.66 order in respect of some of the relief ordered by the arbitrator, not all of it, provided that the provisions are not interdependent, nor why the court cannot have regard to utility as a relevant criterion in doing so."

46 At [39] to [40] of the judgment Foxton J returned to the position of third parties and said that

"39. I accept that the effect of making an order under s.66 on third parties is a relevant consideration for the court (see [15(iv)] above). Taking the third parties identified by Mr Shah:

'(i) It is said that Treehouse Spain may be adversely affected if the Transfer Order causes it to lose the Property, and Treehouse IOM and/or GACH may be adversely affected if the Transfer Order leads to their shares in Treehouse Spain being transferred from them. **However, the Transfer Order is only directed to and binding on Mr McNally. If the Corporate Third Parties are 'true' third parties, rather than Mr McNally's privies, the Transfer Order will not bind them. If they are Mr McNally's privies, they are not third parties in the relevant sense and no issue of third party rights can arise in relation to them**.'

…

40. In any event as I have noted above [para.37], **a s.66(1) order has no immediate impact on Mr McNally and cannot have any impact on any true third parties**. To the extent that any subsequent applications to use the court's enforcement processes can be shown appropriately to engage third party interests, there will be an opportunity for the court to take that consideration into account when deciding what relief to grant."

(emphasis added)

F. The Grounds for the Application and the Response Thereto

47 The Applicants submit that there was a failure to give full and frank disclosure in the following respects:

(1) It is said that Eurafric should have brought to the court's attention the Applicants' Award Challenge of 22 December 2019 in the Nigerian court, which was issued two days after the Recognition application of 20 December 2017, and that, by extension, the respondent failed to refer the court to the basis for the Applicants' Award Challenge, including the Applicants' position that the arbitral tribunal lacked substantive jurisdiction to determine certain issues (in relation to land and forgery) and (so it was alleged) the Federal High Court at Lagos, Nigeria had jurisdiction to set aside the Award because Nigerian law was the applicable law in the resolution of disputes between the parties and sections 43 and 48 of the Nigerian Arbitration and Conciliation Act dealt with international commercial arbitration regardless of whether arbitral proceedings were heard in Nigeria or not. It is said that, although the Applicants' Award Challenge was served on 16 January 2018 (i.e. the day after the Recognition Order was granted) given the nature of the dispute between the parties, it was incumbent on Eurafric to make proper enquiries as to whether any proceedings had been issued before the Nigerian courts relating to the arbitration, particularly in circumstances where the Applicants are emanations of the Nigerian State.

(2) It is said that Eurafric also failed to bring to the court's attention the NDPHC Challenge of 21 December 2017 (i.e. 1 day after the Recognition application) and (by extension) the basis for the NDPHC Challenge (namely, amongst other matters) that the Award was unenforceable as against NDPHC and its proprietary interest in seeking an order of perpetual injunction restraining the respondent from taking any further step to enforce the Award against NDPHC or its proprietary interest, which was granted on 13 June 2017 in circumstances where Eurafric had received a letter from NDPHC on 19 December 2017 (i.e. the day before it issued the Recognition Application).

(3) No effort at all was made in Bromhead 1, in support of the Recognition Application, to address either the possibility of a Challenge before the Nigerian court nor the likelihood of the NDPHC Challenge being issued, despite the respondent being notified of the same as early as 19 December 2017. There is no evidence, it is said, of any enquiries being made at that time.

48 In relation to these points, it is also said that no effort was made at all thereafter to comply with the continuing duty of full and frank disclosure, and it was said that this was particularly egregious in circumstances where the Recognition Order was not served on the Applicants until, it is said, early April 2018 and the accompanying documents were not served until 1 October 2021. At no stage did Eurafric seek to appraise the court of either the Applicants' Award Challenge or the NDPHC Challenge, notwithstanding the fact that

Eurafric took active steps in the proceedings before the Nigerian court raising issues of jurisdiction and abuse of process.

