Case Nos: CL-2021-000196
& CL-2022-000529

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

Neutral Citation Number: [2022] EWHC 2949 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2022

Before :

THE HON MR JUSTICE BUTCHER

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IN THE MATTER OF ARBITRATION CLAIMS

Between :

RQP

Claimant in CL-2021-000196

- and –

ZYX

Defendant in CL-2021-000196

And Between :

ZYX

Claimant in CL-2022-000529

-and-

RQP

Defendant in CL-2022-000529

- -
- -

Jonathan D.C. Turner and Mark Baldock (instructed by **Richard Slade & Co**) for **RQP**
Chris Aikens (instructed by **Pinsent Masons LLP**) for **ZYX**

Hearing date: 31 October 2022
Additional Submissions 1 November 2022

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Approved Judgment

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Mr Justice Butcher:

1. There are three applications before the court arising out of a dispute between two companies RQP and ZYX.

Background

2. The dispute relates to rights and obligations arising out of the successful development of a certain product ('Product 1') and of modifications thereof.

3. In brief, RQP contends that Product 1 was developed by a Mr X in conjunction with ZYX pursuant to the terms of two consultancy agreements, under the second of which ('the Second Consultancy Agreement') ZYX was obliged to pay Mr X royalties. RQP says that the benefit of the Second Consultancy Agreement was assigned to it by an assignment dated 21 December 2018. Product 1 had ultimately been released in June 2014.

4. RQP contended that Product 1 had been developed while Mr X was working for RQP. RQP contended that Mr X had incorporated some of its assets into Product 1, and asserted claims against ZYX, inter alia for infringement of intellectual property rights. The parties compromised claims that they had against each other in relation to Product 1 by a License Agreement dated 2 August 2016 ('the License Agreement'). Under the License Agreement ZYX granted RQP a right to develop 'enhancements' to Product 1 in return for which RQP was required to pay ZYX a royalty. RQP developed an 'enhancement' of Product 1 ('Product 2') and, ZYX contends, other downloadable content related to Product 2, in respect of which ZYX alleges that RQP owes it royalties.

5. The License Agreement contained, as its Clause 17, an arbitration agreement. It was in the following terms:

   'DISPUTE RESOLUTION: Any controversy, claim, or dispute arising out of or relating to this Agreement or this agreement to arbitrate, including, without limitation, the interpretation, performance, formation, validity, breach, or enforcement of this Agreement, and further including any such controversy, claim, or dispute against or involving any officer, director, agent, employee, affiliate, successor, predecessor, or assign of a party to this Agreement (each, a "Dispute"), shall be fully and finally adjudicated by binding arbitration to the fullest extent allowed by the law (the "Arbitration"). The seat of the Arbitration shall be the London Court of International Arbitration.'

6. ZYX commenced arbitration by filing a Request for Arbitration on 31 January 2020. The tribunal is composed of a single arbitrator ('the Arbitrator'). ZYX's principal claim in the arbitration was for breach of contract. It specified that there had been breaches of Clauses 2 and 13 of the License Agreement. Clause 2 required RQP to pay a royalty and provide royalty statements; Clause 13 provided that if the License Agreement was terminated due to RQP's breach, RQP must cease all development of console ports and enhancements to Product 1. ZYX claimed that, based on sales information as at January 2020, RQP owed ZYX US$10,902,576.

7. RQP served a Response to Arbitration on 15 April 2020, and an Amended Response to Arbitration on 7 May 2020. One feature of the Response was that RQP contended that certain alternative claims which ZYX had advanced, for trade mark, passing off and copyright infringement were not within the arbitration clause. Another was that it was said that a further sequel to Product 2 ('Product 3'), which ZYX contended was an enhancement of Product 1, had been developed, not by RQP, but by another company, E.

8. On 21 August 2020 ZYX filed its Statement of Case. This included an allegation that if Product 3 had been developed by E, this had been the result of a breach by RQP of Clause 4 of the License Agreement, which prohibited the assignment of rights under the Agreement without the consent of the other party.

The MSCMC

9. Following the close of pleadings in the arbitration, the Arbitrator scheduled a Mid-Stream Case Management Conference (or 'MSCMC') for 15 February 2021. It was relisted by consent and heard on 3 March 2021. The Arbitrator circulated an agenda for the MSCMC on 9 February 2021, which included 'Jurisdictional Objections/Bifurcation'. In the pleadings and in the skeleton arguments for the MSCMC there were the following jurisdictional issues raised: (1) an objection by RQP to ZYX's claim under Clause 4 of the License Agreement on the basis that it was not within the scope of the Request for Arbitration; (2) an objection by RQP to an alternative claim by ZYX, to the effect that if Product 3 was not an enhancement of Product 1 and thus not within the scope of the License Agreement, Product 3 nevertheless infringed ZYX's registered trade marks for a device (which has been called the 'second alternative trade mark claim'), on the basis that such a claim was neither within the scope of the arbitration clause in the License Agreement, nor within the scope of the Request for Arbitration; and (3) an objection by ZYX to a claim made by RQP in its Statement of Defense and Counterclaims whereby it sought to set off against any sums it owed to ZYX sums owing from ZYX to it under the Second Consultancy Agreement, on the basis that it did not fall within the scope of the arbitration clause in the License Agreement.

10. At the MSCMC submissions were made by both parties in respect of the other's jurisdictional objections. Mr Aikens, on behalf of ZYX, referred to the fact that the Arbitrator had the power to rule on his own jurisdiction, and, pursuant to Article 23.4 of the LCIA Rules, might do one of two things, namely decide the objection to jurisdiction now in an award, or postpone a decision on jurisdiction until the final award in the case. The Arbitrator then proposed that there should be a 30-minute break after which he would give his 'preliminary comments on these jurisdictional issues'. After that break, the Arbitrator said that he 'would like to give you my comments with regard to the jurisdictional objections briefly'. He then said:

(1) In relation to the objection to the Clause 4 claim, that given the 'rather broad' requirement as to a Request for Arbitration in Article 1.1(iii) of the LCIA Rules, that claim fell within 'the nature and circumstances of the dispute' and 'I don't see any need for a remedy of the Request for Arbitration with regard to that'; but that questions of which entity actually developed [Product 3] and whether there had been an assignment were factual issues which would be considered in the arbitration;

