Neutral Citation Number: [2025] EWHC 41 (Comm)

Case No: CL-2023-000853

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 17/01/2025

Before :

MR JUSTICE ANDREW BAKER

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Between :

RRY	**Claimant**
- and -	
NKX	**Defendant**

- -
- -

John Brisby KC and Karl Anderson (instructed by **Carter Lemon Camerons LLP**) for the **Claimant**
David Joseph KC (instructed by **Gunnercooke LLP**) for the **Defendant**

Hearing dates: 22 November, 12 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

Introduction

1. By a partial final award dated 16 August 2023, a sole arbitrator awarded the defendant US$1,071,320 plus interest and the costs of the award. He reserved all questions relating to the parties' own costs.

2. By Arbitration Claim Form dated 25 August 2023, the claimant sought to appeal against the award under s.69 of the Arbitration Act 1996 ("the s.69 claim") and to challenge the award for serious irregularity under s.68 of that Act ("the s.68 claim"). The defendant resisted the claims, and in respect of the s.68 claim it applied for summary dismissal as contemplated by the Commercial Court Guide (11th Edition, 2023 Update, Section O.8.6). In correspondence that followed, the claimant *inter alia* proposed that the application for leave to appeal within the s.69 claim be dealt with at a hearing. That proposal was rejected by Henshaw J, who directed that both claims (together with a s.69 claim arising out of a separate arbitration between the defendant and a different counterparty) "*be dealt with, by the same judge, on the papers at least at this stage, in the usual way*".

3. Pursuant to that direction, this Claim came before me for determination on the papers of the claimant's application for leave to appeal in the s.69 claim and the defendant's application for the summary dismissal of the s.68 claim. By order dated 4 September 2024, for reasons given in the order, I refused leave to appeal and granted the summary dismissal application. I therefore ordered that this Claim was finally dismissed, with costs (which I assessed summarily).

4. There is more procedural history to relate, but for now it suffices to say, as to substance, that the claimant wishes to appeal to the Court of Appeal against the refusal of leave to appeal under s.69 and against the summary dismissal of the s.68 claim. Neither appeal can be brought without the leave of this court:

    (i) by s.69(6) of the 1996 Act, "*The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal*";

    (ii) by s.68(4) of that Act, "*The leave of the court is required for any appeal from a decision of the court under this section*"; and

    (iii) it is well established that those provisions mean what they say, namely that only the court deciding to grant or refuse leave to appeal or to uphold or dismiss a serious irregularity claim, respectively, may grant leave to appeal, such that in the present case the Court of Appeal (as prospective appeal court) cannot grant leave.

5. Neither of the claimant's proposed appeals would have any real prospect of success. Leave to appeal to the Court of Appeal will be refused accordingly. I took time to prepare this reserved judgment to be handed down in public, the hearings upon which it arises having been in private under CPR 62.10(3)(b), because the application in the s.69 claim raised an issue that may deserve consideration by the Civil Procedure Rules

Committee. The judgment has been anonymised to preserve the confidentiality of the arbitration process so far as is still possible.

Procedural History

6. By Application Notice dated 18 September 2024, the claimant applied, so far as is material to this judgment, for:

   (i) the setting aside of the summary dismissal of the s.68 claim;

   (ii) an extension of "*[t]he time for the Claimant to apply for permission to appeal [the refusal of leave to appeal in the s.69 claim], pursuant to s.69(6) Arbitration Act 1996*", until 21 days after the final determination of the s.68 claim.

7. As regards the extension of time application, Part C of the Application Notice stated that "*there is no fixed procedure for obtaining leave to appeal [a refusal of leave to appeal under s.69 of the 1996 Act] to the Court of Appeal (because permission to appeal cannot be obtained from the Court of Appeal, so that CPR 52.12 cannot apply, but in addition there has been no "hearing at which the decision to be appealed was made" at which permission could be sought under CPR 52.3(2)(a))*."

8. The suggestion that CPR 52.12 cannot apply where only the lower court has power to grant permission to appeal is wrong. CPR 52.12 provides as follows:

   "*52.12–(1) Where the appellant seeks permission from the appeal court, it must be requested in the appellant's notice.*

   (2) The appellant must file the appellant's notice at the appeal court within–

   (a) such period as may be directed by the lower court at the hearing at which the decision to be appealed was made or any adjournment of that hearing …; or

   (b) where the court makes no such direction, …, 21 days after the date of the decision of the lower court which the appellant wishes to appeal.

