IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

No: BL-2018-001435

Rolls Building
Fetter Lane
London, EC4A 1NL

NCN: [2019] EWHC 2560 (Ch)

Before:

MS CLARE AMBROSE sitting as a Deputy High Court Judge

B E T W E E N :

MR DAVID STERLING — Claimant

- and -

MRS MIRIAM RAND
MR MORRIS RAND — Defendants

MR H. BOR (instructed by Waller Pollins Goldstein) appeared on behalf of the Claimant.

MR J. HOLMES-MILNER (instructed by DPA) appeared on behalf of the Defendants.

J U D G M E N T

MS AMBROSE:

1 This is the adjourned hearing of the Claimant's application by an arbitration claim form dated 26 June 2018 for summary enforcement of an arbitration award dated 25 January 2015 ("the Award"). An initial hearing in this matter took place on 10 April 2019 and I repeat parts of the judgment given at that stage so that matters are covered as a whole in this judgment.

2 The Award was made by a tribunal consisting of Dayan Gelley, Dayan Abraham, and Dayan Simons. They were acting as dayanim (judges) of the London Beth Din (Court of the Chief Rabbi). I refer to the tribunal as "the Beth Din". The Award arises out of a dispute between the parties relating to a property at 4, Dunsmure Road in Stoke Newington ("the Property").

3 The dispute before me raises issues as to the powers available under the Arbitration Act 1996 ("the 1996 Act") to a Beth Din tribunal to order specific performance of a contract relating to land. It also raises issues as to the proper exercise of the court's discretion to refuse to make an order enforcing a domestic arbitration award under section 66 of the 1996 Act.

The Procedural Background

4 There were two previous sets of proceedings relating to enforcement of the Award. Proceedings were issued in the Commercial Court by the Claimant on the 16 December 2016, and a second set of proceedings was issued in 2017.

5 By an order dated 3 May 2018, made following an oral hearing on the 13 April 2018 at which both parties were represented, Popplewell J made an order that both claims be struck out, and that any further proceedings to enforce the Award be issued in the Chancery Division. There were some administrative errors on the court's part regarding the first set of proceedings. Following that order of 3 May 2018 these proceedings were issued in June 2018. Following a directions hearing on 5 December 2018, at which both sides were represented by counsel, Deputy Master Bartlett made an order listing this matter for a one-day hearing. He refused the Defendants' request to serve further witness evidence, but allowed the Defendants to serve further documents, and the Claimant was allowed to serve documents in addition following the Defendants' disclosure. The Defendants at that hearing confirmed that their grounds for objection would be limited to those they had put forward in their skeleton argument of 11 April 2018.

6 The matter was listed before me on 10 April and I gave permission to file and serve further evidence including expert evidence as to Jewish law. I dealt with a number of the Defendants' objections but left open those relating to section 48(5)(b) of the 1996 Act, the workability of the Award, and more generally the exercise of discretion under section 66. The evidence before this court was as follows:

a) A copy of the arbitration agreement that both sides signed in October 2014;
b) The Award;
c) The Heskem dated 19 March 2008, and a translation;
d) The Claimant's First and Second statements;
e) Witness statement of Mr Shimon Stern dated 14 June 2019;
f) Witness statement of Mr Shlomo Davidovits (the Claimant's rabbinical advocate at the hearing before the Beth Din);
g) A report from Dayan Hool, instructed on behalf of the Claimant to give expert evidence of Jewish law;
h) Mr Rand's witness statement;
i) Three witness statements from Mrs Rand;
j) Documents disclosed by the Defendants in January 2019;

k) Witness statement of Mr Alexander Strom (the Defendants' rabbinical advocate before the Beth Din); and
l) A report from Dayan Schmahl, instructed on behalf of the Defendants to give expert evidence of Jewish law.

7 The relief that the Claimant is seeking in this application are orders under s.66 and/or s.66(2) of the 1996 Act for:

"(1) permission to enforce an arbitration Award of the London Beth Din dated the 25th January 2015 ("the Award"), which has not been complied with, in the same manner as a judgment or order of the court to the same effect; and/or (2) for judgment to be entered in terms of the Award and other orders as set out in the draft order attached. In the alternative, the Claimant seeks an action on the Award."