(2) In relation to the objection to the claim regarding the trade mark in respect of the [device], that 'claims regarding [Product 3] are set out in the Statement of Claim and are covered by the language included in Claimant's Request for Arbitration, so also there I don't see any need for a remedy of the Request for Arbitration'; but that whether the claims in respect of trade marks were outside the scope of the arbitration agreement was an issue intertwined with the merits of the dispute and could not be decided at that stage;

(3) In relation to the objection to RQP's counterclaim, the Arbitrator referred to the fact that it had been intimated on behalf of RQP that proceedings would be commenced in this court to claim sums due under the Second Consultancy Agreement pursuant to a jurisdiction clause therein whereby the parties submitted to the non-exclusive jurisdiction of the English courts. He continued that 'obviously the Arbitral Tribunal would not have any jurisdiction with regard to that because that would be an interference with those proceedings and would create a risk of contradicting decisions, which wouldn't make any sense at all', and that 'definitely in that sphere I do not see jurisdiction of this Tribunal'.

<u>The email of 22 March 2021</u>

11. After the hearing of the MSCMC, on 22 March 2021, the Arbitrator sent an email to the parties, enclosing a copy of the transcript of the hearing. The Arbitrator stated:

'Because of the many intertwined issues, I made a point not to decide on jurisdictional objections at this stage and restricted myself to comment, and to a statement that the issues of jurisdiction will be dealt with as the arbitration continues.

For the sake of good order, I hereby confirm the following:

Concerning the Claimant's contractual claims regarding [Product 3], the Claimant's claims as set out in the Statement of Claim do not fall outside the scope of the dispute referred to the Sole Arbitrator by the Request for Arbitration and are deemed covered by the language included by the Claimant in its Request for Arbitration. There is no need for the Claimant to amend its Request for Arbitration pursuant to Article 22.1 of the LCIA Rules. Furthermore, which entity developed [Product 3], and whether [Product 3] is an enhancement of [Product 1], are factual issues too intertwined with the merits of the dispute to be decided at this stage. The Sole Arbitrator reserves the right to decide whether he has jurisdiction over the Claimant's contractual claims with a decision on the merits pursuant to Article 23.4 of the LCIA Rules.

As to the Claimant's trade mark claims regarding [Product 3], the Claimant's claims as set out in the Statement of Claim do not fall outside the scope of the dispute referred to the Sole Arbitrator by the Request for Arbitration and are deemed covered by the language included by the Claimant in its Request for Arbitration. There is no need for the Claimant to amend its Request for Arbitration pursuant to Article 22.1 of the LCIA Rules. Furthermore, whether the Claimant's trade mark claims fall outside the scope of the arbitration agreement is an issue which is too intertwined with the merits of the dispute to be decided at this stage. The Sole Arbitrator reserves the right to decide whether he has jurisdiction over the Claimant's trade mark claims with a decision on the merits pursuant to Article 23.4 of the LCIA Rules.

…

Lastly, for amounts said to be owed under the Second Consultancy Agreement based on an assignment by Mr [X] to [RQP], the Sole Arbitrator confirms he would not have jurisdiction to entertain any such counterclaim in view of the dispute resolution provision provided for under said agreement and where [RQP] itself has asserted the jurisdiction of the High Court of England and Wales.'

The issue of RQP's claim form and subsequent events

12. On 31 March 2021, RQP issued an arbitration claim form claiming, pursuant to s. 67 Arbitration Act 1996 ('s. 67'), an order setting aside the 'Award as to jurisdiction' which RQP contended had been made at the MSCMC and/or in the Arbitrator's email of 22 March 2021.

13. The only subsequent events which it is necessary to refer to at this stage are as follows. On 6 April 2021 RQP and Mr X commenced proceedings in this court against ZYX for sums due under the Second Consultancy Agreement. On 16 April 2021, RQP indicated that it would not be paying its contribution to the costs of the LCIA arbitration and, as a result, by his Procedural Order No. 10 of 11 October 2021, the Arbitrator ordered that RQP's counterclaims were deemed withdrawn.

14. Thereafter, in the summer of 2022, RQP contended that it had learned of conduct on the part of ZYX which, it said, constituted a repudiatory breach of the arbitration agreement. What RQP contends is that ZYX and its solicitors have made extensive disclosures to public relations consultants and directly to journalists, of materials created for the purposes of the arbitration and of other confidential documents and information. This, RQP says, has been a breach of ZYX's obligation under Article 30.1 of the LCIA Rules and of the implied obligation on the parties to treat the arbitral proceedings as confidential. RQP contends that as a result of these breaches, journalists contacted several witnesses whose evidence RQP had intended to adduce in the arbitration, and three witnesses had informed RQP that they would not now give evidence having realised, because of the contact made by the journalists, that they could not rely on their evidence being kept confidential. On 26 July 2022, RQP sent a letter saying that it was accepting these alleged repudiatory breaches on the part of ZYX as terminating the arbitration agreement, divesting the Arbitrator of any jurisdiction and bringing the arbitration to an end.

15. RQP accordingly advanced its s. 67 application, as it put it, 'solely for the purpose of seeking a determination as to the scope of the [Arbitrator's] jurisdiction at the commencement of the Claim'. The primary relevance of this, it was said, was as to costs; but it might be of relevance if it were later held that it was not correct that the arbitration agreement had been terminated. The s. 67 application was advanced on the basis that it was not to be taken as an affirmation that the arbitration agreement was still in force.

The s. 67 Application

16. With that introduction it is possible to turn to the merits of the s. 67 application itself.

17. S. 67 contains the following provisions:

'(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).'

18. That section should be read together with ss. 30 and 82(1) of the 1996 Act. Those sections provide, in relevant part:

'30. Competence of tribunal to rule on its own jurisdiction.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

…

82. Minor definitions.

(1) In this Part—

…

"substantive jurisdiction", in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.'