49 In this regard, it is pointed out that Eurafric filed a Notice of Preliminary Objection in relation to the Applicants' Award Challenge on 23 January 2018 (i.e. a week after the service of the Applicants' Award Challenge). By 16 January 2018 (the day after the Recognition Order was granted and well before it was served) and subsequently it filed an affidavit in support of the notice on 29 January 2018. Eurafric argued, amongst other things, that the courts of the seat of the arbitration (per Eurafric) London, England had the jurisdiction to set aside the Award and that, in any event, the High Court of Delta State, where the disputed land was sited, and not the Federal High Court of Lagos had the original and exclusive jurisdiction to determine land matters and the suit should be struck out, as it was an abuse of the court process, which manifested itself in two forms: (i) filing an action seeking the setting aside of a foreign arbitral Award in Nigeria when no law supports such an action; and (ii) in pursuing a multiplicity of actions of the same issue in light of the NDPHC Challenge, which sought relief in respect of the same Award and purported to litigate similar issues contemporaneously before separate courts.

50 The fact that these matters were not brought to the court's attention is accepted, as is the fact that the Respondent owed a duty to make full and frank disclosure of all relevant matters. It is said that no proper explanation has been given for what are characterised as such failures (including such failures to provide disclosure as part of Eurafric's continuing duty). It is also said that these failures, coupled with Eurafric's failure to serve the documents accompanying the Recognition Order or the claim form until 1 October 2021 (i.e. over three years after obtaining it) "indicate (at best) a lackadaisical approach to the conduct of this matter".

51 It is submitted that the fact that Eurafric failed to disclose the Applicants' Award Challenge and the NDPHC Challenge was plainly material. Orders under s. 66 of the Arbitration Act 1996 are discretionary. The court has a discretion not to grant leave to enforce an Award summarily. The discretion will be exercised in an appropriate manner in the interests of justice. It is pointed out, as I have already noted, that this is not an administrative rubber-stamping exercise and the Applicants refer to what was said by Toulson LJ in *West Tankers* that I have already quoted.

52 It is submitted that, even where a court grants permission to enforce an Award, it may also stay the execution of that order for a limited period. The court has a general discretion to stay the enforcement of a judgment or an Award where there are special circumstances which render it inexpedient to enforce it (see CPR 83.7(4)).

53 It is said that the fact of (a) a Challenge to the Arbitral Award in Nigeria by the Applicants and (b) the proceedings brought by NDPHC to protects its proprietary interest in Sapele II would have influenced the judge when deciding either whether to make the order itself or, at the very least, in deciding upon the terms upon which the order should be made (applying the test of materiality set out by Cooke J in *Alliance Bank v. Zhunus*, *supra*, at para.65). The fact that the rendering of the Recognition Order in the terms sought, which included declaratory relief, could impact the rights of third parties, would, it is said, have been material in deciding the terms upon which any recognition order would be made.

54 In this regard, the Applicants referred to Eurafric's own evidence in the context of the NDPHC Challenge, which it is said appears to acknowledge the relevance of the NDPHC Challenge to the enforceability of the Award. As recorded in the NDPHC Challenge judgment, dated 13 June 2018, on 3 May 2018, the respondent filed "a 122 paragraph" counter affidavit "with 49 exhibits of 788 pages" in which it argued that

> "the claimant is an agency of the Federal Government of Nigeria. That Award is binding on the Federal Government of Nigeria who is a party to the arbitral proceedings and consequently, the Award is binding on the claimant."

Eurafric are currently appealing the judgment of 13 June 2018 on the basis that, amongst other matters,

> "the decision of the trial court to the effect that [NDPHC] is not bound by an arbitral Award which is binding on its principal - (the Federal Government of Nigeria) - is perverse and shall deprive [Eurafric] of the fruits of the arbitration if not set aside, thus occasions a grave miscarriage of justice against [Eurafric]."

55 It is also said that Eurafric, in Ms Drenth's third witness statement, appears to accept that the Applicants' Award Challenge and the NDPHC Challenge were material facts when she states that:

> "On behalf of Eurafric, I do apologise that these matters were not raised with the court as soon as they became apparent to Eurafric's former solicitors."

56 The Applicants submit that Eurafric's failure to disclose material fact was substantial, no proper explanation has been provided for that failure and that the Recognition Order should, therefore, be set aside. The Applicants reject Eurafric's suggestion that setting aside the Recognition Order would be futile because "Eurafric could simply seek permission again to enforce the Award. Eurafric will not be time barred until 28 September 2023" on the basis

that this ignores the seriousness of the duty of full and frank disclosure in applications made without notice and the seriousness of Eurafric's failures and, should Eurafric seek permission again to enforce the Award and the matters identified by the Applicants are aired in court, a court, it is said, may elect not to exercise its discretion to enforce under section 66 of the Arbitration Act 1996 or might make an order on different terms to the Recognition Order or even exercise its discretion to stay enforcement pending the outcome of the NDPHC Challenge and/or the Applicants' Award Challenge.