   (3) Subject to paragraph (4) and unless the appeal court orders otherwise, an appellant's notice must be served on each respondent–

   (a) as soon as practicable; and

   (b) in any event not later than 7 days,

   after it is filed.

   (4) Where an appellant seeks permission to appeal against a decision to refuse to grant an interim injunction under section 41 of the Policing and Crime Act 2009, the appellant is not required to serve the appellant's notice on the respondent."

9. Since the Court of Appeal cannot grant leave to appeal against a refusal of leave to appeal under s.69 of the 1996 Act, an appellant's notice for such an appeal will not include any application for permission to appeal (*cf* CPR 52.12(1)), or at all events it

should not do so; and CPR 52.12(4) will not apply on the facts. Meanwhile, CPR 52.12(2)/(3) remains straightforwardly applicable. That is self-evidently the case for CPR 52.12(3). For CPR 52.12(2), it is equally obvious if a moment is taken to identify its effect. Its effect is that any appellant's notice must be filed at the appeal court within 21 days of the decision appealed against, unless a different time limit has been set by the lower court at the hearing at which that decision was made, or at an adjournment of that hearing.

10. The reference in CPR 52.12(2)(a), in its present wording, to dealing with the time limit for any appeal at an adjourned decision hearing spells out what was previously the combined effect of CPR 52.12(2)(a) and CPR PD 52B, para 3.1, as explained by the Court of Appeal in *McDonald v Rose* [2019] EWCA Civ 4.

11. Where there has been no decision hearing, because the decision to be appealed against was made without a hearing, then necessarily the lower court cannot and will not have set a time limit for an appeal at, or at an adjournment of, such a hearing. That does not disapply CPR 52.12(2). Rather, it means only that CPR 52.12(2)(a) will not apply and so CPR 52.12(2)(b) will always apply. The time for any appellant's notice will be 21 days from the date of the decision appealed against, a time limit only the appeal court, not the lower court, will have power to extend.

12. Where the lower court sets a time limit for appeal, exercising its power under CPR 52.12(2)(a), strictly that is not an *extension* of time at all, it is the fixing of an original time limit. In practice, the language of 'extending time' is sometimes used nonetheless. For example, in the current edition of the White Book, within n.52.12.3, the Editors talk of an "*application to the lower court to extend time pursuant to r.52.12(2)(a) must be made at the hearing at which the judgment [sic., decision] to be appealed was made … [or] at an adjournment of that hearing*".

13. In the present case, that meant any appellant's notice for an appeal against my refusal of leave to appeal in the s.69 claim had to be filed with the Court of Appeal within 21 days of 4 September 2024. No appellant's notice was filed within time, or has yet been filed. Were I to grant leave to appeal, assuming I have power to do so, that would not give the claimant the extension of time it would need to pursue the appeal, and it would be a matter for the Court of Appeal, not for me, whether that extension of time should be granted.

14. The claimant did not include with its set-aside application any directions it proposed for the hearing of that application. I issued such directions by an order dated 8 October 2024, in response to a letter dated 7 October 2024 from the claimant's solicitors making proposals. Those directions provided for a hearing before me, which was in due course listed for 22 November 2024, of the set-aside application and the extension of time application. The latter was recited as being an application for an order "*extending the time for the Claimant to appeal against*" the refusal of leave to appeal under s.69. I now recognise that as a slip, but it led me at the November hearing to express doubt that I had power to grant the extension sought (on the logic set out in paragraph 11 above).

15. The time available on 22 November 2024 did not allow all matters to be dealt with fully. The set-aside application was argued by Mr Brisby KC, and I did not find it necessary to call on Mr Joseph KC. That application was dismissed, but the hearing was otherwise adjourned part heard. I gave very brief reasons for the dismissal of the

set-aside application, and said that fuller written reasons would follow. Written reasons duly followed, on 4 December 2024.

16. The resumption of the hearing was fixed for 12 December 2024. Mr Joseph KC was unavailable, but he provided a further skeleton argument and Mr Philip Rubens of the defendant's solicitors made submissions at the hearing, with my permission, allowing Mr Joseph KC to be excused from attending.