19. Further, by section 31(4) of the 1996 Act it is provided that:

'Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

…'

20. RQP's s. 67 application is based on the Arbitrator having made an award as to jurisdiction at the MSCMC and/or in his email of 22 March 2021. ZYX did not accept, at least in relation to the objections to the Arbitrator's jurisdiction in relation to (1) the Clause 4 claim and (2) the alternative trade mark claim, that there had been any award. If there was no award as to jurisdiction, RQP's claim under s. 67 must fail. This issue must accordingly be addressed first.

Was there an award?

21. In order to consider this question it is germane to have regard to the provisions of the 1996 Act as to the form of an award, to the LCIA Rules, and to guidance from authority.

22. Section 52 of the 1996 Act provides:

> '(1) The parties are free to agree on the form of an award.
> (2) If or to the extent that there is no such agreement, the following provisions apply.
> (3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.
> (4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.
> (5) The award shall state the seat of the arbitration and the date when the award is made.'

23. As will be apparent, s. 52(1) permits the parties to agree on the form of an award. In the present case, the arbitration was agreed to take place under LCIA rules. Those rules, in the version effective from 1 October 2014, included, in Article 23.4 a provision that:

'The Arbitral Tribunal may decide the objection to its jurisdiction or authority in an award as to jurisdiction or authority or later in an award on the merits, as it considers appropriate in the circumstances.'

The rules further provide:

'**Article 26 Award(s)**

…

26.2 The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based. The award shall also state the date when the award is made and the seat of the arbitration; and it shall be signed by the Arbitral Tribunal or those of its members assenting to it.

…

26.7 The sole or presiding arbitrator shall be responsible for delivering the award to the LCIA Court, which shall transmit to the parties the award authenticated by the Registrar as an LCIA award …'

24. It is established by authority that the court does not have a general power to supervise the conduct of an arbitration prior to an award. It cannot review interlocutory directions which are not awards. See Republic of Uganda v Rift Valley Railways (Uganda) Ltd [2021] EWHC 970 (Comm) at [44]-[45] and the cases there cited.

25. In determining whether a ruling is or is not an award, helpful guidance is provided by Cockerill J's summary in ZCCM Investments Holdings v Kanshanshi Holdings Plc [2019] EWHC 1285 (Comm) at [40], where she said:

'a) The Court will certainly give real weight to the question of substance and not merely to form: *Emmott* at paragraph 18 (by concession); *Russell on Arbitration* (24th edition, 2015) at [6-003].

b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim: *Cargill* at 5, *The Smaro* at 247; *Enterprise Insurance* at [39].

c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award. *Brake* at [25], *The Smaro* at 247; *Emmott* at [19-20], *Cargill* at 5, *The Trade Fortitude* at 175.

d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status: *The Trade Fortitude* at 175 *Emmott* at [19-20].

e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it: *Emmott* at [18]; *Ranko* p 4.

f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning: *Emmott* at [19 -20]; *Uttam Galva Steels* at [29]; *The Trade Fortitude* at 175; *The Smaro* at 247.

g) While the authorities do not expressly say so I also form the view that:

i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award: *The Smaro* at 247, *Ranko* p 4.'

26. In my judgment it is plain that there was no award in relation to the Arbitrator's jurisdiction in relation to the Clause 4 claim or in relation to the second alternative trade mark claim.

27. At the MSCMC itself, the Arbitrator stated that he was only making 'preliminary comments'. He then delivered ex tempore oral remarks. Plainly this did not comply with the stipulations as to the form of an award in the LCIA rules. It was not in writing, did not state the seat or the date of the award, was not signed and was not communicated via the LCIA. The Arbitrator did not call it an award. Furthermore, the reasoning was specifically said to be brief, and the language used was somewhat informal. Given all these matters, I do not consider that a reasonable participant would have regarded what happened at the MSCMC as an award. As his subsequent email made clear, the Arbitrator did not intend what he had said to be an award on jurisdiction.

28. As to that email, once again, it is not called an award. Nor does it comply with the formal requirements of an award under the applicable rules. I do not consider that a reasonable recipient would have regarded it as an award.

29. Furthermore, in relation to the objection as to the second alternative trade mark claim, the Arbitrator expressly stated that he was making no decision as to whether it fell within the scope of the arbitration agreement, and that he reserved the right to decide that question in a decision on the merits. There was clearly no award in relation to that. All that it might be said that the Arbitrator decided was that he considered that the Request for Arbitration was wide enough to embrace both the Clause 4 claim and the second alternative trade mark claim, and did not need amending. That was, in my view, a procedural decision. I do not consider that it rendered the Arbitrator functus officio on the issue. He could, I think, have revisited that issue if asked. It was, in any event, essentially a procedural matter: a question of whether the Request should be amended, or whether it should be treated as being wide enough to embrace the two relevant claims.

30. Given that I have concluded that there was no award in relation to either of these jurisdictional objections I do not consider that it is necessary or appropriate for me to express a view as to the correctness or otherwise of how the Arbitrator dealt with them.

The objection to RQP's counterclaim

31. I have not hitherto considered the third jurisdictional issue with which the Arbitrator dealt, namely the question of RQP's counterclaim for sums due under the Second Consultancy Agreement. For my own part, I would not have considered that there was an award in respect of that matter, for very much the same reasons as apply in relation to the first two points.

32. The position of the parties, however, is that RQP contends that there was an award in relation to this matter; and ZYX contends that the Arbitrator did make a final determination on this issue and 'so could be said to have made an award capable of challenge under s. 67'. Given both parties' positions, I consider that the right course is for me to deal with the matter on the basis that what was decided by the Arbitrator should be treated as an award.

33. RQP's argument to the effect that the Arbitrator had jurisdiction was that the relevant cross-claim was a transaction set-off and thus a defence, and that its resolution was within the arbitration clause in order to permit disputes between the parties to be 'fully and finally adjudicated … to the fullest extent allowed by the law'.

34. ZYX contended that the cross-claims were not a transaction set-off, but only an independent set-off. An independent set-off was not arbitrable unless it fell within the scope of the arbitration agreement. Even if it were a transaction set-off it would not be arbitrable unless it fell within the arbitration clause. If the set-off concerned a different contract with its own dispute resolution clause, that might well prevent the arbitration dealing with the set-off.

