Neutral Citation Number: [2017] EWHC 3045 (Comm)

Case No: CL-2016-000802

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

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

Date: 01/12/2017

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

MICHAEL JONATHAN CHRISTOPHER OLDHAM	**Claimant**
- and -	
QBE INSURANCE (EUROPE) LIMITED	**Defendant**

- -
- -

Mr Michael Oldham as Litigant in Person
Mr Imran Benson (instructed by **DWF LLP**) for the **Defendant**

Hearing dates: 23 November 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell :

Introduction

1. The Claimant, Mr Oldham, brings applications under s.68 & s.69 of the Arbitration Act 1996 ("the 1996 Act") arising out of two awards of Mr Arthur Harverd dated 7 October 2016 ("The Part I Award") and 4 November 2016 ("The Part II Award") in favour of the Defendant ("QBE"). Mr Oldham requires and applies for an extension of time in which to make the applications. By an order of 28 June 2017 Knowles J ordered a rolled up hearing of all the substantive and procedural issues.

2. Mr Oldham is an accountant and licensed insolvency practitioner. He faced proceedings brought by the joint liquidators of MK Airlines Limited arising out of events between June 2008 and March 2009 when he was one of three joint administrators of the company ("the High Court proceedings"). Those proceedings resulted in a judgment against him for a sum in excess of £1million, from which he is currently appealing. The appeal has not yet been determined.

3. QBE are Mr Oldham's professional indemnity insurers under a policy covering claims made for 12 months at 19 February 2014 ("the Policy"). The Policy was subject to the minimum indemnity requirements ("the Minimum Terms") of the Institute of Chartered Accountants of England and Wales ("ICAEW"). The Policy provided that the Minimum Terms were to take precedence over the Policy terms in the event of a conflict in which the Minimum Terms were more favourable to the insured.

4. QBE disputed that the policy responded to Mr Oldham's potential liability in the High Court proceedings and the coverage dispute was referred to arbitration before Mr Harverd. QBE funded Mr Oldham's defence costs in the High Court proceedings pursuant to its obligation to do so under clause C10.2 of the Minimum Terms, pending resolution of the coverage dispute.

5. In the Part I Award the arbitrator held that Mr Oldham was not covered by the Policy because the claim had been made against him or notified to him prior to inception. There is no challenge to that aspect of the Award.

6. The current applications involve challenges under s.68 and/or s.69 to three aspects of the Awards.

   (1) Defence costs in the High Court proceedings. In the Part II Award, the arbitrator held that QBE was entitled to reimbursement of these costs which it had funded, quantified at £43,775 inclusive of VAT. This ruling is subject to challenge under s.69 of the 1996 Act on the grounds that as a matter of law QBE has no entitlement under the terms of the Policy to recover such defence costs. There is a challenge in the alternative under s.68 of the 1996 Act on the grounds that the arbitrator did not give Mr Oldham a fair opportunity to address the question of such entitlement.

   (2) The costs of the arbitration. In the Part I Award, the arbitrator ordered Mr Oldham to pay the costs of the arbitration, both the tribunal's costs and QBE's

costs. They were not then quantified, and their amount remains to be quantified in a Part III award which has not yet been made, but QBE's claimed costs are £120,685.85. This is the subject of a challenge under s.68 of the Act on the grounds that Mr Oldham was not given a reasonable opportunity to address argument as to why this order should not have been made.

(3) Payment on account of costs. In the Part II Award the arbitrator ordered Mr Oldham to pay £70,000 on account of costs within 28 days of the Award. This is the subject matter of a challenge under s.68 of the 1996 Act on the grounds that Mr Oldham was not given a reasonable opportunity to address argument in respect of such an order.

The adjournment application

7. At the outset of the hearing an application was made by counsel on behalf of Mr Oldham for an adjournment, which I refused for reasons which I briefly summarised. I set them out in this judgment because Mr Oldham has indicated a desire to appeal against such refusal.

8. The hearing of these arbitration applications was fixed on 7 July 2017 to take place on 23 November 2017 with an estimate of three hours, with half a day's pre-reading. On 22 November 2017, the day before the hearing, Mr Oldham issued an application to adjourn the arbitration applications. This was the first intimation to QBE of his desire to do so. The application was not served on QBE until late in the day on the eve of the hearing. On the morning of the hearing the application was made orally on Mr Oldham's behalf by Mr Van Heck of counsel, who was not instructed in relation to the substantive arbitration applications.