8 The Claimant put forward a draft order requiring the Defendants to transfer the Property to him or his nominee Mr Shimon Stern.

The issues to be decided

9 The overall question I have to decide is whether to make an order that the Defendants transfer the legal title to the Property to the Claimant or his nominee, Shimon Stern upon discharge of the existing mortgage. Effectively, I have to decide whether to give judgment in terms of the Award.

10 The legal issues that require consideration are:
a) **Did the Beth Din have power to order the transfer of the Property?** This raises a question as to the application of section 48(5) of the 1996 Act and whether it is too late to raise the objection to their powers;
b) **Even if the Beth Din lacked power to make such an order, does the Court have such power?**
c) **Should the Court exercise its discretion under s66 to make the requested order?** This includes questions going to workability, arbitrability and also new evidence served since the hearing.

11 Factual issues have arisen in the application and there are questions of Jewish law upon which expert evidence has been served. Both parties have served considerable evidence but neither asked for the opportunity to have cross-examination of witnesses. I made clear in my decision on 10 April 2019 that I could decide factual issues on a s66 application.

The Factual Background

12 The Property is a house that is currently split into three flats. The Claimant currently lives at the property, and has lived there since around late 1995. The Defendants are married and live on the same street in a different property. They are the current freeholders of the property.

13 The property was originally purchased by Mrs Rand's father as a gift to her on her marriage, and was transferred into Mr and Mrs Rand's joint names in around 1985 or 1986. At that stage the house was in two flats, but was split into three flats in 2010. At the date of the Award, a relative of Mr Rand's was said to be occupying the downstairs flat. A different tenant is said to occupy the top flat currently as a tenant of the Defendants. On 10 July 2007 the Defendants mortgaged the property for around £640,000. The mortgage was later transferred to another lender by a charge dated 19 May 2016. This is on the Land Register.

14 On around 19 March 2008 Mr Rand entered into a signed agreement with the Claimant. It was handwritten on a single side of paper in Hebrew. Both sides recognised that such an agreement is known as a Heskem and I have referred to it as such. It referred to a deed of trust through a solicitor. Mrs Rand did not sign the Heskem. The Defendants produced a manuscript translation of the agreement, and that translation was not disputed. It provided as follows:

"1) Shared ownership house
2) [Interest calculations]
3) The above refers to a sale of the house by deed of trust through a solicitor
4) After approximately 2 years [C] will take out a mortgage and [C] will repay [D1] the remaining money that [C owes] him on condition that [D1] closes the mortgage on the house
5) In the event that the above conditions are not met by either party there is a possibility that the sale is cancelled. But [C] will try if [he is] able to arrange a new mortgage for a new owner.
6) The £20,000 loan will remain until the shared ownership land is sorted out (either by selling or receiving planning permission) whereby the profits will be split and the loan will be repaid.
7) During these two years I [C] have the option of doing what I like with the house."

15 The terms of the Heskem as found by the Award were for the Claimant to purchase the property for £745,000. The Beth Din concluded that, *"With regard to the aforementioned mortgage of £640,000 because there would be a penalty on redeeming the mortgage within the first two years, it was agreed that title to the property would not pass formally to Mr Sterling but that instead he would take over responsibility for paying the mortgage, which he duly did. As for the shortfall of £105,000 between the sale price and the mortgage it was agreed to deal with this in the following manner (a) Mr Sterling paid the sum of £40,000 to Mr Rand and (b) having previously lent Mr Rand £45,000 to pay for wedding expenses, it was agreed that instead of repaying the loan, this sum could be retained by Mr Rand as part-payment for the Property*". The balance of £20,000 was effectively considered as part of the purchase price on the basis that the Claimant would be paying higher interest under the existing mortgage than he would have paid if he had taken out his own mortgage. As part of the Heskem it was agreed that although title was not being transferred to the Claimant immediately, Mr Rand would sign a declaration of trust stating that they held the property beneficially for the Claimant. It was also agreed that after two years the Claimant would raise a new mortgage, thereby discharging the Defendants' liability under the mortgage.

