Case No: CL-2018-000449

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Neutral Citation Number: : [2020] EWHC 3045 (Comm)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 31 July 2020

BEFORE:

HIS HONOUR JUDGE MARK PELLING QC
(**Sitting as a Judge of the High Court**)

BETWEEN:

(1) A
(2) B

Claimants

- and -

(1) C
(2) D
(3) E
(4) F

Defendants

MS ANGELINE WELSH (instructed by Cripps Pemberton Greenish) appeared on behalf of the Claimants
MR ROWAN PENNINGTON-BENTON (instructed by Morrison & Foerster) appeared on behalf of the Defendants

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JUDGMENT
(Approved)
(**Via Skype**)

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(Official Shorthand Writers to the Court)

JUDGE PELLING:

1. This is the hearing of a challenge under section 68 of the Arbitration Act 1996 to a costs award dated 1 May 2019 issued in an LCIA arbitration by a tribunal consisting of Mr Stephen Furst QC, The Chairman, Dr Michael Powers QC and Mr Timothy Otty QC ("the Tribunal"). Hereafter, where I refer to the claimants, I refer to the claimants in these proceedings who were respondents in the arbitration, and where I refer to the defendants, I refer to the defendants in these proceedings who were the claimants in the arbitration.

2. In these proceedings the claimants allege that (a) contrary to section 68(2)(a) of the Arbitration Act 1996, the Tribunal failed to comply with its duty under section 33 of the Arbitration Act 1996 to give the claimant a reasonable opportunity of putting their case or addressing that of the defendants or to provide a fair means for the resolution of the matters to be decided and/or (b) contrary to section 68(2)(b) of the Arbitration Act 1996, the Tribunal exceeded its powers.

3. The defendants maintain that the claim should be dismissed, both because there was nothing substantively wrong with the Tribunal's conduct and resolution of the costs issues and because the claimants failed to take the point they now seek to rely upon before the Tribunal and so have lost the right to object by operation of section 73 of the Arbitration Act 1996.

4. There are, therefore, four issues that need to be deciding being:

   (a) was there a procedural irregularity within the meaning of section 68(2)(a) of the Arbitration Act;

   (b) was there a procedural irregularity within the meaning of section 68(2)(b) of the Arbitration Act;

   (c) if the answer to (a) or (b) is yes, whether that led to substantial injustice; and

(d) whether in the events that have happened, the claimants have lost the right to object by operation of section 73 of the Arbitration Act 1996.

Factual background

5. As might be expected, there is no significant disagreement between the parties as to the primary facts. The substantive dispute determined by the Tribunal arose under a sale and purchase agreement dated 7 December 2012 (hereafter "SPA"), under which the defendants sold their shares in an entity called HEM to the first claimant. The second claimant guaranteed the obligations of the first claimant under the SPA and the dispute arose because the defendants claimed payments were due to them under the agreement from the first claimant that had not been paid. The first claimant disputed the sums claimed but the second claimant maintained that it had been relieved of its guarantor obligations as a result of an amendment to the SPA.

6. There was a cross-claim by the claimants for breach of warranty. The substantive outcome was that the claimants were found liable to pay the defendants a sum of in excess of €21 million, less sums already paid by them to the defendants and less also the sum of €120,204 odd in respect of which the defendants were found liable to the claimant on the cross-claim. In addition, the first claimant was found liable to make future payments to the defendants under the agreement giving rise to the dispute on an annual basis.

7. There are disputes between the parties as to the precise outcome in financial terms, but that is not material to this dispute and I need not take up time describing them. The Tribunal awarded the defendants the costs of the claim on the indemnity basis and the claimants the costs of the counterclaim on the standard basis and by the final award dated 1 May 2019 the Tribunal directed the claimants to pay the defendants net the sum of £1,517,869 by way of legal costs. The defendants' case is that this was unfair because the Tribunal had told the parties that original documentation proving the cross-claim were not required initially and thereby implied that they would be called for and considered by the Tribunal at some subsequent stage before it arrived at a final conclusion as to what sums should be paid by which parties.