9. There are a number of powerful factors which weighed against granting an adjournment. It was made very late, after the Court had read into the case and after QBE had incurred the costs of preparation, briefing counsel and submitting a skeleton argument for a hearing which had been fixed for months. Any adjournment would have seriously prejudiced QBE not merely by a delay in disposing of the challenges to the awards but also by the inevitable increased costs, in circumstances where such increased costs might never be recoverable from Mr Oldham because of his avowed impecuniosity. Significant delay would not only prejudice QBE but is inimical to the principle of speedy finality in arbitration which underpins the 1996 Act, especially since the applications had already taken over a year to get to a hearing and included an application to bring them out of time. The disruption caused by an adjournment in terms of the waste of court time and adverse impact on other court users is contrary to the public interest in the proper administration of justice and would involve allotting this case an inappropriate share of court resources in preference to other cases.

10. There is no good reason for an adjournment. Mr Oldham sought to justify it on the grounds that he could not afford representation. The background is that the arbitration applications were prepared by Lewis Silkin LLP whom Mr Oldham had instructed on 9 December 2016. Lewis Silkin instructed experienced counsel, Ms Dias QC, to advise and assist in drafting the applications and supporting material, which included a detailed skeleton argument setting out the grounds for the relief sought. She continued to be involved at least until June 2017. On 27

October 2017 Lewis Silkin notified Mr Oldham that it was terminating the retainer for cause, as it had previously warned him it would. Mr Oldham did not accept that there was an entitlement to terminate the retainer. Lewis Silkin made an application to come off the record on 2 November 2017, and, having considered the matter on paper in the usual way, I made an order on 9 November under CPR part 42.3 declaring that Lewis Silkin had ceased to act for Mr Oldham. For administrative reasons which were not known to me, and were not the fault of QBE, Mr Oldham was not notified of the application before I made my order. He was made aware of it on 13 November 2017. On 20 November 2017 Mr Oldham issued an application to set aside my order. I ordered service of evidence and heard the application on 22 November 2017 with the benefit of argument from Mr Oldham and counsel for Lewis Silkin. I dismissed the application on the grounds that the evidence established a clear entitlement on the part of Lewis Silkin to terminate the retainer and that they had validly done so.

11. These events provide no good grounds for an adjournment. Mr Oldham has not provided details of his assets or evidenced an inability to instruct counsel on grounds of impecuniosity. He clearly has some funds, having instructed counsel, Mr Van Heck, to make the application for an adjournment on his behalf. He has known since 27 October 2017 that Lewis Silkin had terminated his retainer and his misguided refusal to accept that fact affords no excuse for leaving it to the last minute to apply for an adjournment. On any view he has had some three weeks to arrange alternative representation.

12. It was also argued on his behalf that the hearing of these applications should be deferred until after the judgment in his appeal in the High Court proceedings I describe below. He hopes that such a judgment will be favourable to him, and if it is, there is a real prospect of an award of costs in his favour which would enable him to fund representation on these applications. The next step in those proceedings are further submissions which are to be made to Ms Worthington QC sitting as a Deputy High Court Judge in the Chancery Division. It is not known when thereafter judgment might be given. It might be subject to further appeal. None of that provides any good reason for the adjournment application being made at the last minute: Mr Oldham has known of the judge's request for further submissions since early October 2017, and known since then that the fixed date for the hearing of his arbitration applications would take place before the resolution of his appeal in the High Court proceedings. An adjournment for that reason would depend upon the unknown contingencies of Mr Oldham succeeding on the appeal; and the unknown contingency of when such an appeal, if successful would occur and be final, so that an adjournment if justified on these grounds would be indefinite (although Mr Oldham sought in the first instance only a delay of three months). Moreover these grounds assume that a successful outcome to the appeal would make the difference between an ability then to fund representation on these applications in place of an inability to do so now, an assumption which is unjustified in the absence of any evidence of Mr Oldham's assets.

13. I recognised that refusing an adjournment would mean that that he would be unrepresented at the hearing. The disadvantages of lack of representation are however tempered, although not eliminated, by the fact that a very full skeleton

argument had been prepared and submitted by Ms Dias QC and that I have been able to take full account of it in reaching my conclusions.

14. Accordingly and applying the overriding objective, I concluded that the interests of justice required the adjournment application to be refused. After announcing my decision and, briefly, my reasons, I refused leave to appeal and Mr Van Heck withdrew. So too did Mr Oldham, saying that he could add nothing by way of legal submissions and that he had been advised that if he stayed he might prejudice his ability to appeal my refusal of the adjournment. I explained that would not be so and Mr Benson on behalf of QBE specifically undertook to take no such point. Mr Oldham maintained that he had also been advised that if he stayed he might say something which prejudiced his position in the High Court proceedings. He then withdrew and I heard oral argument from Mr Benson on behalf of QBE before reserving judgment.