35. I was referred to a number of well-known formulations of what constitutes a transaction as opposed to an independent set-off. In Aectra Refining and Marketing Inc v Exmare

NV (The 'New Vanguard') [1995] 1 Lloyd's Rep 191, Hoffmann LJ said this (at 199-200):

'For this purpose it is necessary to distinguish between what Mr Philip Wood, in his valuable book on *English and International Set-Off* (1989) calls "independent set-off" and "transaction set off". Independent set-off, as its name suggests, does not require any relationship between the transactions out of which the cross-claims arise. In English law it is based upon s. 13 of the Insolvent Debtors Relief Act 1729 as amended by the Debtors Relief Amendment Act 1735, known as the Statutes of Set-off, whose effect is now to be found in R.S.C., Ord. 18, r. 17. The only requirements are that the cross-claims must both be due and payable and either liquidated or capable of being quantified by reference to ascertainable facts which do not in their nature require estimation or valuation. Transaction set-off, on the other hand, is a cross-claim arising out of the same transaction or one so closely related that it operates in law or in equity as a complete or partial defeasance of the plaintiff's claim. The category covers a common law abatement of the price of goods or services for breach of warranty, as explained by Baron Parke in *Mondel v Steel* (1841) 8 M&W 858, 872 and equitable set-off, as explained by Lord Justice Morris in *Hanak v Green*, [1958] 2 QB 9, 19. At common law, as Baron Parke said, the purchaser-

> … defend[s] himself by showing how much less the subject-matter of the action was worth …

and in equitable set-off the defendant asserts what Lord Justice Morris called:

> … an equity which went to impeach "the title to the legal demand".'

36. It is equitable set-off which is of potential relevance here. In Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667, after reviewing the authorities, Rix LJ (at [43]) identified that the test for an equitable set-off involved both a formal and a functional requirement. There was a formal requirement of a close connection between the dealings and transactions which gave rise to the respective claims. There was also a functional requirement whereby it needs to be unjust to enforce the claim without taking into account the cross-claim. The best restatement of the test is that formulated by Lord Denning MR in Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri) [1978] 2 QB 927, namely 'cross-claims … so closely connected with [the claimant's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'.

37. In part as a result of my prompting, I was also referred to a number of authorities in relation to the circumstances in which a cross-claim might be arbitrable. In addition to The 'New Vanguard', these included Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Plant [2004] EWHC 1354 (Comm), Benford Ltd v Lopecan SL [2004] EWHC 1897 (Comm), Metal Distributors (UK) Ltd v ZCCM Investment Holdings PLC [2005] EWHC 156 (Comm), Econet Satellite Services Ltd v Vee Networks Ltd [2006] EWHC 1664 (Comm) and Norscot Rig Management PVT Ltd v Essar Oilfields Services Ltd [2010] EWHC 195 (Comm).

38. It is not necessary to attempt an exhaustive analysis of these cases, or of the circumstances in which a cross-claim may be brought in an arbitration. I consider that the following propositions to be correct and consonant with authority:

(1) That arbitration is a consensual process and this will usually prevent the introduction into the arbitration of claims or parties which were not within the scope of what the contracting parties agreed to. (Metal Distributors [17(3)]).

(2) That where A brings a claim against B in arbitration, a cross-claim by B against A under a separate transaction and which does not amount to a transaction set-off will not be capable of being brought into the arbitration unless it is itself within the scope of the arbitration clause. (Metal Distributors [17(8)]). Accordingly, in the ordinary case, unless the cross-claim is one which, if brought in court, might be stayed in favour of the arbitration, then it may not, in the absence of agreement of the other party, be brought in the arbitration.

(3) Whether a cross-claim which does amount to a transaction set-off may be brought into the arbitration depends on the proper construction of the arbitration clause. (Econet Satellite [17]; Metal Distributors [17(7) and (11)]).

39. The first question to answer is whether the cross-claim which RQP sought to bring in the arbitration was a transaction set-off, as being an equitable set-off against ZYX's claim. In my judgment it clearly was not. I say this for the following reasons:

(1) The cross-claim was not sufficiently closely connected with the claim. The cross-claim arose out of a separate agreement from the License Agreement, namely the Second Consultancy Agreement. Furthermore, the two agreements were between different parties, in that the Second Consultancy Agreement was entered into between ZYX and Mr X, acting personally and independently of RQP; and was entered into more than two years before the License Agreement, and more than a year before the dispute between ZYX and RQP arose. RQP can only pursue the claim itself on the basis (as it says) that it has taken an assignment of Mr X's claim, but this highlights the distinctness of the cross-claim from the transaction giving rise to the claim.

(2) It is not manifestly unjust to consider ZYX's claim in the arbitration without taking into account the cross-claim. This is in part because of the absence of close connection, described above. It is also because the cross-claim arises from a contract which has its own jurisdiction provision, which RQP has invoked. RQP can pursue its (assigned) claim in the English courts, as it is doing. There is no obvious injustice in RQP being left to sue on its cross-claim in the forum stipulated in the agreement giving rise to that claim, and not in the arbitration under the License Agreement.

40. Given the way RQP put its case, and given that I conclude that the cross-claim was, if anything, an independent set-off, it is not strictly necessary for me to consider the question of whether, if the cross-claim was a transaction set-off, it could as a matter of the construction of the arbitration clause be brought in the arbitration. I will, however, briefly express my view that it could not. I do not consider that a claim, even if considered to be a defence, which arises from a contract between ZYX and a third party, and which is only brought by RQP against ZYX in the arbitration because of an assignment, is a 'controversy, claim or dispute arising out of or relating to [the License Agreement]'.

41. For these reasons, I conclude that, assuming that the Arbitrator made an award to the effect that he had no jurisdiction over the counterclaim, he was correct to do so.

The s. 42 Application

42. The second application before me is an application by ZYX for enforcement by the Court of a peremptory order of the Arbitrator pursuant to s. 42 of the Arbitration Act 1996 ('s. 42'). It is necessary to set out the facts giving rise to this application, insofar as they have not been described in the context of the s. 67 application.