17. At the hearing, I refused the defendant's application for its costs of the set-aside application in respect of the s.68 claim, ordering that there be no order as to the costs of that application. Although Mr Joseph KC's skeleton argument for the 22 November was in fact useful, the defendant having chosen to instruct him for that hearing, I considered there had been no real need for that such as to take the case outside the general rule of practice described by Males J, as he was then, in *The Labhauler, Midnight Marine Ltd et al v Thomas Miller Speciality Underwriting Agency Ltd* [2018] EWHC 3431 (Comm), at [39], *viz.* that:

"*bearing in mind the limited nature of the issue, ie whether the claim has a real prospect of success, and that respondents will already have made submissions on the point in writing[,] in general respondents should not attend or, at any rate, should not recover their costs if they do.*"

18. Mr Joseph KC's skeleton argument, in my view, added nothing of substance to the written submissions made in support of the defendant's original request for the s.68 claim to be dismissed summarily, or anything that was not in truth obvious from the papers. I therefore followed the general rule articulated by Males J. I agreed with Mr Brisby KC's submission that it is a separate matter whether, if a respondent to an application to set aside a summary dismissal of a s.68 (or s.67) claim is awarded costs, though that is not the norm, there may then be an expectation that they might be awarded on the indemnity basis (Commercial Court Guide, Section O.8.7).

19. Apart from that costs point, the hearing on 12 December 2024 dealt with the claimant's application for an extension of time for applying for leave to appeal to the Court of Appeal in relation to the s.69 claim, its application for such leave, if the extension of time sought be either granted or unnecessary, and its further application for leave to appeal in relation to the s.68 claim.

Extension of Time Application

20. As I noted at paragraph 7 above, the extension of time application took as its premise that there is "*no fixed procedure*" for seeking leave to appeal a refusal of leave to appeal under s.69 of the 1996 Act. That did not identify the time limit it was thought might apply, an extension of which was therefore sought. Mr Brisby KC's skeleton argument for the December hearing addressed that within his argument in support of the proposition that there must be power to grant leave to appeal against a refusal of leave to appeal under s.69 of the Act where the refusal to be appealed is not made at a hearing.

21. His submission as to time limit was that there is none set by the CPR. I have concluded that that is correct, because within the CPR:

(i) CPR 52.3(2) deals with when and how applications for permission to appeal are to be made (unless overridden by CPR 52.1(4), to which I return below).

(ii) Read with CPR 52.12(1)/(2), CPR 52.3(2)(b) indirectly provides a time limit for any application for permission to appeal that is made to the appeal court. That is because CPR 52.3(2)(b) states the general rule that such an application may be made "*to the appeal court in an appeal notice*" (my emphasis); as I noted above, CPR 52.12(2) fixes the time within which any appeal notice must be filed; and then CPR 52.12(1) confirms that if the appellant seeks permission to appeal from the appeal court, that permission "*must be requested in the appellant's notice*".

(iii) However, for applications for permission to appeal made to the lower court, the rule under CPR 52.3(2)(a) is that any such application must be made "*at the hearing at which the decision to be appealed was made or any adjournment of that hearing*". Thus, if asking under CPR 52.3(2)(a) whether the appellant is 'in time' to seek permission to appeal from the lower court, the issue is not how much time has passed since the decision to be appealed was made; the issue is whether the application is being made at the relevant decision hearing (as first listed, or following an adjournment).

22. In *Kirby v Baker & Metson Ltd* [2020] EWHC 3181 (Ch), Meade J handed down judgment on 7 October 2020 on an appeal under s.69 of the 1996 Act. That was done remotely (see at [2]), which I envisage means that the judgment was sent in final form to the parties, and for publication, without a hearing of any kind. The judgment stated that the s.69 appeal was allowed and that there were to be written submissions within 7 days if the form of Order to be drawn up was not agreed (*ibid*). A form of Order was agreed, and as a result, as Meade J put it (at [7]), "*On 14 October I made an Order disposing of the appeal*".

23. For any appeal to the Court of Appeal against that Order, the leave of the High Court was required, as in the present case, although the operative provision was s.69(8) of the 1996 Act rather than s.69(6). Meade J refused an application for leave to appeal made to him on 29 October 2020. He did so, as I read his judgment, on the basis that:

(i) the requirement in CPR 52.3(2)(a), that permission to appeal be sought from the lower court, if at all, at the hearing at which the decision was made, applied to appeals to the Court of Appeal against decisions on appeals under s.69 of the 1996 Act, and applied to the case then before the court (see at [13]-[17], [22]);

(ii) therefore, he had no power to grant leave to appeal, indeed he had had no such power since 7 October 2020 (see at [23]).