Narrative

15. From 10 June 2008 to 9 March 2009 Mr Oldham was one of three joint administrators of MK Airlines. The other two administrators were a Mr Bradney and Mr Duncan of Bridge Business Recovery LLP ("BBR") by whom Mr Oldham was retained as a fee paid consultant.

16. On 26 September 2014 Mr Oldham was served with an application by the joint liquidators of MK Airlines for permission to bring a claim against him for repayment of allegedly misappropriated company property. In essence it is alleged that a sum in excess of £850,000 was paid in respect of fees without proper authorisation. Mr Oldham disputes the validity of the claim against him. He says that he was not at any time either a member or employee of BBR and was not responsible for the payments.

17. Shortly thereafter on 2 October 2014 Mr Oldham notified the claim to QBE. On 10 August 2015 QBE declined cover on the basis that the claim was first notified in 2011. In September 2015 QBE's solicitors said that the coverage dispute would have to be arbitrated in accordance with the Minimum Terms and invited Mr Oldham to agree to a named nominee as arbitrator. QBE accepted that it was liable to fund defence costs pending a coverage decision pursuant to clause c10.2 of the minimum terms, but indicated that it would seek to recover them if successful. In March 2016 Bond Dickinson, funded by QBE, were appointed to represent Mr Oldham in the High Court Proceedings. Meanwhile on 23 February 2016 Mr Oldham's broker sent an email suggesting that he would prefer the arbitrator to be chosen by the ICAEW, which was what happened. On 16 June 2016 the ICAEW appointed Mr Harverd to determine the coverage dispute. Mr Oldham was unable to afford legal representation in the arbitration proceedings and acted throughout as a litigant in person. He requested an oral hearing but the arbitrator determined that the matter should be resolved on written submissions.

18. On 5 October 2016 Registrar Derrett gave judgment in the High Court Proceedings against Mr Oldham for a little over £1.03 Million plus £100,000 on account of costs. Execution of the judgment was stayed pending an application for permission to appeal, which was subsequently granted.

19. Two days later, on 7 October 2016, the arbitrator issued his Part I Award determining that there was no cover under the QBE policy and awarding costs against Mr Oldham. His reasoning in relation to coverage was to be provided in a subsequent award. His reasoning in relation to the costs order was contained in paragraph 13 in the following terms:

> "As I cannot find any reason to depart from the general principle that costs follow the event, I herewith DETERMINE that [Mr Oldham] is liable for the costs of the arbitration, being the costs incurred by [QBE] and the fees of the tribunal."

20. The Award did not quantify the amount of the costs in either respect. At that stage QBE withdrew funding for the High Court Proceedings and Bond Dickinson ceased to represent Mr Oldham, who was able to obtain interim funding of defence costs from his 2011 professional indemnity insurers pursuant to clause c 10.2 of the Minimum Terms, notwithstanding that those insurers also denied coverage.

21. On 21 October 2016 QBE served submissions on costs in the arbitration requesting repayment of defence costs and an interim payment on account. The submissions were accompanied by a costs schedule. On 26 October 2016 the arbitrator gave Mr Oldham until 18 November to respond to QBE's costs submissions. That date was later extended to 23 November and ultimately to 2 December 2016. Before the time had expired or Mr Oldham had made his submissions, the arbitrator issued his Part II Award. This included his reasons for his decision on coverage and the orders that all defence costs be repaid within 28 days and that Mr Oldham make an interim payment of £70,000 on account of costs, also within 28 days.

22. The arbitrator posted a copy of his signed Award to the parties but it was not received by Mr Oldham. On 8 November 2016, in view of his imminent absence abroad, Mr Oldham asked for an electronic copy of the Award and was sent an unsigned and undated version without any confirmation that it was identical to the final signed version. He returned to the United Kingdom on 24 November 2016 and on the same day the arbitrator confirmed that the unsigned and signed versions of the Award were identical. On 2 December 2016 Mr Oldham received a copy of the signed Part II Award. On the same day the 28 day time limit for challenging the Part II Award expired. On 9 December 2016 Mr Oldham instructed new solicitors, Lewis Silkin LLP. The current applications were issued on 20 December 2016, 18 days after the expiry of the time limit so far as concerns the Part II Award and some 6 weeks out of time in relation to the Part 1 Award.

The s. 69 application: recovery of defence costs

23. QBE did not object to an extension of time for making the s.69 application; nor did it resist the grant of permission to appeal. It invited the court to address the question as a point of general importance.