Facts relevant to the s. 42 Application

43. As I have already said, in the initial Request for Arbitration, ZYX claimed a sum of US$10,902,576. In its Statement of Case filed on 29 October 2020 it estimated that the total royalty owed by RQP was US$26,149,891, as a result of the launch of a further product. In RQP's Statement of Defence and Counterclaim filed on 15 January 2021, RQP referred to itself as having sold all its assets in April 2020 to a company (C), a company owned by a larger company (D). That, so it is said, was the first time that ZYX was aware that RQP was contending that it had disposed of all its assets. As a result, ZYX's solicitors, Pinsent Masons LLP, wrote to RQP's legal representatives on 1 February 2021 asking RQP to confirm how it intended to fund any financial award or an award of costs if one was made against it at the end of the arbitration.

44. On 10 March 2021, having received no reply or at least none which was considered satisfactory, ZYX submitted an application to the Arbitrator for an order for security for the amount in dispute and/or ZYX's legal costs and arbitration costs ('the Security Application'). On 20 May 2021 a hearing of ZYX's Security Application took place. Thereafter, on 5 July 2021, by Procedural Order No. 6, the Arbitrator asked for some further information, including as to RQP's corporate structure, and confirmation of the apportionment of funds received by RQP following the corporate transaction of April 2020. RQP then provided some further statements. On 25 August 2021, the Arbitrator issued Procedural Order No. 8. He stated that 'the irresistible conclusion is that [RQP] has been dissipating assets'. He ordered that RQP should by 8 September 2021 issue a bank guarantee in favour of ZYX or make a deposit pursuant to Article 25(1)(i) of the LCIA Rules in the sum of US$10,902,576, as security for any future award issued in favour of ZYX in the arbitration. He also ordered RQP to provide security for a future costs award in the sum of US$250,000 by the same date.

45. On 8 September 2021 RQP stated to the Arbitrator that it would not be able to make payment of the cash deposits or obtain the bank guarantees. The Arbitrator then invited the parties to submit comments regarding the application of Article 24.6 and Article 25.2 of the LCIA Rules. On 11 October 2021 the Arbitrator issued Procedural Order No. 10, which made clear that the Arbitrator deemed RQP's counterclaims as withdrawn as a result of its failure to pay its share of the arbitration costs, and that security for costs of those counterclaims did not need to be provided.

46. On 29 March 2022 ZYX sought a peremptory order under s. 41(5) of the 1996 Act, to the effect that RQP should issue a bank guarantee or provide a deposit as security for a future award, as ordered by Procedural Order No. 8. On 16 June 2022 the Arbitrator issued Procedural Order No. 13. In that Procedural Order, the Arbitrator stated that RQP's 'financial situation is not a sufficient cause for failure to comply with the [Arbitrator's] order'. He further stated that, in the exercise of his discretion under s. 41(5) of the 1996 Act he considered it appropriate to make and did make the peremptory order sought, stipulating that the security should be provided by 27 July 2022.

47. On 26 July 2022, as I have already said, RQP sent a letter stating that it considered that the agreement to arbitrate had been repudiated by ZYX and was at an end. The security which the Arbitrator had ordered should be provided by 27 July 2022 was not provided. ZYX thereafter sought that the Arbitrator should grant it permission under s. 42(2)(b) of the 1996 Act to permit it to make an application to court under s. 42(1) of the 1996 Act to require RQP to comply with the peremptory order. After receiving submissions, on 30 September 2022 the Arbitrator, by Procedural Order No. 14, granted ZYX permission to make an application to the court under s. 42(2)(b) of the 1996 Act.

48. On 6 October 2022 ZYX issued the Claim Form in CL-2022-000529, which sought that the court should make the peremptory order. ZYX also sought that this application should be expedited and heard at the same time as RQP's s. 67 application which was already listed for 31 October 2022. In the application and in the supporting evidence it was estimated that the application would take up to an hour 'or 30 minutes for a judge familiar with the background (as the Judge hearing the s. 67 application will be)'. ZYX also made an application for alternative service on RQP by service on its solicitors. The application for alternative service was dealt with by Foxton J on the papers and without notice to RQP. By order dated 7 October 2022 Foxton J granted that order and set a timetable for the service of RQP's evidence in relation to ZYX's claim which would permit its being heard on 31 October 2022.

49. On 21 October 2022 RQP issued an application ('the Set Aside Application') for orders: declaring that the court had no jurisdiction to hear ZYX's application for a peremptory order because the arbitration agreement had been terminated; discharging Foxton J's order on the grounds of material non-disclosure; and ordering ZYX to pay costs on an indemnity basis.

The terms of s. 42

50. The provisions of the 1996 Act material to the s. 42 application are as follows:

'41. Powers of tribunal in case of party's default.

(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2) Unless otherwise agreed by the parties, the following provisions apply.

(…)

(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(…)

42. Enforcement of peremptory orders of tribunal.

(1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.

(2) An application for an order under this section may be made—

(a) by the tribunal (upon notice to the parties),

(b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or

(c) where the parties have agreed that the powers of the court under this section shall be available.

(3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.

(4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.'

ZYX contends that all the requirements for an order under s. 42 of the 1996 Act are met in this case. RQP however contends that they were not because s. 42(2) was not complied with. RQP's case is that the only limb of s. 42(2) said to be applicable by ZYX, namely s. 42(2)(b), did not apply because no permission to bring an application under s. 42 had been given by 'the tribunal'. This was because, on RQP's case, by the time that the Arbitrator gave permission to bring a s. 42 application, namely on 30 September 2022, the arbitration agreement had been terminated, the Arbitrator no longer had any jurisdiction, and was accordingly no longer 'the tribunal'.

51. I will consider later the extent to which RQP's challenge to the jurisdiction of the Arbitrator is relevant to the discretion as to whether to make an order under s. 42. At present, I address the argument, to the extent that it was made by RQP, that if the jurisdiction of a tribunal is subject to an extant challenge, then for that reason it is not a 'tribunal' for the purposes of s. 42. I do not consider that that can be correct. Not least because it is open to a tribunal to defer a decision on its jurisdiction to an award on the merits, there will be cases in which there is an extant and unresolved challenge to the jurisdiction of the tribunal, but where it is convenient for the tribunal to ask the court to make an order requiring compliance with a peremptory award. Furthermore, were the mere fact of challenge to the jurisdiction of the tribunal sufficient to mean that the apparent tribunal did not count as a 'tribunal' for the purposes of s. 42, that would open the door to a party thwarting the possibility of a s. 42 application by raising a challenge to the tribunal's jurisdiction. In my view, therefore, and consonantly with the usage of the phrase 'the arbitral tribunal' in ss. 30-31 of the 1996 Act, the words 'the tribunal' in s. 42 can include a tribunal whose jurisdiction is subject to challenge.