8. In addition, as I have said, the claimant also alleges the Tribunal acted in excess of its powers in finding that the effect of ordering costs to be paid on an indemnity basis shifted the evidential burden to the claimants concerning the reasonableness of the defendants' costs and in then not requiring the defendants to prove their costs by producing the original documentation.

9. The indications as to future conduct of the determination of the costs issues on which the claimants rely start with remarks made by Mr Furst QC at the end of the substantive hearing of the reference. The relevant remarks were made on 26 March 2018 and were as follows as recorded in the transcript:

> "The Chairman: Good. We need therefore to consider the question of housekeeping. I think we indicated that we would give a partial award which will deal with everything other than costs and that's still our present intention. We think that the parties, we would be assisted and the parties would be assisted, in making submissions about costs by seeing what we've decided. But as a preliminary to that we need to know what your costs are and so, what we would like to propose, subject to our submissions is that you provide us each with your schedule of costs, so just the costs that you're claiming or would claim assuming that we were to make an order for costs in your favour. We are not expecting huge schedules detailing each and every cost, but a broad schedule which would include things such as hourly rates being claimed, the number of hours and a detail of disbursements sufficient to us to be able to understand in broad terms the costs that are being claimed, why they've been incurred, so that we can make an assessment. The Tribunal have got no preconceived ideas on this. It may be that we would want to divide the costs or we may want to -- between the claim and the counterclaim, and so I'm inviting the parties to, whether they would wish to divide up their costs between them, between claim, counterclaim and whether they think it's reasonably possible…
>
> Mr Senarsi: Yes, would that just be an Excel sheet without the supporting documents?
>
> The Chairman: No, not supporting documents. Yes, an Excel sheet if that's how you want to present it, but perhaps with a summary sheet on top. No, we don't want the original documents at this stage…"
> (Quote unchecked)

10. The claimant maintains that the request was for schedules for informational purposes only and that in that context not wanting supporting documents made sense, particularly as the claimants had said that costs would be dealt with in a separate award.

11. There then followed two partial awards resolving the substantive issues between the parties, the last of which is dated 7 December 2018. Following the publication of the second partial award, the Tribunal gave directions concerning the determination of the costs issues by an email from Mr Furst to the parties dated 14 December 2018 which was in these terms:

> "Dear Colleagues,
>
> It now falls to the Tribunal to decide the allocation of the arbitration costs within the meaning of rule 28.1 of the LCIA rules and the allocation and the sum recoverable by either party by way of legal costs within the meaning of rule 28.3 of the LCIA rules.
>
> For that purpose we would ask for the parties' written submissions as to -
>
> (1) how the arbitration and legal costs should be allocated as between the parties;
>
> (2) the amount of legal costs that should be recoverable. In that connection we require a schedule itemising the claimed expenditure showing, where applicable, the hourly or other rates being claimed. We do not require at this stage any invoices or other documents supporting such claimed expenditure.
>
> We would ask that the parties exchange their submissions and serve them on the Tribunal by Friday, 11 January 2019…"
> (Quote unchecked)

12. Although the claimant emphasises the phrase "*at this stage*" in paragraph two of the email, there could be no reasonable doubt as to why the material sought by the Tribunal was required. This is apparent from the first and second sentences of Mr Furst's email where he identified the issues the Tribunal had to determine as including the sums recoverable by either party by way of their legal costs and that submissions were being sought for that purpose.

13. The claimants maintain they understood that the parties would be directed to prove their costs through the production of supporting documents at a later stage: see paragraph 18 of the statement of Ms L, the second claimant's head of legal affairs dated 17 July 2019. I return to that evidence later, but it is noteworthy that Ms L does not quote the whole of the email set out above in her statement but only the last two sentences of paragraph two. In consequence she does not explain how the view she says the claimants had could be one that they reasonably held having regard to the terms of the email when read as a whole.