24. The relevant parts of the Policy and Minimum Terms are as follows:

The Policy

"1. INDEMNITY CLAUSE

Insurers agree, subject to the terms, limitations, exclusions and conditions of this Policy, to pay on behalf of the Insured, Loss as a result of any Claims made against the insured during the Period of Insurance or Extended Reporting Period (if exercised), and arising in the course of the performance of or failure to perform the Insured Entity's Business which gives rise to a civil liability.

3.4 Advancement of Defence Costs

Insurers also agree to pay on behalf of the Insured all Defence Costs within thirty (30) days after invoices for those Defence Costs are received by the Insurer.

5.3 "Claim" shall mean:

(a) receipt by a Responsible Person for the first time of any writ, summons or other legal process, written communication, demand or other application of any description whatsoever or cross-claim or counter claim issued against, served upon or communicated to the Insured containing a request for, or seeking a remedy; or

(b) awareness by a Responsible Person for the first time of any circumstances which may give rise to a claim being made against the Insured.

Any subsequent Claim(s) made against the insured, arising from or related to such circumstances as given in (b) above, shall be deemed to have been made during the Period of Insurance.

5.4 "Defence Costs" shall mean all fees, costs and expenses incurred in the investigation, defence, adjustment, discharge, dismissal, settlement and/or appeal of any Claim.

5.13 "Loss" shall mean:

(a) the legal liability of the Insured to pay damages, costs and expenses awarded against the Insured;

(b) any settlement as agreed by Insurers;

(c) any amount which the Insured is required to pay as a result of a Restitution Order;

(d) Defence Costs.

The Minimum Terms

Al. Civil Liability

To indemnify the insured in respect of any Claim or Claims first made against the Insured during the Period of Insurance in respect of any civil liability (including liability for Claimants' costs, expenses and disbursements) arising out of and/or in connection with the conduct of any Professional Business carried on by, or on behalf of, the Insured.

A2. Awards by Ombudsmen

To indemnify the Insured against any amount paid and/or payable and/or the costs of taking any steps which the Insured is directed to take pursuant to or by the recommendation of any Ombudsman to the same extent as Insurers are obliged under this policy to indemnify the Insured in respect of any civil liability.

A3. Defence Costs

To indemnify the Insured in respect of Defence Costs provided that if a payment in excess of the amount of indemnity available under this policy has to be made to dispose of any Claim or Claims against the Insured, Insurers' liability for Defence Costs shall be only that proportion which the limit of indemnity available under this policy bears to the amount which is required to be paid to dispose of such Claim or Claims.

For the avoidance of doubt, the limit of indemnity specified in the Schedule is exclusive of Defence Costs, and Defence Costs shall be paid by Insurers over and above and in addition to sums paid pursuant to clause Al and/or clause A2 and/or the limit of indemnity."

"B2. "CLAIM" means any written or oral demand for compensation or damages from, or the assertion of a right against, any Insured and shall be deemed to include any complaint or reference to any Ombudsman which arises out of the conduct of Professional Business carried on by, or on behalf of, the Insured."

"B4. "DEFENCE COSTS" means any costs, disbursements and expenses incurred by the Insured with the written consent of Insurers (such consent not to be unreasonably withheld) in:

(a) defending any Claim or any proceedings relating to any Claim;

(b) conducting any proceedings for an indemnity, contribution, damages or other recovery relating to a Claim;

(c) investigating, reducing, avoiding or settling any actual or potential Claim; or

(d) investigating any circumstance which is notified to Insurers in accordance with the terms of this policy."

"C5. Advancement of Defence Costs

Notwithstanding the provisions of Clause C4, and subject to clause C3.2 and C10.2, insurers will indemnify the Insured in respect of Defence Costs as and when they are incurred, including Defence Costs incurred on behalf of an Insured who is alleged to have committed or condoned a dishonest or fraudulent act or omission, provided that Insurers are not liable for Defence Costs incurred on behalf of such Insured after the earlier of:

(a) the insured admitting to Insurers the commission or condoning of such dishonest or fraudulent act or omission; or

(b) a court or other judicial body finding that the Insured was in fact guilty of such dishonest or fraudulent act or omission,

Each Insured who admits to Insurers the commission or condoning of such dishonest or fraudulent act or omission, or against whom there is a finding of a court or other judicial body that such Insured was in fact guilty of such dishonest or fraudulent act or omission shall reimburse Insurers in respect of Defence Costs advanced on that Insured's behalf."

"C10. Dispute Resolution

C10.1. Any dispute between the Insured and/or Insurers arising out of or in connection with this policy shall be referred to arbitration before a sole arbitrator (to be mutually agreed upon by the Insured and Insurers, or, failing agreement, to be appointed by the President of the Institute of Chartered Accountants in England and Wales/of Scotland/in Ireland as applicable) whose decision shall be final and binding on the parties.