Guidance from authority

52. Helpful guidance as to the circumstances in which it is appropriate for the court to make an order under s. 42 appears in the decision of Teare J in Emmott v Michael Wilson & Partners (No. 2) [2009] EWHC 1 (Comm). At paragraphs [53] – [59] having referred, inter alia, to s. 1 of the 1996 Act, Teare J said this:

'53. … If a party fails to comply with a peremptory order of the tribunal, the court is permitted to intervene in the arbitration by making an order that the party comply with the order; section 42. In the particular context of section 38(4) one would expect that the proper role of the court would be to support the tribunal by making the requested

order. Indeed, more generally, given general principle (a) [in s. 1 of the 1996 Act] and the exhortation in general principle (c) one would expect the Court to support, rather than frustrate, the tribunal.

54. This approach is supported by the Report of the Departmental Advisory Committee on the Arbitration Bill when commenting upon general principle (c) at paragraphs 20-22.

> "The limitation on the right of appeal to the Courts from awards brought into effect by the 1979 Arbitration Act, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach and it seems to us that it should be enshrined as a principle in the Bill."

55. I infer that general principle (c) was intended to give effect to that approach.

56. That approach is also supported by *Mustill and Boyd* who observe that general principle (c) has been described as expressing the concept of "judicial minimalism"; see p.28 of the Companion Volume.

> "The principle is well recognised, and is an essential element in the scheme of the Act, as a counterpart to the wide powers entrusted to the arbitrator and the explicit encouragement to use them with boldness and imagination. Unnecessary meddling by the court both falsifies the trust which the legislature and the parties have placed in the arbitrator and discourages arbitrators from employing them boldly in the future. If the courts do not back up the arbitrator even when faced with the temptation to put right a procedural decision which it would itself have made differently the Act will be a failure."

57. To the same effect is an earlier passage at p.25.

> "The general principles, read with sections 33 and 40, will now require the courts to recognise that an arbitrator who has acted fairly but firmly is entitled to support; and this will in turn fortify the arbitrator to act resolutely without apprehension about needless meddling by the court."

58. I therefore accept the submission made on behalf of Mr. Emmott that judicial interference with the arbitral process should be kept to a minimum, that the proper role of the court is to support the arbitral process rather than review it and that the circumstances in which the court can properly interfere with or review the arbitral process are limited to those within sections 67-69 of the Arbitration Act 1996 (challenges to the substantive jurisdiction of the arbitral tribunal, challenges based upon a serious irregularity and appeals on points of law).

59. I also accept, as submitted on behalf of MWP, that section 42 confers a discretion upon the court and that it would be inconsistent with the existence of a discretion that the court should act as a rubber stamp on orders made by the tribunal. However, I do not accept that the court must in every case satisfy itself that the case is a proper one for the order which is sought if by that is meant that the court must review the

decision made by the tribunal and consider whether the tribunal ought to have made the order in question. The reasons that I do not accept that submission are as follows:

i) It is inconsistent with general principle (c) in the context of sections 33 and 40 of the Act.

ii) The Act confers on the court limited powers to rehear or review decisions of the tribunal. It would be surprising if a power to rehear or review was hidden within section 42.

iii) It is true that the making of an order under section 42 exposes the party against whom the order is made to being in contempt of court if he breaches the order. But that is the purpose of section 42. It may only be exercised when the arbitral process is exhausted and the party in question has failed to comply with a peremptory order. I am not persuaded that the exposure of that party to being in contempt of court requires the court to rehear or review the arbitrator's decision to grant the peremptory order.

iv) Counsel relied on a passage in *Merkin On Arbitration* at paragraph 16-25 "……the court has a discretion under s.42 of the 1996 Act whether or not to make an order. Relevant factors will doubtless *be the reasonableness of the requirements imposed by the arbitrators' peremptory order,* and whether the court takes the view that the problem could be resolved by the arbitrators themselves in their approach to the arbitration" (emphasis added). If this passage is intended to mean that the court will routinely consider whether it would have made the order I do not consider that it is correct.'

53. At paragraph [62] Teare J said this:

> 'In what circumstances then might a court decide not to make an order that a party comply with a peremptory order of the tribunal? In general terms the answer to that question will be where such an order is not required in the interests of justice to assist the proper functioning of the arbitral process; see para.212 of the DAC report. This is not the occasion for a comprehensive list of such circumstances, even assuming it were possible to compile such a list. One example might be where there has been a material change of circumstances after the peremptory order was made. Another might be where the tribunal has not fulfilled its duty to act fairly and impartially between the parties in breach of its general duty to do so. Another might be where the tribunal has made an order which it had no power to make.'

54. Teare J's approach was followed in Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq [2016] EWHC 3361 (Comm), especially at [45]-[47].

Should there be an order under s. 42?

55. With the benefit of this guidance, I therefore turn to consider whether I should make an order under s. 42 in the present case. I am satisfied that the requirements in subsections (3) and (4) of s. 42 are met.

56. I nevertheless have a discretion as to whether to make an order under s. 42. I have concluded that it is appropriate to do so. My reasons follow.

57. The starting point is that the court will generally seek to support the arbitral process, and will not ordinarily seek to review the decision of the arbitral tribunal as to whether a peremptory order should have been made.

58. In the present case, there seems to me no basis on which the court should conclude that the Arbitrator's peremptory order was not one which it was appropriate for him to make. It was made in the course of an arbitration which had been ongoing for a considerable time and in response to non-compliance with an order which he had originally made in August 2021.