57 For its part, Eurafric denies there was any breach of the duty of full and frank disclosure, but, if there was, it says it was inconsequential and not material. It is said that the Applicants advanced no proper grounds whatsoever to resist enforcement of the Award at any stage (even now). They have not Challenged the Award at all (which could only be done in England, as the seat of the arbitration) and are long out of time to do so. It submitted that the Applicants have no grounds for resisting enforcement and a judgment in the terms of the Award is inevitable. It is said that, in such circumstances, it would be without any proper purpose to set aside the Recognition Order.

58 Eurafric acknowledges that it did not identify the proceedings in Nigeria were going on in the evidence in support of the Recognition Application and acknowledges that that was something which, ideally, would have been included in the evidence. However, it is said that this would only have been out of an abundance of concern to comply with the duty of full and frank disclosure and not because the existence of the Nigerian proceedings was at all material to the granting of the relief sought.

59 It is said that the reasons why Eurafric's former solicitors did not include any reference to the Nigerian proceedings appear to be related to the timing of the events in the Nigerian proceedings, which were taking place just around the time that the Recognition application was being made, as explained in Drenth 3 at [29], and the Nigerian proceedings do not, in fact, offer any basis to resist enforcement as they went on to explain.

60 It is said that neither of the Nigerian proceedings have any relevance to the Recognition Order, and provide no basis to suggest that the Recognition Order should not have been made or that it would not have been made if it were considered again with the evidence of the Nigerian proceedings. It is submitted that the application by the Applicants to set aside the Award (the Applicants' Award Challenge) has no merit whatsoever since the Award was indisputably seated in London and the Nigerian High Courts have no power to set it aside. It is also pointed out that that application has been struck out by the Nigerian High Court and judgment entered in favour of Eurafric. Whilst there is an appeal by the Applicants against that decision, it has not been resolved and the Applicants' Award Challenge remains struck out at the present time.

61 Equally, the second proceedings before the Nigerian court (the NDPHC Challenge) consists of an application by NDPHC, a company owned by one of the Applicants, which claims to be entitled to the Land and which seeks orders declaring that it is not bound by the Award and restraining enforcement of the Award against NDPHC.

62 It is pointed out by Eurafric that NDPHC is not a party to the Award and it was on this basis (and on the basis that the Award cannot be enforced against NDPHC) that NDPHC succeeded at first instance in the Nigerian proceedings. In circumstances where NDPHC is not party to the Award, and it is the Award that is being sought to be enforced (against the Applicants) Eurafric submits that there was no necessity to disclose the NDPHC Challenge at all.

63 It is said that the existence of each of the Nigerian proceedings has no effect whatsoever on Eurafric's entitlement to judgment for the relief granted against the Applicants in the Award.

64 It is submitted that the Applicants' Award Challenge is simply an illegitimate attempt to challenge the Award to avoid paying the costs of the Award and, equally, with regard to declaratory relief and injunctive relief in the Award, the Award remains valid and binding on the parties to the Award and the issue of the ownership of the land as between Eurafric and the Applicants is resolved by the Award.

65 Equally, and whilst in Nigeria, Eurafric may wish to argue that NDPHC is in reality an agent of the Applicants and should, therefore, be considered to be bound by the Award, what is being enforced in England is an arbitration Award between Eurafric and the Applicants binding upon the parties thereto.

66 It is further submitted that the proceedings in Nigeria are no proper reason to refuse or delay enforcement of the Award against the Applicants applying s. 66 of the Arbitration Act 1996, which allows the refusal of enforcement of an English-seated Award where the respondent shows that the tribunal lacked substantive jurisdiction. The Applicants have made no attempt to argue or demonstrate before this court that the tribunal lacked jurisdiction and it is submitted that the discretion should be exercised in favour of enforcement of the Award.