C10.2 In the event of any dispute concerning liability to indemnify the Insured (including without limitation a dispute as to the policy year under which any Claim or circumstance might fall to be dealt with between (a) Insurers and (b) any insurer(s) subscribing to the policy corresponding to this policy in respect of a previous period of insurance), the Insured and the Insurers agree that Insurers will advance Defence Costs and

> indemnify the Insured in accordance with clauses Al – A3 and clause C5 above pending resolution of any such dispute."

25. There is no shortage of modern House of Lords and Supreme Court authority on the approach to construction, most recently in the Supreme Court decision in ***Wood v Capita Insurance Services Ltd*** [2017] UKSC 24; [2017] 2 WLR 1095 at paragraphs [10] to [14]. The task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. In the case of wording promulgated by someone in a regulatory position setting minimum terms, the Court will have in mind that the regulator will have had to balance the need for reasonable protection of the public with considerations of the cost and availability of obtaining professional indemnity insurance: see ***AIG Europe Ltd v Woodman & others*** [2017] 1 WLR 1168 per Lord Toulson at paragraph [14]. Where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which is more consistent with business common sense, in what is an iterative process.

26. The arbitrator's reasons for his decision that the defence costs funded by QBE prior to the date of the Award should be repaid by Mr Oldham were contained in paragraphs 109 to 110 of his Part II Award in the following terms:

> "As stipulated in clause C10.2 the advance of defence costs and the indemnity are in accordance with clauses A1 – A3 and clause 5. The claim by Mr Oldham does not meet the overriding provision under clause A1 that the indemnity is only in respect of claims first made during the period of insurance. I hold, therefore, that the claim made by Mr Oldham is outside the scope of the terms of the QBE insurance policy. He was not covered for the claim eventually lodged by Stephenson Harwood LLP on 26 September 2014. It follows that defence costs already advanced to Mr Oldham by QBE are repayable by him to QBE as I have directed."

27. In her written skeleton argument lodged with the applications on behalf of Mr Oldham, Ms Dias QC argued that the word "pending" in clause C10.2 connoted only a temporal qualification and meant "until". She relied on the fact that there was no express right to repayment provided for by the clause, and drew a contrast with the express right to repayment conferred by clause C5, thereby demonstrating the draftsman's intention in clause C10.2 for there to be no such right.

28. The starting point is that leaving aside the provisions of clause C10.2 of the Minimum Terms, the liability of insurers for defence costs arises only if and to the extent that there is coverage under the policy. That is the position under the Policy wording itself; and it is the position under the wording of the Minimum Terms apart from clause C10.2. Under the terms which define the scope of coverage any costs incurred in defending a claim made other than in the policy year are not insured and the insurers are not liable for them.

29. If Ms Dias' construction were correct clause C10.2 would therefore have the effect of altering the scope of cover, to provide coverage for defence costs incurred provided they were incurred at a time when coverage was in dispute. The clause cannot have been intended to have that effect for a number of reasons.

30. First, clause C10 is not addressed to the primary terms of coverage but to dispute resolution. Clause C10.1 provides for "any dispute" to be resolved by arbitration. Clause C10.2 is concerned with payments pending the resolution of such disputes. It is not therefore naturally to be read as effecting a change in the scope of coverage.

31. Secondly, in order for there to be a dispute triggering the operation of the clause, an assured need only assert a right to coverage, however ill founded; it need not meet a minimum standard of arguability as a matter of merit: see for example ***Halki Shipping Corpn v Sopex Oils Ltd*** [1998] 1 WLR 726. The effect of Ms Dias' construction would be to confer an entitlement on an assured to create a right to coverage where none existed simply by so asserting. This unbusinesslike consequence is unlikely to be what was intended.

32. Thirdly although this case is concerned with defence costs, the same is true of the obligation to indemnify against the assured's substantive civil liability to the third party claimant. Clause C10.2 provides that pending resolution of the dispute over coverage the insurer is to "indemnify the Insured in accordance with clauses A1-A3". Clause A1 is concerned with the core liability to indemnify in respect of the assured's civil liability. That obligation can only have been included in clause C10.2 if it meant that there was an obligation to provide that indemnity pending a coverage dispute, notwithstanding that if the dispute were resolved in insurers' favour the obligation to indemnify would no longer fall within clause A1 by virtue of the definition of "Claim". In other words in cases where the assured's civil liability for a claim is established or admitted, clause C10.2C requires the insurer to provide the indemnity "pending resolution of the dispute". It is absurd to suppose that in that context the expression meant simply "until" resolution of the dispute, with no right of reimbursement to insurers if coverage were held not to exist. It would allow an assured to establish liability on the part of the insurers where it did not exist in relation to the core purpose of the policy merely by asserting it without any foundation for doing so. The expression "pending resolution of the dispute" must mean the same when applied to a required advance of defence costs as it does to a required indemnity for liability. The natural conclusion is that in each case the payment is to be provisional and subject to repayment in the event that the dispute is resolved in favour of there being no coverage.