14. Although some reliance is placed by the claimants in the ICC Commission Report on Decisions on Costs in International Arbitration where at paragraph 76 it states that a Tribunal must, "… *satisfy itself through proper verification of the reality of those costs* …" what is proper verification will depend on the circumstances. Many tribunals will assess costs on the basis of what has been claimed by reference to principles such as reasonableness and proportionality on the basis that the sums claimed have been certified to be due or payable by the receiving party. One example is the approach of the English courts to summary assessment. Another is the approach adopted for detailed assessment by the English courts where a party is required to lodge a detailed bill of costs but not the underlying documents, other than those relevant to counsel's fees, expert fees and other disbursements: see paragraph 5.2 of CPR PD 47. As was submitted by the defendant, very real difficulties concerning privilege and confidentiality would need to be addressed if underlying documents such as timesheets or narrative invoices from lawyers to clients were to be produced. That would have to be worked out as part and parcel of any directions concerning disclosures sought, but of course never were worked out in the circumstances of this case because no application for such discovery was ever made. Ultimately, what may be ordered to be disclosed will depend on the nature of any dispute as to the costs claimed or particular items of costs claimed. Finally on this point, Ms L does not refer to the ICC Report as being the basis for the claimants' understanding of what was to happen.

15. Returning to the email from Mr Furst on which the claimants rely, I consider the much more natural meaning to be attributed to it was that the Tribunal was reserving to itself a right to call for underlying documents, either if it considered that they were

necessary in order to carry out the assessment exercise or any part of it, or if one of the parties applied for the material or some of the material in aid of the submission as to the recoverability of some or all of the sums claimed by the receiving party.

16. Following the direction, the parties filed lengthy and detailed submissions and supporting schedules. As the final award records at paragraph 5:

> "Pursuant to directions given by the Tribunal dated 14 December 2018, the parties made submissions in writing to the Tribunal as to how it should allocate the arbitration costs within the meaning of Article 28(1) of the LCIA Rules 2014 ('the Rules') and the allocation and sum recoverable by either party by way of legal costs within the meaning of Article 28(3) of the Rules. These submissions are contained within the following documents:
>
> 5.1 For the claimants substantive submissions dated 25 January 2019, together with a chronology (annexe 1) and a costs schedule (annexe 2) with four sub-sheets of detail which will be referred to collectively as 'the CSC'.
>
> 5.2 For the respondents, substantive submissions dated 25 January 2019, together with a costs statement (annexe 1) and an LCIA costs calculator (annexe 2) which will be referred to collective as "RSC".
>
> 5.3 For the claimants, submissions in reply dated 6 February 2019, together with annexes of their demand for payment (annexe RRSC1), the respondent's reply (annexe RRSC2) and a second demand for payment (annexe RRSC3) which will be collectively referred to as "RRSC".
>
> 5.4 For the respondents submissions in reply dated 8 February 2019, together with various claimants' emails (annexe A), calculation of … credits forwarded by the respondents to the claimants and the Tribunal on 7 November 2018 (annexe B), TJS company records (annexe C), fees applied by a well-known Mauritian law firm (annexe D) and press articles (annexe E) which will be collectively referred to herein as "the RCSC"."
> (Quote unchecked)

17. On 18 February 2019 the LCIA Secretariat informed the parties that the Tribunal was to issue its final award in the following month. The claimants did not say either to the LCIA or the Tribunal or the defendants that this was wrong in principle since there was

to be a further stage in the assessment process of the sort the claimants maintain they expect to occur. Notwithstanding that, Ms L in paragraph 18 of her first statement says this:

> "… The respondents believed that there would be a second stage in the Tribunal's determination of costs, ie, following the Tribunal's assessment of the parties' respective liabilities for costs, the successful parties would be required to produce invoices or other documents to justify the costs and expenses claimed. This was also consistent with the way in which the Tribunal resolved other claims in the arbitration. The first partial award dealt with liability but certain issues were reserved for further consideration and dealt with in the second partial award."
> (Quote unchecked)

18. Three points arise. First, this is contrary to and ignores paragraph 2 of from Mr Furst to the parties dated 14 December 2018. Secondly, in my judgment, the scheme identified by Ms L is, with respect, obviously wasteful of time and costs and is a hopelessly inefficient way of proceeding and one likely to give rise to a serious risk of inconsistent findings. Aside from that, it would work only if the initial determination was dealt with by a partial award, as Ms L implicitly recognises in her description of what occurred in relation to liability. However at no stage did the Tribunal suggest there would be any form of bifurcated procedure for determining the costs issues of the sort Ms L refers to. Indeed to the contrary, the email to which I referred earlier makes it clear the intention of the Tribunal to deal with all issues concerning both liability for and the assessment of sums payable by way of costs.