16 Some three months after the Heskem the Defendants entered into a signed deed of trust relating to the property. The deed was signed and witnessed. It was undated but referred to a transfer dated 25 March 1986 by which Mr Shimon Stern acquired the property for consideration and the Defendants held the property on trust for Mr Stern. Mr Stern is the Claimant's relative.

17 In the Award the Beth Din made findings that Mr Rand had not pressed the Claimant to redeem the mortgage after two years, and instead both parties had initially been willing to leave the situation as it had been following the Heskem.

18 In 2010, the Claimant carried out building works to the property spending a cost of approximately £50,000. In March 2014 Mr Stern made an application to register a restriction relating to his interest in the Property. The First Tier Tribunal ruled that he had registered a caution against the Property in order to protect his interest. He had not taken the application further, and it appears that the reason for this was the parties' agreement to arbitrate later in 2014. Mr Stern withdrew the application in March 2015, after the Award was made.

19 On 10 July 2014 the Claimant wrote to the London Beth Din asking them to arrange a Din Torah (a Beth Din hearing of a dispute) concerning ownership of the Property referring to civil procedures initiated by the Defendants. At that stage Mr Stern was named as an interested party.

20 The parties on both sides signed an arbitration agreement (signed on around 23 and 29 October 2014 respectively) under which they agreed that their dispute over ownership of the Property be referred to the Judicial Division of the London Beth Din (Court of the Chief Rabbi) for a binding arbitration under the Arbitration Act 1996.

"Re: Dispute over ownership of 4 Dunsmure Road N16 5PW I agree to the submission of this matter, including all claims and counterclaims arising in respect of it, to the Beth Din for a binding arbitration under the Arbitration Acts for the time being in force and under the following terms:

(1) The Beth Din will consist of three dayanim unless the parties agree to the substitute of a single dayan.
(2) The Beth Din's rules of procedures are those of Jewish law.
(3) Each party to this matter shall have, by signing this document, indicated his assent to an arbitration under these terms. The Beth Din may continue the arbitration and conclude it ex parte if any party fails after receiving reasonable notice to attend any hearing.
(4) In the event that a vacancy arises in the Beth Din on account of the inability or refusal of any of its members to determine the arbitration, the Beth Din may appoint one or more of its own members to fill the vacancy, and may at its own discretion determine how the arbitration shall continue to be conducted. The Beth Din may determine that a single dayan may hear and receive evidence on behalf of the full Beth Din.
...
(6)The Beth Din has the power to make both inter partes and ex parte orders from the day upon which all parties are sent the terms of this agreement until such time as the Beth Din is functus officio under Jewish law. The Beth Din has the power to make orders under Jewish law both as to its own costs, and as to the costs incurred by any party in participating, bringing or defending any claim or counterclaim. The Beth Din may make orders as to security for costs, and in respect of claims.
...
(9)The Beth Din shall decide the matter under Jewish law incorporating such other laws as Jewish law deems appropriate."

21 The Beth Din was appointed, and a hearing took place before it on 29 October 2014. The parties were not represented by lawyers but they did have representatives. The main area of argument was as to the validity of the Heskem, in part on grounds that Mrs Rand had not agreed. The Beth Din held that the Heskem was binding, and that Mr Stern was the Claimant's nominee. I referred above to the tribunal's findings as to the nature of the Heskem. The Beth Din's conclusion was as follows:

"*For all the above reasons we believe that Mr Sterling is entitled to have the property transferred to him or to his nominee Mr Stern immediately on his discharge of the existing mortgage on the property, and it is ordered that: (1) the Defendants do transfer the title of 4 Dunsmure Road London N16 5PW to Mr Sterling or any nominee appointed by him provided that the existing mortgage on the property is discharged by Mr Sterling or his nominee."*

22 Registered title to the property was not passed to the Claimant following the Heskem or the Award. The Defendants' mortgage remained in place; indeed the Defendants re-mortgaged in 2016 after the date of the Award. There was documentary evidence from the Claimant that

the bank had in the last year or so attempted to take possession proceedings regarding the property. This suggested that mortgage payments were not being made in full.