24. Meade J seems to have proceeded on the basis that there had been a hearing on 7 October 2020, at which an application for leave to appeal under s.69(8) could have been made or which could have been adjourned *inter alia* to allow such an application to be made at a later date. I do not need to decide whether he was correct about that. It is not given any attention in the judgment, as neither party argued that the remote handing down of the substantive judgment affected the position (see at [3]).

25. If it was correct to regard the s.69 appeal decision in *Kirby* as having been made at a hearing on 7 October 2020, then I would respectfully agree with and follow Meade J's conclusion that thereafter he had no power to grant leave to appeal to the Court of Appeal. In stipulating, by s.69(8), that the leave of the court is required for an appeal, the 1996 Act entitled the intended appellant to seek such leave. The CPR could not exclude that right, I apprehend, but they could make provision for how and when it was to be exercised. Thus, where a decision under s.69 is made at a hearing, applying CPR 52.3(2)(a) in accordance with its terms, as Meade J did in *Kirby*, does not give rise to any difficulty. The statutory right to seek leave is not purportedly excluded by requiring the application to be made at a hearing that did take place (or an adjournment of it).

26. That is not this case, however. Here, the relevant decision under s.69 was my refusal of leave to appeal against the arbitrator's award, a decision made without a hearing on 4 September 2024.

27. That leave to appeal decisions under s.69 are generally to be made without a hearing is laid down by the statute itself. By s.69(5), "*The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.*" The entitlement granted by s.69(6), to seek leave to appeal from the court that has determined an application for leave to appeal against an arbitration award, is granted in respect of any such decision. It is not limited to the case, intended by the statute to be the exception, where the decision is made at a hearing.

28. To apply CPR 52.3(2)(a) in accordance with its terms, where there has been no hearing, would be to allow the CPR to exclude the putative applicant's statutory right to seek leave. That was not the effect in *Kirby*, since Meade J proceeded on the basis that there had been a hearing at which CPR 52.3(2)(a) could have applied. He was able, therefore, to reject a submission in that case that CPR 52.1(4) prevented CPR 52.3(2)(a) from precluding the application before him (see at [14]-[15], [22]).

29. Where, as here, CPR 52.3(2)(a) would make it impossible for the putative appellant to seek the leave to appeal that the 1996 Act entitles it to seek, in my view CPR 52.1(4) does become the answer.

30. Drawing the threads together, where under s.69 of the 1996 Act leave to appeal against an arbitration award has been refused (or granted) without a hearing, as typically it will have been:

    (i) the deadline for commencing any appeal against that decision will be 21 days from the date of the decision, under CPR 52.12(2)(b), there having been no hearing at which (or at an adjournment of which) the court making the decision might have set a different deadline under CPR 52.12(2)(a);

    (ii) CPR 52.3(2) does not apply, since by CPR 52.1(4) both parts of it must yield to the 1996 Act:

        (a) CPR 52.3(2)(a) is inconsistent with the statutory right to seek leave to appeal from the lower court, where the decision to be appealed was made without a hearing; and

(b) CPR 52.3(2)(b) is inconsistent with the statutory restriction, to the lower court, of the power to grant leave to appeal;

(iii) but then, as Mr Brisby KC submitted, that leaves time at large, for the making of any application, necessarily an application to the lower court following its decision on paper, for leave to appeal against that decision.

31. I shall therefore dismiss the application for an extension of time to apply for leave to appeal against the refusal of leave to appeal against the arbitrator's award. No time limit applied to the making of any such application that there might be a power to extend. If there were a serious basis for an appeal against the decision on leave to appeal in the s.69 claim here, the necessary application for leave to appeal against that decision should have been capable of being prepared and presented promptly; and a failure to act promptly would ordinarily be a factor weighing against the grant of leave. But that does not mean there was any fixed time limit that might require to be extended.

32. Applications for leave to appeal against the refusal of leave to appeal under s.69 of the 1996 Act are very rare. Nonetheless, it does not seem satisfactory for the procedural rules to fail to cater for them so that time is at large. The Civil Procedure Rules Committee may wish to consider whether an amendment to the rules is warranted. The CPRC would be able to consider whether this is the only such lacuna, calling perhaps for an amendment to CPR Part 62 or PD62, or whether there are also other areas where the rules do not cater fully for the range of matters decided nowadays without a hearing, in which case perhaps it might be better to contemplate amending CPR 52.3(2).