Section 68(2) - Relevant Principles

19. Section 68(2) requires any procedural irregularity to be "*serious*" and one that the court considers "*has caused or will cause substantial injustice to the applicant …*" In relation to section 68(2)(a) challenges, the applicable principles are those summarised by Popplewell J (as he then was) in Terna Bahrain Holding Company v Al Shamsi [2012] EWHC 3283 (Comm); [2013] 1 All ER (Comm) 580 at [85] in these terms:

> "(1) In order to make out a case for the Court's intervention under s. 68(2)(a), the applicant must show:

(a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice.

(2) The test of a serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

(3) a balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under s. 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

(4) There will generally be a breach of s.33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s. 33 or a serious irregularity.

(6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.

(7) In determining whether there has been substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the

point, the tribunal might well have reached a different view and produced a significantly different outcome."

20. For present purposes, these points need to be emphasised: (i) it will only be in an extreme case that justifies the court's intervention; (ii) generally there will be a breach of section 33 if the Tribunal decides the case on the basis of a point that one of the parties has not had a fair opportunity to address; but (iii) there is an important distinction to be drawn between (a) a party having no opportunity to address the point; and (b) the party failing to recognise or take the opportunity that exists. The latter will not be a breach of section 33 or a serious irregularity.

21. Finally, and before turning to the facts of this case, it is worth emphasising that section 33 and section 68 together are not a means by which appeals on fact or law from the decisions of arbitrators can or should be permitted. Section 68(2)(b) challenges do not permit challenges based on alleged errors of fact or law: see in this regard Lesotho Highlands Development Authority v Impregilo SpA [2006] 1 AC 221 at [31] to [32]. It applies only where a tribunal exercises power it did not have not where it erroneously exercises a power that it had.

The section 68(2)(a) challenge

22. There are two aspects to this challenge, one based on an expectation that the cost assessment exercise would be a two-stage process as described by Ms L in paragraph 18 of her witness statement, and another based on what is characterised as an erroneous application of the indemnity basis of assessment.

23. Turning to the first of these aspects, the claimants argue that the Tribunal's directions set out earlier created in the mind of the claimants a "*clear expectation*" that there would be a subsequent stage of the assessment process at which documents would be required to be produced to verify the sums claimed. I reject the suggestion that the claimant could reasonably have thought that there was to be such a process for the following reasons.

24. First, on this hypothesis, the defendants would have been called upon to prove sums claimed after they had been the subject of adjustment on reasonableness grounds and

thus at a time when their recoverable costs had been reduced below what they had claimed had been incurred. This makes no sense. If there was a dispute as to whether the costs claimed had been incurred in fact, then the time to investigate that was either at the same time as or possibly before consideration of reasonableness challenges. Had the claimant considered that it required the production of some underlying documents, the time to say so was in its costs submissions delivered pursuant to the directions contained in 14 December email and/or by applying for disclosure of those documents before being required to file and serve its cost submissions. It did not take either of these steps.

25. Secondly, there is no reasonable basis for reading the directions given by the Tribunal as directing any such procedure either expressly or impliedly. What the Chairman said at the end of the substantive hearing has little or no bearing on the situation because the directions for the assessment process were those contained in Mr Furst's email of 14 December referred to above. That email makes it entirely clear that the Tribunal was intending at that stage to decide the sums recoverable by either party by way of legal costs on the basis of the material they were directed to submit by the directions set out in the email. This is apparent not merely from what is set out in the first sentence of the email, but from the requirement for submissions as to the amount of legal costs that should be recoverable. It was entirely clear from the email that it was at least a possibility and maybe the probability that the Tribunal would resolve that issue without requiring sight of "… *any invoices or other documents supporting claimed expenditure* …"

26. In any event, it is plain that if one or other party considered that the underlying documents were required in order to deal with the issues that arose, it would need to say so. In fact, at no stage until after publication of the final award, did the claimants mention this issue at all. It was not mentioned in any of the submissions that were lodged pursuant to 14 December directions. None of the submissions made pursuant to those directions reserved rights pending sight of the underlying documents or pending the second stage in the process that Ms L says the claimants were expecting.