59. While RQP contends that it cannot pay the amount of the security ordered, and that this is a reason why the court should not make a peremptory order, this is an issue which the Arbitrator himself considered prior to making the peremptory order. In Procedural Order No. 8 he stated that the conclusion was irresistible that RQP had been dissipating assets. He said that '[a] retransfer of the approximately USD 10 million distributed to Mr [Y] and Mr [Z] from the proceeds of the [C/D] transaction said to have been initially transferred to [RQP], would appear to be a reasonable effort to bring [RQP] back into a pecunious situation.' In Procedural Order No. 13 he said this (at para. 44):

> 'For its failure to comply with PO No. 8, [RQP] maintains that it does not have $10.9 million in cash to pay a deposit for security for the claim and it cannot give a bank guarantee in that amount. In the [Arbitrator's] view, the Respondent has not provided justifiable reasons for its failure to comply with PO No. 8. [RQP's] financial situation is not a sufficient cause for failure to comply with the [Arbitrator's] order but is indeed the reason why the [Arbitrator] decided it was necessary for [RQP] to provide the amount in dispute as a security as ordered in PO No. 8. As summarised in said order, according to [RQP's] own submissions, it received $40 million from the [D] transaction, however, notwithstanding the ongoing arbitration, [RQP] elected to distribute $10 million to the owners of [RQP] Mr [X] and Mr [Y]. Based on the foregoing, as well as the reasoning of the [Arbitrator] set forth in PO No. 8, which the [Arbitrator] continues to uphold and incorporates by reference herein, the [Arbitrator] … considers it appropriate in the present circumstances to grant [ZYX's] Peremptory Order Application …'

60. The court will not review the Arbitrator's decision that a peremptory order for security was appropriate notwithstanding RQP's protestations of impecuniosity. There has not been a material change of circumstances in this regard since the Arbitrator made his peremptory order. I therefore take the view that this point does not provide a persuasive reason for refusing to make an order under s. 42.

61. The other main objection made by RQP to the grant of an order under s. 42 is that RQP contends that the arbitration agreement has been brought to an end as a result of ZYX's repudiatory breach. Thus RQP argues that, while the Arbitrator had jurisdiction at the time he made Procedural Order 13, he has not had any jurisdiction since 26 July 2022. This amounts, RQP contends, to a material change of circumstances and, because of it, the court should not make an order under s. 42 because such an order will not assist the proper functioning of the arbitral process, which is at an end.

62. I do not consider that the fact that the jurisdiction of the tribunal is contested is of itself and without more a good reason to refuse to make an order under s. 42. There are other circumstances where the court can make orders which seek to support the arbitral

process, and to secure the enforceability of an award, even though the jurisdiction of the tribunal is contested. This is the case with orders under s. 70(6) and (7) of the 1996 Act, which can be exercised in respect of applications under s. 67 of the Act. Furthermore, unless the court were able to make orders under s. 42 notwithstanding an extant challenge to the jurisdiction of the tribunal, it would permit a recalcitrant party, simply by challenging the tribunal's jurisdiction, to prevent the court exercising a power which is there precisely to help support the tribunal in the face of recalcitrance.

63. On the other hand, the fact that the jurisdiction of the arbitrator is challenged is a material, and may be a very material, factor in whether the court should grant an order under s. 42. How significant it is will in my view depend on a number of matters, including: (a) the apparent strength of the challenge, if the court can take a view on this; (b) what it is that the tribunal has ordered which the court is being asked to require compliance with; and (c) the stage in the proceedings at which the challenge to the jurisdiction of the tribunal is made.

64. In the present case, on this application, the court can only make the following assessment in relation to the strength of RQP's case as to the termination of the arbitration agreement:

(1) A party alleging that an arbitration agreement has been repudiated faces the significant hurdle of showing that the alleged breach goes to the root of the contract, and ordinarily this involves showing that it has deprived the innocent party of substantially the whole benefit of the agreement to arbitrate. (See <u>BDMS Ltd v Rafael Advanced Defence Systems</u> [2014] EWHC 451 (Comm) especially at [57]).

(2) Nevertheless, it is arguable that, on appropriate facts, a failure to comply with the express or implied obligations of confidence in relation to materials produced for and in an arbitration might constitute a repudiatory breach of the agreement to arbitrate. This is contemplated as a possibility by Chan Seng Onn J in the Singapore High Court in <u>AAY v AAZ</u> [2009] SGHC 142 at [96].

(3) On this application, where it has not been the subject of any detailed investigation, it is impossible for the court to assess the strength of RQP's factual case as to what was disclosed by ZYX or its significance. It is possible only to say that RQP's case is arguable.

65. That there is an arguable case as to the termination of the arbitration agreement does not, however, persuade me that it is inappropriate to make an order under s. 42. The argument that the existence of that challenge to the Arbitrator's jurisdiction means that an order under s. 42 will not support the arbitral process because there is no extant 'arbitral process' overlooks the point that, if RQP's case as to termination is wrong, then the Arbitrator does indeed have jurisdiction. Given that possibility an order under s. 42 will support an arbitral process which, on that hypothesis, remains the agreed forum for the resolution of the parties' disputes.

66. A further significant consideration is the nature of the order made by the Arbitrator with which it is now sought that the court should require compliance. It is an order for the provision of security. This entails that, if RQP's case as to termination of the arbitration agreement is correct, then the security will be returned or released. This reduces the possibility of prejudice to RQP from a court requirement that it comply with an order

made by the Arbitrator should it ultimately be found that the arbitration agreement is indeed at an end.

67. Another factor telling in favour of an order under s. 42 is the stage that the arbitration has reached. The order for the provision of security has been outstanding and unperformed for a long time. The final hearing in the arbitration is fixed for December. Unless an order under s. 42 is made at this stage, there will be no possibility of the Arbitrator's peremptory order being enforced prior to the hearing. In circumstances where there is clearly a real possibility that the Arbitrator does continue to have jurisdiction, if the court did not make an order under s.42 now it would have altogether foregone the possibility of giving relevant support to the tribunal

68. RQP further contended that the Arbitrator had acted unfairly in not determining its objection to substantive jurisdiction and in permitting ZYX to apply to the court under s. 42. RQP referred to the fact that it had asked the Arbitrator to rule on the issue of jurisdiction or alternatively to permit the court to rule on this issue at the hearing on 20 September 2022. The Arbitrator had, by his Procedural Order No. 14 declined to take either of these courses. RQP argued that the fact that the matter came before the court under s. 42 before a decision on the issue of jurisdiction, even by the Arbitrator, was a reason why an order should not be made.