Leave to Appeal (s.69)

33. In dealing with the question of time, I have also identified why I consider Mr Brisby KC must be correct that I have power to grant leave to appeal to the Court of Appeal in respect of the s.69 claim in this case. There is no such power under CPR 52.3(2)(a), because the relevant decision, to refuse leave to appeal under s.69, was not made at a hearing. But the CPR cannot deprive the claimant of its statutory right, implicit in s.69(6) of the 1996 Act, to seek leave from this court; and CPR 52.1(4) ensures that CPR 52.3(2)(a) does not do so.

34. I am prepared to proceed on the assumption, without deciding, that Mr Brisby KC is also correct to say that the ordinary permission to appeal test should apply, asking whether there is a realistic prospect of success for an appeal, or other compelling reason why there should be an appeal.

35. The issues decided by the arbitration award in this case were all one-off points particular to this individual dispute. There is no reason, let alone a compelling reason, why an appeal should be contemplated if it would not have a realistic prospect of success.

36. The underlying claim was for US$1,071,320 said to be due pursuant to a written Loan Agreement dated 25 August 2009, amended by a Supplementary Loan Agreement dated 1 September 2009 and an Addendum dated 1 January 2017. The arbitrator stated the issues for decision, as identified to him by the parties, as being:

(i) "*On its true construction, taking into account the relevant matrix of fact, did the agreement dated 25 August 2009 as amended by the agreements dated 1*

September 2009 and 1 January 2017 … confer on the [defendant] enforceable claims for the repayment of principal and interest by the [claimant] … and was interest to be paid on a simple or compound basis?"

(ii) "*Is the [defendant] entitled to the sums claimed or, as the [claimant] contends, …:*

(a) Did the [claimant] appropriate or the parties allocate the payment by the [claimant] of £1,253,411.90 on 23 November 2017 to extinguish the principal due or allegedly due?

(b) Did the parties agree in or around March 2019 to waive any interest remaining due or allegedly due?"

37. On the main part of the first issue, the arbitrator construed the parties' written agreement in an orthodox fashion, considering the sense of the language they had used, read in context and having in mind commercial sense. He did not accept the claimant's argument that "*the Loan Documents were not intended to give rise to an enforceable relationship of lender and borrower ... . Rather, they were intended to provide a mechanism in what was effectively an intra-group relationship based upon mutual trust and confidence pursuant to which the [claimant] was able to freely extract or supply funds to the [defendant]*." The arbitrator preferred the defendant's argument that the written agreement was, as it was expressed to be, a loan agreement, and that, properly construed, a provision by which the defendant promised not to demand repayment was not unlimited in time or unqualified by context.

38. The arbitrator held therefore "*that the Loan Documents, taking into account the relevant matrix of fact, conferred on the [defendant] enforceable claims for the repayment of principal and interest … . That is the objective meaning of the Loan Documents, the meaning which a reasonable person with knowledge of the background or factual matrix would have understood the parties to mean.*" That discloses no arguable error of law. The claimant's proposed appeal was never more than an attempt to argue this one-off point of construction, as if the true meaning of the parties' contract had not been put to arbitration for decision.

39. In refusing leave to appeal against the arbitrator's construction, I reasoned that it was "*not obviously wrong (or for that matter open to serious doubt). It is plain from the Award that the arbitrator understood, had well in mind, and applied in a rational and reasonable manner the ordinary principles for the construction of contracts under English law.*" No error of approach on my part was identified by the claimant's submissions in support of its application for leave to appeal to the Court of Appeal.

40. Mr Brisby KC submitted that my decision had failed to give proper weight to the wording of the promise not to demand repayment, which (it was said) was so unambiguous as to preclude any possibility of a purposive construction. But I was not seeking myself to construe the contractual language, I was considering whether the way the arbitrator construed it disclosed an obvious error of law. In his view, the claimant was seeking to give a literalist meaning to the promise not to demand repayment, reading it in isolation, that would render what appeared to be an agreed loan illusory. It seemed from Mr Brisby's argument before me that the claimant is adamant that indeed the true bargain was such that the appearance of it being a loan was illusory. However,

it was never even arguable, with respect, that the arbitrator's rejection of that position was obviously wrong.