Evidence on housing benefit

23 Mrs Rand's evidence was that she granted the Claimant a tenancy of the maisonette on the first and second floors of the Property under the terms of a tenancy agreement and his rent has been paid in full by Hackney LBC from when he started living there in 1995 until April 2019. She produced several housing benefit applications pre-dating the Heskem which required applicants to keep the council updated on any relevant change in circumstances and contained the question *"Are you a joint tenant or joint owner?", "Are you an owner occupier?"*. She did not have any of the applications post-dating the Heskem and these were not produced by the Claimant.

24 In 2009 a fresh tenancy agreement was entered into under which the rent was £400 per week. The benefits payments received by Mrs Rand from Hackney in respect of the flat occupied by the Claimant were between £300 and £400 per week. The exhibited documents suggest that she has also been receiving housing benefit (since July 2018 on the documents) in respect of the two other flats in the Property being let to two other tenants (one in the basement flat and the other in the ground floor flat). Shortly after the last hearing housing benefit payments for the Claimant were suspended.

25 Mr Rand's evidence was that when he asked the housing benefit department why the benefit had been suspended in April 2019, he was told that the Claimant had asked the council to withhold it and notified the council (via his solicitors) that the ownership of the property had been transferred to Dunsmure Estates Ltd and that there was a dispute about ownership in court.

Evidence on financial arrangements (including evidence given following the April 2019 hearing)

26 The financial arrangements both before and after the Heskem was entered into were unclear. In the Award it was said that, "*Immediately after the signing of the contract for sale and the aforementioned payments being made, Mr Sterling stopped paying rent to the Defendants and Yisrael Rand* [the tenant of the basement flat, a relative of the Defendants] *paid rent to Mr Sterling."* In his First Statement the Claimant said that after signing the Heskem he had taken over the mortgage and also that, "*I stopped paying rent, and the First Defendant started paying me rent. This was paid by the Defendants towards the mortgage."* In his second statement he says that, "*the rental payments went towards the mortgage"*.

27 The Claimant's first statement was that he had arranged for a new mortgage of the property and had three mortgage offers but was unable to go ahead with them due to the Defendants' refusal to cooperate. At that stage he named Dunsmure Estates Ltd as his nominee. He also referred to his interest in the property. His solicitors in correspondence to the Land Registry on 25 June 2018 also referred to his interest in the property stating, "*our client retains the interest in the Property as awarded"*. At the hearing in April 2019 his counsel indicated that it was absolutely clear from the Award that the property belonged to Mr Sterling.

28 The Claimant's second statement now says he was appointed to act as Mr Stern's agent in all dealings with the transaction until the Property was transferred to Mr Stern. He says that when the First Defendant started denying the validity of the Heskem Mr Stern had no interest in dealing with the dispute and wanted him to handle the matter. It was said that Mr Stern granted Mr Sterling a power of attorney to appear in his name before the Beth Din.

29 As to the events around the Heskem he says that he approached Mr Stern not long before the Heskem was concluded in 2008 to ask him whether he wanted to purchase the Property. He said:

"*I mentioned that I thought that this would be a good investment, due to the rise in value in the area, a purchase would also provide a way for the Rands to repay the money that had been lent to them, which as stated came from Mr Stern in the first place. Mr Stern agreed but wanted me to deal with everything until the Property was transferred to him in the future. I was the one who had the idea and was familiar with the Rands, not him. However, to secure his investment, we agreed that I would have the Rands enter into a deed of trust to secure his interest. I then negotiated the deal with the Rands for the Property, as is known. The deal was to take place over a period of time for Mr Rand's convenience. During this time, the rental payments went towards the mortgage. Around 2 years after the sale, Mr Rand started denying the validity of the sale and the dispute was bought to arbitration before the Beth Din. Mr Stern had no interest in dealing with the dispute. I had arranged and entered into the deal and he wanted me to handle the matter."*

30 In Mr Stern's statement he says, "*I can confirm that I am the true owner of the Property purchased on my behalf by Mr Sterling".* He says that the arrangement is as explained by the Claimant. He indicated that he is a director of Dunsmure Estates Limited, and that company has already received three mortgage offers in relation to the property.