67 It is submitted that the fact that later enforcement steps to secure payment of the moneys and possession of the land might involve seeking to enforce the Award against NDHPC makes no difference. The Recognition Order is not made against NDHPC. Furthermore, the execution stage of a judgment (enforcing an arbitral Award) is separate from the entry of judgment (see *General Dynamics v. Libya* in the Supreme Court [2021] UKSC 22 at [183])

and the present case is one where the judgment is not even made against the party who would resist execution.

68 Eurafric also submitted that the Applicants overplay the discretionary nature of s. 66 of the Arbitration Act. If there is no Challenge under section 66(3) (and there is no challenge in England by the Applicants to jurisdiction) then, in such circumstances, by virtue of s. 58 of the Arbitration Act and Article 34(2) of the UNCITRAL Arbitration Rules, the Award is final and binding on the parties, an order will usually be made unless a substantive basis is offered to refuse the order and no such basis exists in this case (see also *Sodzawiczny,* supra*,* at [14(iv)] in this regard).

69 In summary, Eurafric submits that it is not appropriate to set aside the Recognition Order on the grounds of alleged breaches of the duty of full and frank disclosure in the present case, not least in circumstances where the Nigerian proceedings have made no difference to Eurafric's entitlement to relief granted against the Applicants. It is submitted that the timing of the Nigerian proceedings also indicates that its failure to refer to them in the evidence in support of the Recognition Application was not highly culpable and it was not deliberate. It is submitted that it was also a matter for which Eurafric's English solicitors were automatically responsible, since they were responsible for guiding Eurafric (a foreign company coming to the English court for assistance to enforce the Award) as to what must be included in an English application of this nature. It is submitted that Eurafric should not be denied a judgment to which it is entitled on the basis of a criticism of its former solicitors.

70 Ultimately, Eurafric submits that, had the court been made aware of the Nigerian proceedings, when the Recognition Application was made, it would not have made any difference whatsoever and it would still have made the Recognition Order and the court should make an order, even were the Applicants to persuade the court that there had been a material non-disclosure.

71 As a fallback position, Eurafric submits that, even were it appropriate to set aside the Recognition Order for material non-disclosure, it only ought to be set aside insofar as it consists of non-monetary relief related to the Land and an order for the money sum should still be made to further the court's policy in favour of payment of debts and appropriate enforcement of arbitral Awards, without which the Applicants would be able to further delay payment of its debt under the Award.

G. Discussion

72 I will consider each of the alleged failures to give full and frank disclosure in turn. As appears below, and for the reasons I identify I do not consider that there has been any failure to make full and fair disclosure of any material fact on the part of Eurafric.

73 Turning first to the fact that Eurafric did not bring to the attention of the court the Applicants' Award Challenge of 22 December 2017, either at the time of the Recognition Application or thereafter.

74 The position was that there had been an arbitration between Eurafric and the Applicants in relation to the SSA. As already noted, the SSA contained a dispute resolution clause, at Clause 15.3, which provided for disputes to be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. Clause 18.1 of the UNCITRAL Arbitration Rules provides that:

> "If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the Arbitral Tribunal having regard to the circumstances of the case. The Award shall be deemed to have been made at the place of arbitration."

75 Clause 15.6 of the SSA provided that:

> "**The place of the arbitration shall be in London, England**".

Eurafric invoked Clause 15 by issuing a notice of arbitration against the Defendants. The evidence of Ms Drenth of Howard Kennedy in her third witness statement, and in opposition to the application is that, on information from Eurafric's Nigerian lawyers, Obla & Co, during the substantive arbitration it was never disputed that the arbitration was seated in London. Indeed, the revised terms of appointment dated 26 January 2016 and the Procedural Order No.22, which are before me, stated expressly at para.19 that the reference in the arbitration agreement to "London":

> "**signifies the Parties' agreement that London is the place and juridical seat of this arbitration within the meaning of Article 18(1) of the UNCITRAL Rules and Section 3(a) of the Arbitration Act 1996 of England & Wales."**

76 As already noted, the Revised Terms of Appointment were singed by Eurafric, three arbitrators and BPE, NCP and FGN. Although the MoFI does not appear to have signed the revised terms of appointment, the evidence before me is that it never raised any objection to them (as far as Eurafric is aware) and continued to participate in the arbitration thereafter. The evidence before me, accordingly, leads to the conclusion that the seat of the arbitration was London.