27. The claimants did not apply for disclosure of any of the underlying documents at any stage, and in particular did not apply for sight of them prior to lodging its submissions

which were required to deal with the issue of amounts payable and which in fact dealt with the amounts payable. The claimants purported to challenge in detail the genuineness of the attribution of sums claimed for particular tasks in the submissions lodged pursuant to the directions. By way of example, if it was thought that there was to be a second stage, that was the context to reserve the position until after determination of the second stage that it was said was understood to take place or to apply for the disclosure of the relevant documents if it was thought they could assist or to say that the issue could not be resolved without sight of the underlying documents. The claimant did none of these things.

28. If, as Ms L maintains, that the claimants were expecting a second stage at which the "*successful parties would be required to produce invoices to justify the costs and expenses claimed …*", it ought reasonably to have appreciated by no later than the receipt of the LCIA's notice that a final award was to be published, that there was to be no further stage. That was so particularly having regard to the point that, when previously bifurcated procedures were adopted by the Tribunal that they had been carried into effect using partial awards.

29. That was, on any view, the point at which if the claimant considered there was to be a second stage, that it would have been writing to the Tribunal or the LCIA or the defendants or all of them making that very point. It did not do so. I am entirely satisfied that the claimants could not reasonably have thought that there was to be a second stage, and whether either from the terms of 14 December email directions or otherwise. In those circumstances, in my judgment, it cannot be said that the claimant had a reasonable expectation that there would be such a process and it cannot be said that by failing to adopt such a process the Tribunal failed to give each party a reasonable opportunity to put its case. This was at best a failure by the claimants to address the point by either reserving its position or applying for disclosure or for saying that some of its submissions could not be addressed without disclosure of the underlying materials.

30. It was not a case of the claimant not having an opportunity to address the issues that arose, but a failure on the part of the claimants to recognise or take the opportunity that existed to address the issue by applying for disclosure of what was required or

reserving the right to make further submissions following an examination of the relevant documents.

31. I now turn to the other aspect of the section 68(2)(a) challenge, that is by adopting an erroneous application of the indemnity basis of assessment, the Tribunal deprived the claimant of a reasonable opportunity of advancing its case.

32. This submission is based on the Tribunal's conclusion at paragraph 46 of the final award that in consequence of deciding that the defendant should recover their costs of the claim on the indemnity basis *"... we do not have to have regard to any issue of proportionality; it lies with the respondents to satisfy the Tribunal that the legal costs of the claimants on the claim were unreasonably incurred or unreasonable in amount*." If this paragraph is read in isolation, it is a not entirely apposite description of the relevant English law principles. However, in my judgment, that is not a fair way of approaching this summary. The defendants set out the relevant principles comprehensively in their initial cost submissions referred to in paragraph 5 of the final award. In paragraph 13 of those submissions, the defendants refer to Home Office v Lownds [2002] EWCA Civ 365 and quoted at length from the judgments in that case, including in particular paragraph 6 which was in these terms:

> "The fact that when costs are to be assessed on an indemnity basis there is no requirement of proportionality and, in addition, that where there is any doubt, the court will resolve that doubt (as to whether costs were unreasonably incurred or were reasonable in amount) in favour of the receiving party, means that the indemnity basis of costs is considerably more favourable to the receiving party than the standard basis of costs."

33. Whilst the language used by the Tribunal is not entirely apposite as I have said, it was clearly an attempt to replicate in summary form the defendant's submissions based on the decision of the Court of Appeal in Lownds being the only submissions made on this point to the Tribunal. There is no indication anywhere within the final award that the Tribunal was intending to adopt any more stringent approach to this issue than had been contended for by the defendants or that in fact it adopted any more stringent an approach or any other approach at all to the task that it had had to undertake than that which it was submitted by the defendants should be adopted.

34. In my judgment, to read this particular paragraph of the final award in the manner contended for by the claimant is therefore unreal and artificial. If adopted, it would defeat the general approach of striving to uphold awards by reference to artificial reading of particular paragraphs of the award in isolation and out of context. Furthermore, reading the final award as a whole, as I have said, does not suggest that the Tribunal did anything other than to apply the correct principles that they had been invited to apply.