31 Mr Davidovit's evidence is that he understood that Mr Sterling was acting as an undisclosed agent for Mr Stern in purchasing the Property and the Defendants raised no objection before the Beth Din to Mr Stern's involvement in the transaction or his non-involvement in the Beth Din.

32 Mr Strom's evidence was that at the hearing before the Beth Din, Mr Stern was only mentioned as Mr Sterling's nominee and not as someone who was the purchaser of the Property or the provider of the loans.

33 Mr Rand says he was unaware of any interest of Mr Stern until Mr Sterling's solicitors produced the draft trust deed in 2008. He was not aware that Mr Stern had been named as an interested party before the Beth Din.

34 Mrs Rand says that the first time she heard of Mr Stern was when she was notified by the Land Register in 2014 that he had registered a restriction against the title of the Property.

Comments on the factual evidence

35 As mentioned above, there was no oral evidence and I refrain from making final findings on most of the witness evidence for that reason, and because there are some potentially serious issues arising from the financial arrangements that would not be for me to decide. However, I accept Mrs Rand's evidence regarding the receipt of housing benefit payments, the tenancy agreements and the housing benefit applications that she produced. It was unchallenged and consistent throughout these proceedings. Also, most significantly, it was supported by contemporaneous documents including some coming from Hackney LBC.

36 Mr Sterling's second statement is inconsistent with his first statement, and also the position he took at the hearing before me on 10 April 2019 and before the Beth Din on 29 October 2014. His second statement, and that of Mr Stern, has limited support from the contemporaneous documents. It is surprising that this significant explanation as to the true identity of the parties to the Heskem, and its legal and practical purpose, has only emerged more than 11 years after it was concluded and Mr Stern was named as a beneficiary in a trust deed, and 5 years after litigation began relating to the enforcement of the Heskem.

Evidence of Jewish law

37 There was little issue between the parties on the question of Jewish law as to whether a Beth Din would have power to grant an order for specific performance of a contract relating to land. The Claimant's evidence from Dayan Yohanassan Hool was summarised as follows:

a. A Beth Din has the power to order a party to transfer real property to another party under Jewish law.

b. Under Jewish law, a deed, payment of money and physically taking possession of real estate can each, in themselves alone, effect the transfer of real property, regardless of local secular law requiring registration. Such deed is not a mere agreement to transfer.

c. The effect of the Award as a matter of Jewish law is that the parties have not merely contracted to sell the Property, but that an actual transfer of title has actually taken place.

d. Once a Beth Din has ruled that a property belongs to a purchaser, it will, if necessary, instruct the seller to transfer the title in the Lands Registry.

e. Orthodox Jewish litigants that have committed to the application of Jewish law in a property dispute would also have agreed to abide by orders for transfer of real property.

38 Dayan Hool's evidence on this last point was supported by a letter from the Registrar of the Office of the Rabbinate of the Union of Orthodox Hebrew Congregations, which suggests that it is normal practice for a Beth Din to order a seller to formalise a transfer of a Property by registering the same in the Lands Register.

39 I accept that this evidence shows that under Jewish law the Beth Din has power to order specific performance of a contract relating to land. This was not seriously challenged since the Defendant's expert evidence addressed different questions.

Did the Beth Din have power to order a transfer of the Property?

40 The Defendants contended that the Beth Din did not have jurisdiction because of s.48(5)(b) of the 1996 Act. That is a provision regarding remedies available in an arbitration governed by the Act, and it provides:

"(1) The parties are free to agree on the powers exercisable by the tribunal as regards remedies.
(2) Unless otherwise agreed by the parties the tribunal has the following powers.
(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
(4) The tribunal may order the payment of a sum of money in any currency.
(5) The tribunal has the same powers as the court
(a) to order a party to do or refrain from doing anything;
(b) to order specific performance of a contract other than a contract relating to land; and
(c) to order the rectification, setting aside or cancellation of a deed or other document."