77 The Applicants participated throughout the arbitration and were represented by Nigerian lawyers and there was no jurisdictional challenge by the Applicants in the arbitration. On 28 September 2017, the Tribunal rendered their Award. Pursuant to section 58(1) of the Arbitration Act 2006:

> "Unless otherwise agreed by the parties, an Award made by a tribunal pursuant to an arbitration agreement is final and binding on both of the parties and on any persons claiming through or under them."

Far from there being any agreement between the parties to the contrary, the parties also agreed to the UNCITRAL Arbitration Rules, including, therefore, Article 34(2) which provides, amongst other matters, that,

> "All Awards … shall be final and binding on the parties. The parties shall carry out all Awards without delay."

78 On established principles, which were acknowledged and accepted by Mr Gregoire during the course of his oral submissions, any Challenge to the Award with its seat in London, be that on the merits or in relation to jurisdiction, is to be brought in England in the Commercial Court in accordance with the Arbitration Act 1996 within the short time limits provided for in the Arbitration Act 1996.

79 No such challenge (whether on the merits or in relation to jurisdiction) occurred within these time limits or at all. Accordingly, and in circumstances where the Applicants' participated in the arbitration and had not challenged the Award, either in relation to the merits or in relation to jurisdiction, there was every reason for the court to grant the relief sought on the recognition application in relation to a final and binding Award and the absence of any challenge in the English courts to the substantive jurisdiction of the Arbitral Tribunal.

80 The Applicants' Award Challenge in the Nigerian courts, on the purported basis that the arbitral tribunal lacked substantial jurisdiction to determine certain issues (in relation to land and forgery) and so (it was alleged) the Federal Court at Lagos had jurisdiction to set aside the Award, because Nigerian law was the applicable law as to resolution of disputes between the parties, and on the basis of any provisions of the Nigerian Arbitration and Conciliation Act, was brought in clear breach of the arbitration agreement and its agreement to arbitrate, and indeed the parties' subsequent agreement recorded in Revised Terms of Appointment.

81 Any dispute as to the jurisdiction of the Arbitral Agreement should have been brought before the Arbitral Tribunal or before the English court (and within the timescales in the Arbitration Act 1996), so as to give effect to the parties' agreement in the context of a London seat and the application of the Arbitration Act 1996. If any view of the Lagos court would have any relevance at all at any stage (and I understand Eurafric deny that), it would not be relevant at the enforcement stage in England, but could only be at the stage of any enforcement in Nigeria of any resulting judgment (were there to be any such attempt at enforcement there) which is separate from the issue as to whether the final and binding arbitration agreement between the parties and the consequent Award should be enforced by way of a judgment of the English court (and then enforced anywhere in the world that Eurafric chose to attempt).

82 The fact that such proceedings had been commenced in Nigeria (in breach of the arbitration agreement and contrary to the agreed contractual regime whereby any challenge to the Award was to be made in England under the Arbitration Act 1996) was not "relevant to the exercise of the court's discretion", in circumstances where it would not have influenced the judge when deciding whether to make the Recognition Order or the terms upon which it would make such an order (*Alliance Bank* at [65]). Nor was the non-disclosure of the Applicants' Award Challenge a point which might have any (still less real) consequence for the judge being asked to make a recognition order on a without notice basis (see *Fenosa* at [32]).

83 An English court would look to the terms of the arbitration agreement between the parties, the terms of the Award and the lack of any substantive challenge to the Award in England and within the timescale specified in the Arbitration Act 1996. It would not have regard to, still less give effect to, in the exercise of its discretion, proceedings brought in another State in relation to an arbitration with a London seat and an ensuing arbitral Award between the parties in London, such overseas proceedings being in breach both of the arbitration agreement between the parties and their subsequent agreement in relation to the arbitration and the findings of the tribunal in the Award itself.

84 If the Applicants were to allege that the tribunal lacked substantive jurisdiction in any respect (as now alleged in Nigeria), the forum to do so was before the tribunal or upon any Challenges to the Award in England and within the timescale specified in the Arbitration Act 1996 and not in Nigeria, which was not the contractual forum to raise any such dispute as to jurisdiction, Nigerian courts having no jurisdiction to set aside an arbitration Award with a London seat governed by the Arbitration Act 1996. The only circumstance in which the views of the Nigerian court may ever be relevant would be at a later stage if, and only if, Eurafric chose to enforce a judgment there, but that would be a matter of enforcement in a foreign court at that stage, which has nothing to do with the English court, and was entirely separate from the question as to whether the English court should exercise its discretion under section 66 of the Arbitration Act 1996, in respect of a final and binding arbitration Award in an arbitration with a London seat after which the judgment could be enforced anywhere in the world where there could be recognition and enforcement, such recognition and enforcement (or otherwise) not being a concern of the English court.