69. I do not consider that there is any arguable case that the Arbitrator acted unfairly and in breach of the general duty under s. 33 of the 1996 Act in proceeding as he did in Procedural Order No. 14. He declined to rule on the issue of his own jurisdiction at that point and decided, rather, that the issue would be considered as part of the evidentiary hearing which was already fixed for December 2022; and that he would render a decision on jurisdiction in the award on merits as he was entitled to do under Article 23(4) of the LCIA Rules. This he considered to be the most efficient way to resolve the jurisdictional issue. That is an apparently rational decision, reached after considering submissions on the point, and there is no basis on which the court can or should seek to review it. The same applies to the Arbitrator's decision not to give permission for a reference of the issue of jurisdiction to the court under s. 32 of the 1996 Act. The Arbitrator carefully considered the application for such permission and concluded that it was unwarranted in the present case. He further doubted that it would produce any substantial saving in costs. His decision was that he would first rule on his own jurisdiction under s. 30 of the 1996 Act and Article 23(1) of the LCIA Rules. That again was an apparently rational decision and there is no basis for the court to review it.

70. In these circumstances, I do not consider that the fact that the s. 42 application comes before the court before a decision has been made on the Arbitrator's jurisdiction in the light of RQP's alleged acceptance of ZYX's repudiation of the arbitration agreement can be said to be a factor of significant weight militating against the making of an order under s. 42.

71. RQP also complained that the Arbitrator was wrong not to take into account its set-off defence when making the peremptory order. Given that I have concluded that the Arbitrator did not have jurisdiction over the cross-claim said to give rise to a set-off, this point does not avail RQP.

72. For these reasons I have concluded that it is in the interests of justice that there should be an order under s. 42 requiring compliance with the Arbitrator's peremptory order for the provision of security.

Penal Notice?

73. RQP raised the further argument that, even if the court was minded to make an order under s. 42, it should not bear a penal notice, and there should not be the possibility of committal for contempt for non-compliance.

74. While I accept that there may be cases in which the order which the court should make under s. 42 is one which does not carry a penal notice and where the party against whom the order is made is not exposed to being in contempt of court if he breaches the order, the usual method by which the court will seek to ensure compliance is to make an order which, if not complied with, will expose the defaulting party to proceedings for contempt: see Emmott v Wilson (above) at [59(iii)] and Pearl Petroleum v KRG at [24(ii)] per Burton J.

75. In the present case, there appears no other way of the court enforcing compliance with the peremptory order. In particular, it is not a case in which there is some other sanction likely to be effective in achieving the object of the order, such as the dismissal of the defaulting party's claim or an award of costs. In the circumstances I consider that the order should bear a penal notice to give warning to RQP of the possibility of contempt proceedings if the court's order is not complied with.

The Set Aside Application

76. The third application before the court is the Set Aside Application which I have referred to in paragraph [49] above. Certain of the arguments advanced on this application in relation to the court's jurisdiction to make an order under s. 42 have already been dealt with. What requires some separate consideration is the part of this application which seeks the setting aside of Foxton J's order granting an order for alternative service, and a compressed timetable for the service of evidence in relation to ZYX's s. 42 application.

77. RQP's case in this regard was that there had been a series of material misstatements or non-disclosures to Foxton J. It was said in particular that it had been a misstatement that the hearing of the s. 42 application would take up to an hour and 30 minutes if heard by the judge dealing with the s. 67 application; that Foxton J had been given a misleading summary of Teare J's decision in Emmott v Wilson; that there had been a misleading statement to the effect that there had not been a delay on the part of ZYX; and that there had been no proper disclosure of Pinsent Masons LLP's involvement in the disclosure of confidential arbitration materials. At the hearing, RQP went as far as to say that the time estimate supplied by ZYX to Foxton J had been dishonestly given.

78. I consider that the time estimate given to Foxton J was an unhelpfully short one. I do not consider, however, that it was dishonestly given. It was doubtless made in the same way as many unhelpfully short estimates are given: namely as a result of a failure properly to allow for the elaboration of argument on both sides. I certainly do not regard the estimate given by ZYX as being more unhelpful than that of 8 hours, which was the estimate given on behalf of RQP for the hearing of the s. 42 application.

79. As to the suggestion that there was non-disclosure of ZYX's delay in making the application under s. 42, I do not consider that there was any material delay to disclose. The application to the Arbitrator for a peremptory order was made on 29 March 2022, considerably in advance of the evidentiary hearing. The Arbitrator made the peremptory order providing for compliance by 27 July 2022. After it was not complied with, ZYX sought, on 2 September 2022, that the Arbitrator should give permission to ZYX to apply to the court for an order under s. 42. The Arbitrator gave that permission on 30 September 2022, and ZYX issued its claim in action CL-2022-000529 promptly thereafter.

80. More generally, I consider that it clearly was desirable that the hearing of the s. 42 application should take place at the same time and before the same judge as the s. 67 application which had already been fixed; and that there was good reason for alternative service on Richard Slade & Co. which was acting for RQP in the s. 67 proceedings and in related matters concerning RQP and parties associated with it. In the circumstances, I do not consider that had there been a fuller explanation to Foxton J of the matters complained of it would have altered his decisions. A more accurate time estimate would have been desirable, but the likelihood is that it would have led to a reconsideration of the time estimate for the s. 67 application, which was generous. One day would have been a proper estimate for the hearing of both the s. 67 and s. 42 applications.

81. In any event, it is difficult to see that the supposed misrepresentations and non-disclosures have had any adverse consequences. It is not said by RQP that the alternative service ordered failed to provide it with proper notice. It was equally not said that RQP was not ready to deal with the s. 42 application at the hearing before me. In fact, the s. 42 application was fully and properly argued, as well as the s. 67 application, within a day.

82. In the circumstances, I do not consider that there was any misrepresentation or non-disclosure to Foxton J which would ground the setting aside of the orders he made.

Conclusion

83. For the reasons given above:

(1) RQP's s. 67 application is dismissed;

(2) The court will make an order under s. 42 requiring compliance with the Arbitrator's peremptory order;

(3) RQP's application to set aside the order of Foxton J is dismissed.

84. I will receive submissions on the appropriate form of the order which should be made to reflect the above decisions.