41 The Defendants' position was that there had been no agreement regarding specific performance of land and accordingly the Beth Din had no power to make their award. They

also argued that the specific performance of the Heskem could not have involved transfer of the Property and the Award was not an order for specific performance of the Heskem. This argument could possibly have been raised before the Beth Din (the Heskem did not on its face appear to be a simple sale of land) but it was too late to raise it now (any appeal on this basis would have been unlikely to succeed), and in any event the argument was governed by Jewish law (of which there was no evidence in support of it).

42 The Claimant's primary position was that the point was now barred because the Defendants have never challenged the Award on this ground or otherwise. By taking part in the arbitration the Defendants were now barred under s.73 of the 1996 Act from taking a point on the tribunal's jurisdiction, and that under s.66 of the 1996 Act the right to resist enforcement on the basis of a lack of substantive jurisdiction is expressly made subject to s.73.

43 Its alternative position was that the Beth Din had jurisdiction as the Defendants had agreed in writing that the Beth Din would decide the dispute according to Jewish law and procedure. The Claimant argued that s.48(5)(b) is subject to the parties' agreement under s.48(1), and here there was no dispute that under Jewish law the Beth Din had power to order transfer of a property in a dispute concerning ownership. By agreeing Jewish law, the parties were agreeing Jewish law to the full extent permitted by the 1996 Act.

Is it too late to raise the point on section 48(5)?

44 Section 66 of the 1996 Act provides that:

"(1) That an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where or to the extent that the person against whom it is enforced shows that the tribunal lacks substantive jurisdiction to make the Award. The right to raise such an objection may have been lost: see s.73."

45 Section 73 provides that:

(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to

the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

46 I initially took the view that the Defendants had not lost the right to take the point regarding s.48(5) by reason of waiver under s.73 because the question under s.48 as to the tribunal's powers to make an order for specific performance was not a question of substantive jurisdiction as defined in s.30 of the 1996 Act (because it did not go to the validity or scope of the arbitration agreement, the reference or the constitution of the tribunal). Any decision to make such an order would not be challengeable for lack of substantive jurisdiction but as a serious irregularity on grounds of excess of power under s.68(2)(b). My initial view was based on the wording of s.66, which only refers to objections that the tribunal lacked substantive jurisdiction. This construction leads to uneven protection against late challenges and this was probably not intended. This uneven result can be avoided by looking to the wording of section 73 which covers challenges on grounds that the proceedings have been improperly conducted. This would include the current objection that the tribunal exceeded its powers. I prefer to adopt the wider approach based on the wording of section 73 and accordingly I conclude that the objection is precluded under section 73 because it could have been taken before the Beth Din or under s.68.

Conclusions on s48(5)

47 If I am wrong in concluding that the objection based on section 48(5) is barred then an issue arises as to the powers of the Beth Din. The Heskem is clearly a contract relating to land (indeed, neither party suggested otherwise). Accordingly, if s.48 applies, the Beth Din would only have power to order specific performance of that contract if the parties had so agreed in writing (as any reference to "agreed" is a reference to an agreement in writing as set out in s.5 of the 1996 Act).

48 The effect of s.48(5)(b) is dealt with in detail by Etherton J in *Telia Sonera AB v Hilcourt* [2003] EWHC 3540 (Ch). He notes that there has been a long-held statutory preference for such orders not to be made by arbitrators, and suggests that the rule was related to a policy in favour of conveyancing matters being decided in court where there was expertise on their complexity. He refers to an acknowledgement in the legislative history that the court could lawfully deal with the remedy if the tribunal could not. There are further, related policy reasons for such a restriction. Firstly, an order for specific performance of land may require the court's coercive powers, and indeed may require an officer of the court to execute a conveyance. Secondly, ownership and transfers of land should be transparent rather than being carried out in a private arbitration. As the Defendants pointed out, a tribunal could not order rectification of the Land Register. Thirdly, and linked to that point, third parties would be affected by transfers of land, and there is a public policy interest in such decisions being made by courts rather than private tribunals (this is linked to the preference that such matters be dealt with by those who have expertise in a system of registered title). Fourthly, there is a question as to the arbitrability of questions as to the ownership of land (dealt with below).