85 I do not consider that the fact of the Applicants' Award Challenge or the subject matter of the same was material to disclosure in the context of the enforcement of the Award. It would not have influenced any judge when considering whether to make the judgment order or the terms on which to make an order (certainly not in terms of the court being less likely to make the order sought).

86 In fact, if anything, it might well have fortified a judge in concluding that the Award should be recognised (so as to uphold the parties to their contractual bargain and to do so before any proceedings in Nigeria had progressed and purported to opine on the validity of an arbitration Award with a London seat). That would very much be a reason <u>not</u> to stay execution of the order (as mooted by the Defendants).

87 It is true that enforcement is discretionary and does not involve an administrative "rubber-stamping exercise" (see Toulson LJ in *West Tankers* at [38]), but, in making a judicial determination as to whether it was appropriate to enter a judgment in terms of the Award, there were no, still less serious, questions raised as to the validity of the Award (in the seat

of the arbitration) and there are no reasons why the court might not be persuaded that the interests of justice favour the order being made. On the contrary, there was every reason to conclude that it was necessary to enter judgment in terms of the Award to uphold and further a final and binding arbitration Award with a London seat, not least in circumstances in which the Defendants have not chosen to challenge the substantive jurisdiction of the arbitral tribunal in the English court.

88 Furthermore, what was being enforced was an arbitration Award between Eurafric and the Defendants and it was being enforced in the terms of the Award with such judgment being between Eurafric and the Defendants. Whether such Award (or such judgment) could have any impact on the rights of third parties, who were not party to the Award (or the judgment), did not impact, on the facts of this case, on the exercise of the court's discretion as to whether to enforce the Award. That was part of the contractual bargain, as such parties, to arbitrate any dispute between them. Prima facie, any such Award or judgment is only binding upon the parties to it. Furthermore, any alleged or potential impact upon third parties will be a matter to be addressed at the time of enforcement and in whatever forum such enforcement takes place and not at the (prior) recognition stage under consideration by the court (see further below what I say in relation to the NDPHC Challenge).

89 I recognise that an Applicant in Eurafric's position might have considered it appropriate to give disclosure of the Applicants' Award Challenge either out of an abundance of caution or so as to give the fullest possible background to events (once aware of the same) but I do not consider that it was obliged to do so.

90 I agree that it is always appropriate to err on the side of caution, given the importance of the duty of full and frank disclosure and the potential consequences of any failure to disclose facts that might be considered material (if only to explain why they were not) but I do not consider that the fact that the Applicants' Award Challenge was not referred to amounted to a failure to give full and frank disclosure of material facts that would justify setting aside the Recognition Order.

91 I have also borne in mind that it would appear that the reasons why Eurafric's former solicitor did not include any reference to Nigerian proceedings relate, in particular, to the timing of the events in the Nigerian proceedings, which were only commenced on 21 December 2017, just after the Recognition application was made (and only foreshadowed in the case of NDPHC immediately prior to that). No doubt, for that reason, they were not part of a narrative of events in Ms Bromhead's witness statement or put before the court. I also consider that is why any alleged relevance of the Applicants' Award Challenge was not perceived at that time.

92 If Eurafric had subsequently put its mind to whether to make disclosure (and it is not clear whether it did so or not), I have no doubt that it would have reached the conclusion that subsequent disclosure was not required as part of the continuing duty of disclosure (the stance adopted on its behalf before me). At most, any such update would only have been to events in Nigeria in relation to proceedings brought in breach of the contractual regime and to explain why the same were <u>not</u> relevant.

93 I do not consider that the fact that Eurafric have chosen to apologise for the fact that the Applicants' Award Challenge and the NDPHC Challenge were not raised with the court, since they became apparent to Eurafric's former solicitors, amounts to an admission that such facts were material (as the Defendants allege). Rather, I consider it is a recognition of

such matters which would, ideally, have been included in the evidence, if only out of an abundance of caution, to ensure that it could not be suggested that there had been any failure to comply with the duty of full and frank disclosure and to explain why such matters were not material.