33. In her written skeleton, Ms Dias argued that the absence of a right of clawback in respect of defence costs did not flout business common sense because there is only a limited pool of insurers who were approved by the ICAEW to offer insurance on the minimum terms required of practitioners, and such insurers might be prepared to accept an obligation to provide interim funding on a non-refundable basis in return for access to a large and potentially lucrative captive market. I found this unconvincing; but in any event it could not begin to justify the same result in

relation to interim indemnity for core liabilities which would also be non-refundable if her construction of "pending" were correct.

34. It involves no abuse or distortion of language to read clause C10.2 as concerned with provisional payments, ultimate liability for which are to be determined by the coverage dispute when resolved. They are to be made pending resolution of that dispute in the sense that the question which party should ultimately bear them is dependent on the resolution of the dispute, and if there is found to be no coverage on the part of the insurers so that they do not fall within the scope of what they have agreed to indemnify, they will be repaid. This interpretation is supported by the use of the word "advanced" in relation to defence costs, which is suggestive of a provisional payment rather than one which determines which party is ultimately to bear it.

35. Ms Dias' reliance on a contrast with clause C5 does not assist her construction. Clause C5 provides that its provisions are subject to clause C10.2. This is inconsistent with her construction of clause C10.2 because if she were correct it would be clause C10.2 which would be subject to clause C5: clause C10.2 would provide the general rule for interim funding with no right to reimbursement with an exception in the circumstances identified in clause C5, namely where there is a dishonest or fraudulent act or omission by the assured. The construction for which QBE contends, however, gives content to the wording that clause C5 is to be subject to clause C10.2: if the coverage dispute is resolved in the insurer's favour, interim payments are to be refunded then; if clause C5 were not expressed to be subject to obligation, its wording would provide that the assured was entitled to keep defence costs unless and until a finding or admission of fraudulent conduct irrespective of the outcome of the coverage dispute.

36. Accordingly I conclude that the arbitrator made no error in his conclusion on QBE's right to repayment of the defence costs, although for different reasons from those he expressed.

The Section 68 Challenges

37. It is convenient to address the merits of the s.68 applications before dealing with the application for an extension of time. This is because the strength of the merits of a s.68 application is one of the factors to be considered in exercising the discretion as to whether to extend time, and in cases such as the present, where the court can reach a concluded view on the merits, is likely to be an important factor. If the s.68 challenge lacks merit, the application for an extension of time becomes irrelevant. If, on the other hand, the court concludes that the challenge is sound and that there has been a serious irregularity, that will often be an important factor in favour of the exercise of the discretion to extend time, as I sought to explain in ***Terna Bahrain Holding Co WLL v Bin Kamel Al Shamzi & others*** [2013] 1 All ER (Comm) at paragraphs 31 to 33.

38. At paragraph [85] of that judgment I identified the applicable principles as follows:

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

(a) a breach of s.33 of the 1996 Act, i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;

(b) amounting to a serious irregularity:

(c) giving rise to substantial injustice.

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

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

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

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

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

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

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

(1) The costs of the arbitration

39. QBE had not expressly sought any order in relation to the costs of the arbitration in any of its principal submissions in the arbitration. Its Statement of Case requested only a declaration that it was not liable to indemnify Mr Oldham in respect of the liquidators' claim. QBE's reply submissions likewise did not address any order for costs. In those circumstances, it is not surprising that Mr Oldham equally did not address them in his submissions.

40. Mr Oldham would wish to have argued that no order for costs of the arbitration should be made until after the outcome of the High Court Proceedings. His argument would have been that if the appeal in the High Court Proceedings were successful, the claim by the joint liquidators would fall away and there would be no question of indemnity from QBE under the Policy in respect of any substantive liability. In those circumstances, so far as costs were concerned, Mr Oldham would have every expectation of an order for costs being made in his favour against the joint liquidators, so that QBE would be reimbursed for those costs. Insofar as there was a potentially small element of irrecoverable costs which QBE had funded but were not recoverable on an assessment, they are likely to have been capable of agreement between the parties and in any event would not have justified a full blown arbitration to resolve the coverage issue. Mr Oldham would therefore have wanted to argue before the arbitrator that the full arbitration proceedings were essentially unnecessary and premature prior to the determination of liability in the High Court Proceedings; and accordingly at the time the arbitrator made his costs award, when their outcome were not yet known, he should for the time being have deferred any decision on whether to make an order in respect of the costs of the arbitration.