35. However, even if I am wrong to read the award in that way, it does not lead to the conclusion that the Tribunal failed to give the claimant a reasonable opportunity for putting its case. As I have said, the claimant from the outset made clear in its initial cost submissions that it was seeking the costs of the claim on the indemnity basis. It made clear why costs were being sought on that basis and further made clear what the principles were as to assessment if that course was to be adopted.

36. The claimants sought to answer that submission in great detail in their submissions referred to in paragraph 5 of the final award. As I have said, their reading of the final award as a whole shows that the Tribunal approached the issue in the manner the defendants had invited the Tribunal to approach them, which was a submission that the claimants had a more than adequate opportunity to answer and did in fact answer in the submissions referred to in paragraph 5 of the final award. That, together with the point that the underlying documents could have no impact on the question of an assessment of reasonableness but only on genuineness means the point is without substance. It is to be remembered that the claimants' case is that there was to be a second stage concerned with proof that the sums claimed had been or were payable by the receiving party. That is exclusively an issue going go genuineness, ie, to whether or not the sums had been paid by the receiving party or the receiving party was liable to pay them and not to the reasonableness of the sums which had been paid or were payable.

37. The direction in paragraph 46 of the final award has no impact on genuineness and the underlying documents can be relevant only to verification not reasonableness. In my judgment therefore it follows that, even if the Tribunal were wrong in the direction it gave itself, it cannot render unfair a failure to offer the claimants an opportunity of

seeing the underlying documents or to adopt the bifurcated approach that Ms L maintains the claimant understood was to take place.

The section 68(2)(b) challenge

38. If and to the extent the claimant submits that the Tribunal exceeded its powers by assessing costs against the claimant on an indemnity basis, that point is unarguable for the reasons set out in the final award. The claimant argues that the Tribunal wrongly found that its effect was to shift the evidential burden to the claimants. I do not accept that to be a fair or reasonable reading of the award for the reasons that I have already given, but in any event I am not able to accept that if and to the extent I am wrong about that, the Tribunal exceeded its powers by adopting such a course. The erroneous application of the power to assess costs on the indemnity basis is not capable of challenge under section 68(2)(b) applying the principles set out above.

39. Finally, it is submitted that having shifted the evidential burden onto the defendants, the Tribunal then acted contrary to its powers by not requiring the defendants to prove their costs by the production of original documentation and thereby the Tribunal took themselves outside the powers conferred upon them by the LCIA Rules because, by Article 28(3) of those Rules, the Tribunal was permitted to decide the amount of legal costs payable only "… *on such reasonable basis as it thinks appropriate* …" I do not accept that if paragraph 46 of the award is read in the way for which the claimants contend, that would be an unreasonable or inappropriate basis to assess costs, at any rate unless the Tribunal combined that finding with a requirement that all the underlying documents be produced and evaluated. Any such documents would go only to the issue of whether those costs had been incurred or were ones in respect of which the receiving party had a liability not to the reasonableness of such costs for the reasons I have explained in detail already. In those circumstances that element of the challenge fails as well.

The section 73 issue

40. The defendants submit that the claimants have lost the right to complain of the matters referred to so far by operation of section 73(1)(b) of the 1996 Act. The defendants

submit that once the LCIA Secretariat had informed the parties that a final award was to be published, it would have been aware that there was to be no second stage of the sort referred to by Ms L in paragraph 18 of the witness statement. As I have explained, the claimant did not at any stage refer to the second stage in any of its costs submissions and did not do so once it knew that the costs issue was to be disposed of by a final not a further partial award, which it will be recalled was the mechanism which Ms L refers to in the relevant paragraph of her witness statement.

41. I am satisfied that the defendants are entitled to succeed on this point in relation to the challenge under section 68(2)(a) for the reasons explained earlier, but by the same token, I do not accept that this is so in respect of a challenge under section 68(2)(b) because that challenge depends on the terms of the award which could not be known to the claimant until after publication of it. However, this issue is academic having regard to the conclusions I have reached concerning the substantive points that arise.

42. In the result, the claim fails and is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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