41. On the subsidiary aspect of the first issue – simple or compound interest – the arbitrator found that the 2017 Addendum, properly construed, had varied the original interest term, but that the parties had so conducted themselves in relation to interest thereafter that there was an estoppel by convention between them to the effect that interest continued to be due on a compound basis. The s.69 claim did not seek to appeal that conclusion, although it was indirectly relevant to one part of the s.68 claim.

42. The formulation of the second issue for decision indicates that there was no real dispute before the arbitrator as to the quantification by the defendant that, under its interpretation of the loan agreement, there was a balance due and unpaid in the amount claimed of US$1,071,320. The claimant took two points against that claim, arguing, firstly, that there had been an appropriation by the claimant or allocation agreed between the parties of a payment in November 2017 whereby all principal then due was repaid and, secondly, that there was an agreement in March 2019 to waive any interest then remaining due and unpaid. If the claimant had been correct on both points, then there would have been nothing to pay.

43. As well as disputing the claimant's two points on their own intrinsic merits, the defendant raised as a positive case, if it needed it, an argument that there had been an acknowledgment of the debt satisfying s.31(6) of the Limitation Act 1980. The defendant contended that such an acknowledgment would bind the claimant so as to preclude it from relying on its two arguments. The arbitrator was persuaded by that positive case. If that had been decisive, there might have been a case for granting leave to appeal. But it was not decisive, because the arbitrator also decided on the facts that the relevant communications on which the claimant sought to rely were not intended to have legal effect, because they were between individuals on either side who recognised between them that anything they might be content to agree in principle would need to be signed off by their superiors.

44. That was obviously not, as the claimant sought to argue when seeking leave to appeal, a decision by the arbitrator that as a matter of law there could not be an agreed final payment / write-off of principal, or an agreed interest waiver, unless it was in writing and signed. It was plainly only a view, on the evidence, that the particular individuals in this case were clear in their dealings with each other that anything they discussed and might agree was not intended to be binding. The taking of that view by the arbitrator did not disclose any arguable error of law. There was no basis for the submission made when seeking leave to appeal that the arbitrator's decision was obviously wrong on a question of law.

45. Because the arbitrator dealt with the s.31(6) 'acknowledgment' point first, and considered it decisive, he prefaced the factual conclusions I just summarised by saying that they were not necessary to the question whether the defendant's figure for the balance outstanding at 31 December 2018 should be taken as correct. However, he said that those factual matters were relevant to another point in the case, so he would consider them, and in any event he set out his conclusions on them in full.

46. In refusing leave to appeal against the arbitrator's conclusions on the second issue, I reasoned, essentially, that the arbitrator had decided on the facts that there had been no

agreed discharge of principal, and no interest waiver, with the result that the amount claimed should be awarded, and that the point on s.31(6) of the Limitation Act 1980 did not affect that. The claimant's submissions in support of its application for leave to appeal to the Court of Appeal, again, did not identify any error of approach on my part.

47. Three grounds of appeal, for any appeal to the Court of Appeal, were formulated by the claimant. None is arguable:

(i) Ground 1 is that I "*should have held that the Tribunal's construction of the Loan Documents was obviously wrong*". I have described, above, the approach the arbitrator took, leading him to his construction, and why I concluded that he did not arguably err in law. It is not arguable, to the contrary, that his construction was obviously wrong in law.

(ii) Ground 2 is that I erred in failing to grant leave to appeal in relation to the point on s.31(6) of the Limitation Act 1980. It is said that I should have concluded that the claimant was not bound by any acknowledgment and that, in consequence, I should have held "*that the Tribunal had erred in refusing to give effect to an agreement reached by email (to the effect that principal had been fully repaid) because it was not signed, and that the agreement was therefore effective*." However, as I explained, above, the arbitrator did not purport to apply some rule of law requiring a signed agreement, he simply reached a view on the facts that was unfavourable to the claimant as to the nature and purport of certain correspondence. The suggested consequence of possibly taking the view that the arbitrator was wrong about s.31(6) does not arguably follow.

(iii) Ground 3 is that I erred "*in concluding that the correspondence [about whether interest would be waived] showed that no binding agreement to waive interest had been reached. A binding agreement had already been reached as a matter of law before the [defendant] suggested that the exercise would need to be deferred.*" I refused leave to appeal on the interest waiver point on the simple basis that the arbitrator had concluded (as indeed he did) that no agreement intended to be binding had been reached, and that there was no arguable error of law in that. I went on to indicate (and continue to think) that on the facts set out in the award, it was not arguable that an agreement to waive interest was reached in March 2019, that being the issue the arbitrator had been asked to decide. There was and is no arguable basis for the grant of leave to appeal under s.69 on the interest waiver point.