94 I would only add that, on the present application, it is, in any event, the court, not either of the parties, which is the arbiter of what is material on the established authorities that I have quoted. I can also well see why a party would wish to make clear that it apologises, if it were to be found to have failed to give full and frank disclosure, as that is relevant to culpability and also to the discretion as to whether to remake the order were it considered that the order should be set aside in the first instance.

95 I would only add that, if contrary to the conclusions that I have reached above, the Applicants' Award Challenge did pass the test of materiality, I do not consider that any such breach could be considered to be of sufficient materiality to require immediate discharge of the Recognition Award without examination of the merits and, if the merits were examined, I consider that they justified (and justify) the making of the Recognition Order in the terms made, such that the Recognition Order ought not to be set aside (or, if it were set aside, it would be appropriate to make the Recognition Order once again). This was also a case where Eurafric did not obtain any advantage from not giving the disclosure that it is said should have been given and this would have militated in favour of remaking a judgment order, had it been appropriate to discharge it in the first instance.

96 Turning to the NDPHC Challenge, I consider that the fact of such challenge by NDPHC in the Nigerian courts to be even more tangential to the Recognition Application than the Applicants' Award Challenge. The Recognition Application is in respect of an Award between Eurafric and the Applicants. NDPHC was not party to the arbitration agreement or the arbitration or the Award. The Recognition application was to seek a recognition order in relation to the Award and associated judgment that was sought between Eurafric and the Applicants and such judgment would be between Eurafric and the Applicants and not NDPHC (who were not party to the Award and would not be a party to the judgment).

97 What happens thereafter, in terms of enforcement in a particular jurisdiction, would be a matter for that jurisdiction and, as noted by the Supreme Court in *General Dynamics, supra,* at [183], the execution stage of the judgment (enforcing an arbitral award) is separate from the entry of judgment, and in the present case the Award is not even made (on its face) against the party who would resist execution (if indeed execution was sought against it in Nigeria or elsewhere).

98 The NDPHC Challenge consists of an application by NDPHC, a company which claims to be entitled to the land and which seeks orders declaring it is not bound by the Award and restraining enforcement of the Award against NDPHC. That is, in fact, the very basis on which NDPHC succeeded at first instance in the Nigerian proceedings (that NDPHC is not a party to the Award, as well as on the basis that the Award could not be enforced against NDPHC). There is nothing inconsistent with the Award or the enforcement of the Award as a judgment in that regard.

99 The Recognition Application relates to an Award between Eurafric and the Applicants and whether that Award should be enforced as a judgment between Eurafric and the Applicants not between Eurafric and NDPHC.

100 If the NDPHC is a "true" third party rather than Nigerian Government privies, the Award and the judgment will not bind them. However, if they were Nigerian Government privies, then they are not third parties in the relevant sense and so no issue of third-party rights can arise in relation to them (see *Sodzawiczny, supra,* at [39]).

101 Mr Gregoire, on behalf of the Applicants, sought to hypothesise as to some even more remote third parties that NDPHC might have contracted with whose interests might be prejudiced, but I did not find any of those examples to be apposite or to assist. There is no evidence that any such further removed third party is dealing with NDPHC or that they dealt with them on terms whereby NDPHC warranted that they own the land or that the same would be relevant to such contracts. The examples given, for example, a fuel sale and purchase contract, simply would not depend on whether NDPHC owned the land. I do not consider that there was any evidence (still less any obligation to disclose) the possibility of more remote third parties being impacted by the Award and no such alleged non-disclosure is, in fact, alleged or, in any event, could be sustained.

102 In such circumstances, the NDPHC Challenge or the subject matter of the same, was not "relevant to the exercise of the court's discretion" in circumstances where it would not have influenced the judge when deciding whether to make the Recognition Order between Eurafric and the Applicants or the terms upon which it would make such an order (see *Alliance Bank* at para.65) nor was there non-disclosure of the NDPHC Challenge a point which might have had any (still less real) consequence for the judge being asked to make the Recognition Order on a without notice basis as between Eurafric and the Applicants (see *Union Fenosa* at [32]).