41. Mr Oldham was deprived of any fair opportunity to advance this argument. The duty in s.33(1) of the 1996 Act to act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, includes the parties being given the opportunity of addressing the arbitrator in relation to costs: see for example ***Gbang Bla v Myth & Sherriff*** [1998] 3 All ER 730. There was therefore a breach of the arbitrator's duty under s.33 and of the 1996 Act in failing to give Mr Oldham a reasonable opportunity of addressing his argument in relation to the costs of the Arbitration. It was a serious irregularity, especially in the context of Mr Oldham acting as a litigant in person and being as he contended in straitened financial circumstances.

42. On behalf of QBE, Mr Benson's main argument was that there was no substantial injustice because the argument which Mr Oldham wished to advance was a bad one. He argued that this was so because the High Court Proceedings are separate and there is no basis to link the costs disposal of the arbitration with the outcome of the third party claim against Mr Oldham. This does not meet the point Mr Oldham wished to raise that the arbitration was unnecessary. Mr Benson also argued that Mr Oldham agreed to the arbitration and took no objection to the coverage dispute being arbitrated. As to agreement to the arbitration taking place,

he relied on the broker's email of 23 February 2016. However this was a response to an email in which QBE had said that the matter must be arbitrated and asking for agreement to the identity of the arbitrator; it was not an agreement that the matter should be arbitrated, or that it do so then. Absence of objection might be a relevant consideration, but is not necessarily a complete answer to the point. The same is true of Mr Benson's further arguments that it was in the interests of both parties to have the coverage issue resolved, especially from QBE's point of view since they were bound to fund defence costs in the meantime. I see the force of these points and they might well have persuaded the arbitrator had they been needed to be deployed. But on the other hand I have concluded, after some hesitation, that the argument which Mr Oldham would have wished to advance meets the threshold as one which the arbitrator might well have accepted had he given Mr Oldham an opportunity to advance it. It is not for me to express a concluded view on the point since Mr Oldham is entitled to have his chosen tribunal determine it.

(2) Payment on account of costs

43. If, as I have found, there was a serious irregularity giving rise to a substantial injustice in the arbitrator making his order for payment of costs, it follows that the same irregularity and substantial injustice arises out of an order for payment on account of costs pursuant to that earlier decision. Moreover, and in any event, the arbitrator having given Mr Oldham until 18 November 2016 to respond, subsequently extended to 2 December 2016, proceeded to decide the question without waiting for his submissions. This was a clear breach of s.33. Mr Benson's response, again, was directed to arguing that there was no substantial injustice because any submissions which Mr Oldham could or would have made would not have resulted in a different order. I disagree. Had Mr Oldham been able to address the question, the arbitrator might well have made a different order both as to timing and as to amount. In relation to timing, he knew that Mr Oldham was a litigant in person claiming financial difficulties and that the background was High Court litigation in which he hoped that his appeal would be successful and if so that it might well resolve his financial difficulties. In those circumstances a tribunal might well have taken the view that there should not be an order for payment on account of costs within 28 days. Moreover the amount awarded was expressed to be 60% of QBE's claimed costs. In fact, however, those claimed costs included a significant element of costs incurred prior to the arbitration which were not costs of the arbitration at all, or at least arguably not so. If those costs are excluded, the costs of the arbitration claimed would have been less than £70,000. In other words, the arbitrator awarded more than 100% of what were, at least arguably, the costs of the arbitration properly so called which were being claimed by QBE.

44. Accordingly the s.68 applications would succeed in respect of the two orders the arbitrator made in respect of the costs of the arbitration, were an extension of time to be granted to bring those challenges. It is not necessary to address whether a s.68 challenge would succeed in relation to the arbitrator's order in relation to defence costs, since I have determined that they are recoverable as a matter of law pursuant to the s.69 application. There can have been no substantial injustice in

respect of them irrespective of whether there was a serious irregularity. I turn therefore to the question of an extension of time.

Extension of Time

45. In ***Terna v Bahrain*** I set out the principles at paragraphs [27]-[33] in the following terms:

> "EXTENSION OF TIME
>
> The applicable principles
>
> [27] The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities, most notably in *Kalmneft JSC v Glencore International AG* [2001] 2 All ER (Comm) 577, *Nagusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [2003] 2 CLC 1, *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817 (TCC), [2008] BLR 366, *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100, [2011] 2 All ER (Comm) 327, and *Nestor Maritime SA v Sea Anchor Shipping Co Ltd* [2012] EWHC 996 (Comm), [2012] 2 Lloyd's Rep 144, from which I derive the following principles. (1) Section 70(3) of the 1996 Act requires challenges to an award under ss 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the 1996 Act, and which is enshrined in s 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the 1996 Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the 1996 Act. (2) The relevant factors are: (i) the length of the delay; (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so; (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay; (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed; (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the court might now have; (vi) the strength of the application; (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined. (3) Factors (i), (ii), and (iii) are the primary factors.
>
> [28] I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged

against the yardstick of the 28 days provided for in the 1996 Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial.