48. Furthermore, I can identify no good reason why the claimant took until 29 November 2024 to articulate any application for leave to appeal against my decision made on 4 September 2024. The fact that the claimant was seeking to have the summary dismissal of its s.68 claim set aside was no reason for delay. Any appeal under s.69 had to stand or fall, likewise therefore any application for leave to appeal against my refusal of leave to appeal, on the award as made; the fact that the s.68 claim, had it been viable, might have resulted in that award being set aside had no impact on the question whether there was a serious argument that I had erred in concluding that there was not a proper basis for granting leave to appeal under s.69.

49. If it were a finely balanced question whether to grant leave to appeal, I would have said the unjustified delay tipped the balance against. As it is, I do not consider the question

to be finely balanced at all. This was a straightforward case for the refusal of leave to appeal under s.69 of the 1996 Act. The award did not arguably disclose any obvious error of law. My decision to that effect does not offer any realistic prospect of success for an appeal to the Court of Appeal.

Leave to Appeal (s.68)

50. The claimant asserted two serious irregularities. The first was that the arbitrator had refused to allow certain cross-examination as to credit arising out of some of the conduct, as alleged by the claimant, of the principal behind the defendant when the business relationship between the parties broke down, many years after the loan agreement under which the defendant's arbitration claim arose. The second was that the estoppel analysis referred to in paragraph 41 above was raised by the arbitrator, rather than by the defendant, without (so it was said) giving the claimant an opportunity to raise an estoppel point that might have worked in its favour.

51. In dismissing the s.68 claim summarily, I said that:

"*I consider the s.68 challenge to lack arguable merit. On the first ground of challenge, the arbitrator made a reasonable procedural decision as to the useful scope of factual evidence and cross-examination, given the nature of the issues that fell to be decided. It is fanciful to suppose that the matters the Claimant wished to raise and explore could have affected the proper construction of the parties' agreement. On the second ground of challenge, the arbitrator's proper decision to invite further submissions on a point of estoppel he had identified did not arguably impose on him a duty to invite submissions on a different estoppel point he had not identified. In any event, the invitation in fact made provided ample opportunity for the Claimant, alerted to the possibility of estoppel analyses, to consider whether to seek to raise any estoppel argument of its own to supplement the case it had advanced at the hearing. As regards the second ground of challenge, therefore, if (as to which I express no view) there was an arguable point here at all, it is a case of a failure by a party to recognise or take the opportunity that existed to raise it, not one of a failure by the arbitrator to conduct the reference properly.*"

52. My reasons for refusing the application to set aside that summary dismissal were as follows (as provided to the parties in writing on 4 December 2024):

"*4. On the first ground of challenge, Mr Brisby KC's argument was no more than an attempt to re-argue the contested procedural issue on which the sole arbitrator had ruled. It did not disclose any arguable failure by the arbitrator to conduct the reference properly. He contended that the decision, which Mr Brisby characterised as a decision "to exclude a short line of cross-examination", was "both extraordinary and unprecedented". He sought to draw a distinction, as if it was a distinction of principle, between a decision by an arbitrator to curtail or limit cross-examination on a particular issue and a decision to shut it out entirely.*

5. The true position, beyond argument, is that arbitrators have a wide discretion over what evidence there is to be and how it is to be dealt with. Whether there should be oral factual witness evidence, and if so whether there should be cross-examination at all, or only on certain topics (whether by defining topics for cross-examination or by specifying topics on which there is to be no cross-examination), are matters within

that wide discretion. The sole arbitrator here conducted a conspicuously fair process, hearing and considering submissions from the parties, as to whether, as proposed by the claimant, the documentary evidence for the merits hearing should include material relating to the breakdown of the business relationship between the parties many years after the relevant contracts were concluded, extending to CCTV footage of an altercation arising then, and there should be cross-examination of the defendant's main witness, Mr K…, about what the claimant contends was serious wrongdoing by him in and about the breakdown of the relationship.