103 If Eurafric had given disclosure of the NDPHC Challenge, it would, at most, have been to explain why it was not relevant to the Recognition application or the relief sought therein as between Eurafric and the Applicants. I do not consider that the failure to do so amounts to a failure to give full and frank disclosure of material facts that would justify setting aside the Recognition Order (which enforced the Award between Eurafric and the Applicants as a judgment as between Eurafric and the Applicants).

104 Once again, it also appears that the reason why Eurafric's solicitors did not include any reference to the NDPHC Challenge relates, in particular, to the timing of the events in the Nigerian proceedings, which were only commenced on 21 December 2017, just after the Recognition application was made (and only foreshadowed in the case of NDPHC immediately prior thereto). No doubt, for that reason, they were not part of the narrative of events in Ms Bromhead's witness statement that were put before the court. I consider that that is also why any alleged relevance of the NDPHC Challenge was not perceived at the time.

105 If Eurafric had subsequently put its mind to whether to make disclosure in relation to the NDPHC Challenge (it is not clear whether it did or not), I have no doubt that it would again have reached the conclusion that subsequent disclosure was not required as part of the continuing duty of disclosure (the stance adopted on its behalf before me) and, at most, any such update would only have been to events in Nigeria in relation to proceedings brought by a party that was not party to the arbitration agreement; in other words, not party to the arbitration and not party to the Award and in respect of which judgment was not being sought (and was not given) in the judgment order so as to explain why the same were not relevant.

106 Once again, if contrary to the conclusions I have reached above, the NDPHC Challenge passed the test of materiality, I do not consider that any such breach could be considered to be of sufficient materiality to require immediate discharge of the Recognition Order without examination of the merits. If the merits were examined, I consider that they justified (and justify) the making of the Recognition Order in the terms made, such that the Recognition Order ought not to be set aside (or, if it were set aside, it would be appropriate to make the Recognition Order once again). This was also not a case where Eurafric gained any advantage through its conduct.

107 Finally, had the same been relevant and had it been necessary to attribute responsibility for any non-disclosure, I do not consider that Eurafric was itself culpable and any failure to give full and frank disclosure lay with Eurafric's previous solicitors. In those circumstance, I consider this would have been a further consideration (and, therefore, a further reason) as to why it would not have been appropriate to require the immediate discharge of the Recognition Order or as to why it would not have been inappropriate to remake such an order.

108 For the avoidance of doubt, I do not consider that either of the proceedings in Nigeria are a reason to refuse or delay enforcement of the Award against the Applicants applying s. 66 of the Arbitration Act 1996 and the discretion contained therein. I am satisfied that such discretion is to be exercised in favour of making the Recognition Order on the facts of the present case and in the terms made.

109 I also make clear that, had it been appropriate to set aside the Recognition Order, there would have been nothing to stop Eurafric from making a further such application (no time bar issues currently arising) and I do not consider that the allegations of non-disclosure (taking them at their very highest) would result in it being inappropriate in the exercise of the court's discretion to make the Recognition Order sought. This is not a case where Eurafric has committed some egregious breach of duty that would require such breach of duty being marked by never giving any future form of relief to that litigant and such a further application would be neither abusive nor inappropriate. That would have been a further factor militating against the setting aside of the Recognition Order, had, contrary to my conclusions, the allegations of failure to give full and frank disclosure of material facts been made out. This court does not give relief in circumstances where it is appropriate to recognise the Award as a judgment and in circumstances where the relief sought would, in fact, only increase costs and cause delay, which would be contrary to the furtherance of the overriding objective and might also result in prejudice to Eurafric.

110 Finally, it would not have followed, even had I considered that there was a failure to give full and frank disclosure, that the outcome would be the wholesale setting aside of all parts of the judgment, without any part of the judgment still being made. In this regard, so far as related to the costs Award, the factual position is that many years have passed, and those costs have still not been paid. Even had I been minded not to reinstate relief in relation to the land, I would still have given judgment in relation to other aspects of the relief. I am sure that that would be so of any judge of this court, having regard to the strong English public policy which favours enforcement of arbitration Awards - see *Sodzawiczny*, *supra*, at [14(iv)].

111 In the above circumstances, the Applicants' application to set aside the Recognition Order is dismissed.

CERTIFICATE

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

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.