[29] Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant 'would have assumed' this or 'would have thought' that, It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

[30] Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In CPR r 3.9(1), which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure. This is because in cases of intentional non-compliance with time limits, a public interest is engaged which is distinct from the private rights of' the parties. There is a public interest in litigants before the English court treating the court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage.

[31] Fourthly the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the 1996 Act. However if the court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for

> an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.
>
> [32] The position, however, is different where, as has happened in the current case, the application for an extension of time has been listed for hearing at the same time as the challenge application itself, and the court has heard full argument on the merits of the challenge application. In such circumstances the court is in a position to decide not merely whether the case is 'weak' or 'strong', but whether it will or will not succeed if an extension of time were granted. The court is in a position to decide whether the challenge is a good or a bad one. If the challenge is a bad one, this should he determinative of the application to extend time. Whilst it may not matter in practice whether the extension is allowed and the application dismissed, or whether the extension is simply refused, logical purity suggests that it would be wrong to extend time in those circumstances: there can be no justification for departing from the principle of speedy finality in order to enable a party to advance a challenge which will not succeed.
>
> [33] Conversely, where the court can determine that the challenge will succeed, if allowed to proceed by the grant of an extension of time, that may be a powerful factor in favour of the grant of an extension, at least in cases of a challenge pursuant to s 68. In such cases the court will be satisfied that there has been a serious irregularity giving rise to substantial injustice in relation to the dispute adjudicated upon in the award. Given the high threshold which this involves, the other factors which fall to be weighed in the balance must be seen in the context of the applicant suffering substantial injustice in respect of the underlying dispute by being deprived of the opportunity to make his challenge if an extension of time is refused. Where the delay is due to incompetence, laxity or mistake and measured in weeks or a few months, rather than years, the fact that the court has concluded that the s 68 challenge will succeed may well be sufficient to justify an extension of time. The position may be otherwise, however, if the delay is the result of a deliberate decision made because of some perceived advantage."

46. In this case the most important factors are, (i), (ii) and (iii), but (iv) and (vi) are also material.

47. In relation to the length of the delay, 18 days is a significant period in the context of the 28 day limit and the imperative of speedy finality which underpins the 1996

Act. The delay of 6 weeks in the case of the order for payment of costs in the Part I Award is substantial. Neither, however, are to be characterised as very lengthy.

48. The explanation for the delay in failing to make the applications in time involves a low degree of culpability. The order in the Part I Award was of no immediate effect until the Part II Award for payment on account of costs which Mr Oldham was about to oppose in his submissions, time for which had not yet expired. So far as the Part II Award order is concerned, Mr Oldham explains in his witness statement that the delay was due to a combination of a number of factors:

    (1) his untutored and erroneous belief that time only started to run against him once he was served with a copy of the signed award;

    (2) the initial copy of the Award sent to him by the arbitrator going astray in the post;

    (3) his absence abroad from 10 to 24 November 2016; and

    (4) his financially straitened circumstances which restricted his ability to obtain legal advice.

49. Mr Benson sought to address a number of criticisms of Mr Oldham's conduct, but they were essentially of a minor nature. Although Mr Oldham's account of events does not render him wholly blameless, it is readily understandable that someone in his position acting in person could have acted as he did.

50. There is no question in this case of QBE or the arbitrator contributing to the delay; nor, on the other hand, was QBE prejudiced by the delay apart from the period of time involved which was not very lengthy.

51. Of particular importance is the strength of the application. I have decided that in the two respects identified, Mr Oldham has suffered substantial injustice arising out of a serious irregularity. The sums of money for Mr Oldham are very significant. For him to be deprived of an opportunity to advance meritorious challenges, with a realistic prospect of successfully reversing the orders that he pay what are to him very significant sums, would be out of all proportion in fairness and justice to any culpability for the delay involved or its seriousness.

52. Accordingly I grant the extension of time sought.

Conclusion

53. In relation to defence costs, an extension of time and permission to appeal are granted, but the appeal is dismissed. In relation to the order for payment of the costs of the arbitration and the order to pay £70,000 on account of costs, the matter will be remitted to the arbitrator for his reconsideration after hearing submissions.