6. Having conducted that proper process, the arbitrator gave a reasoned ruling against the merits hearing going into those matters. There is nothing extraordinary or unprecedented, let alone seriously irregular as a matter of arbitral due process, about that ruling. Even if (which is not clear to me) it is appropriate under s.68 to review the arbitrator's reasoning, it was rational and reasonable. It amounted in substance to the fact that the arbitrator had come to a view that the matters the claimant wanted to explore would not assist in construing the pertinent agreements and would be a disproportionate distraction. The latter difficulty is not answered by Mr Brisby KC's insistence that all he wanted to do was to have half an hour of cross-examination on the point, firstly because that submission was made to and considered by the arbitrator (which is sufficient for present purposes), and secondly because the arbitrator was obviously entitled to form the view he did that that would not be sufficient basis upon which to try to explore the reasons for the breakdown of the business relationship.

7. Mr Brisby KC's further submissions seeking to identify points on which, in the event, [Mr K's] evidence was or may have been accepted where, so he argued, the arbitrator might have come to an adverse view as to [Mr K's] credibility if the extra material and line of cross-examination had been allowed as going to credit, provide no arguable answer to the simple proposition that the arbitrator heard, considered fairly, and ruled rationally and reasonably upon, a procedural issue about the scope of the evidence to be adduced at the hearing.

8. Nothing in the argument on the set-aside application caused me to conclude that there might be an arguable s.68 claim on the first ground.

9. As regards the second ground of challenge under s.68, the cause of action under s.68 is for, and only for, <u>serious</u> irregularity, i.e. irregularity of one or more of the types specified by the 1996 Act (s.68(2)(a) to (i)) "which the court considers has caused or will cause substantial injustice to the applicant". Here, contrary to Mr Brisby KC's submission that this was but infelicitous drafting, the only complaint of substantial (or any) injustice is that when the arbitrator raised with the parties the possibility of an estoppel that, if it had arisen, would have favoured the defendant, he did not "allow the Claimant to provide equivalent submissions on whether an estoppel arose in favour of the Claimant because it had treated principal as having been discharged in its own public accounts following a similar common assumption between the parties [i.e. similar in kind to that which the arbitrator had raised for possible consideration]" (Claim Form, para 5(2)). That and only that is said to have rendered the process unfair. If there could be any room for doubt about that, it is confirmed by:

> *(a) the evidence filed in support of the s.68 claim, stating as it does in terms that the "injustice in relation to this aspect of the claim is … that the Tribunal allowed [the defendant] after the conclusion of the hearing to advance a case which it had never pleaded or articulated, and which ultimately the Tribunal accepted, without giving [the claimant] an equivalent opportunity to advance its own case on estoppel which would have defeated [the defendant's] case in any event" (… my emphasis); and*
>
> *(b) the written submissions for the claimant in support of the s.68 claim, stating as they do in terms that:*
>
> > *(i) the relevant claim was that the arbitrator had "invited the parties to provide written submissions on a point relating to estoppel by convention in favour of [the defendant] … in circumstances where [the claimant] was not given an equivalent opportunity to provide submissions on why an estoppel might instead have arisen in its own favour" (… my emphasis again); and*
> >
> > *(ii) the complaint was of procedural unfairness consisting in the claimant not being given an opportunity to advance a possible estoppel argument in its favour … .*
>
> *10. The Claim Form, evidence in support, and written submissions noted that the estoppel point the arbitrator raised had not been pleaded or the subject of specific evidence or argument at the hearing. But that was not alleged to have created injustice. The evidence in support of the s.68 claim did not include the submissions given to the arbitrator on the estoppel point he had raised (including, if there were any, submissions on whether he should consider the point given that it had not been pleaded by the defendant). That is logical, but only because indeed the complaint was not that the raising of that estoppel point, or how it was then dealt with by the arbitrator, created injustice, rather the complaint was, and was only, that it was an injustice that, so it was asserted, the claimant was not allowed to invite the arbitrator to consider a different estoppel argument. The simple reality, however, as I concluded when dismissing the s.68 claim on paper, is that how the arbitrator raised the point he raised after the hearing did give the claimant the opportunity to advance a possible estoppel point in its favour, if there was an arguable such point to advance.*
>
> *11. I was therefore not persuaded, on either ground, that it would be appropriate to set aside the summary dismissal of the s.68 claim.*"

53. The decision to dismiss the s.68 claim was clear cut, on straightforward grounds upon which it can be seen to have been without any merit whatever. An appeal to the Court of Appeal against that dismissal would not have any realistic prospect of success.