49 The Claimant pointed to *The Arbitration Act 1996* (5th Ed) by Merkin & Flannery, suggesting that the exclusion of contracts "relating to land" no longer had any justification given the availability of quick registration and enforcement of awards. In my view the complications that have arisen in this case provide firm support for the exclusion. Certainty of ownership of land is a matter of public interest. There is good reason to ensure that decisions requiring transfer of land are only made by arbitrators when the parties have clearly chosen this. The availability of summary enforcement from a court is consistent with maintaining the exclusion since it provides safeguards for the appropriate enforcement of decisions that may have far reaching effects on third parties. In the usual case those safeguards can be applied summarily.

50 In light of the policy reasons for the restriction in section 48(5) and its express wording there is a strong argument that if parties want to confer jurisdiction on a tribunal to order specific performance of a contract relating to land, they must use clear terms. Merely incorporating a different governing law should not be sufficient to amount to an agreement in writing to contract out of section 48(5)(b).

51 This case involves the choice of a Beth Din. While choosing London arbitration, the parties agree for Jewish law to cover the procedure of their dispute, not merely the substance. A Beth Din is frequently used as a forum where family and community disputes are resolved. These will often involve the transfer of real property, typically family property. I am told that it is common for a Beth Din to make orders for transfer of property. It would be surprising if a Beth Din were acting without power in doing so.

52 I have come to the conclusion that the Claimant was correct to argue that by agreeing to the application of Jewish law to the procedure of the arbitration the Beth Din has power to order the transfer of the Property because Jewish law gives the Beth Din power to make such an order. However, I do not accept the route by which the Claimant reached that conclusion.

53 The Claimant relied on the decision of Lightman J in *Kastner v Jason* [2004] EWHC 592 regarding whether a Beth Din had power to grant a freezing order. Powers of arbitrators to grant such relief are subject to section 39 of the 1996 Act. It is somewhat differently worded to section 48 but carries the same intention to confer powers where parties agree (but not otherwise). In addressing that question Lightman J considered that *"the critical issue is accordingly whether the grant of such a power is implicit in the provision of the Arbitration Agreement that the Beth Din shall apply Jewish procedural and substantive law."* On the Jewish law before him he was satisfied that there was such a power and concluded that the Beth Din had jurisdiction to grant the freezing order.

54 The matter went to the Court of Appeal ([2004] EWCA Civ 1599) and Rix LJ summarised the position as follows:

"15. The judge therefore held that, in the absence of parties agreeing to confer such power on arbitrators, there would normally be no jurisdiction in an arbitration held under English law for the arbitrators to make a freezing order at an interim stage prior to a final award. In the instant case, however, Mr Kastner and Mr Jason had agreed that the Beth Din should apply Jewish procedural and substantive law. If therefore Jewish law permitted a Jewish court to grant an interim freezing order, then the arbitration agreement vested the Beth Din in this case with the necessary jurisdiction."

55 Rix LJ commented that no issue had been taken on this analysis, pointed to debate on the area and emphasised that the Court of Appeal had not taken any particular view on the above analysis taken at first instance.

56 It was critical in *Kastner v Jason* that the court was dealing with an agreement on the application of the procedural law of another legal system. The mere choice of a foreign law (or religious system of law) as the governing law would not be sufficient to amount to an agreement conferring powers for the purpose of section 39. In that case it was clear that section 39 concerned provisional relief which was a matter of procedure. Section 48 is less obvious since remedies are not wholly a matter of procedure.

57 The further significant reason why a choice of foreign law would not establish an agreement to confer powers for the purpose of section 48 is that it would not meet the express requirement

that the agreement must be made in writing. This reflects an important policy in the interests of certainty. The meaning of "writing" is defined in firm terms in section 5 of the Act. It does not cover an implied agreement and, to that extent, there is perhaps doubt as to Lightman J's approach in looking for an "implicit" agreement.

58 I am cautious to depart from the route of Lightman J (and that put forward by the Claimant) and the point is technical but the statutory limitations on powers require careful application. I consider that the agreement on Jewish procedural law does not amount to an agreement to confer powers for the purpose of the proviso to s48(5) but it means that section 48 simply does not apply since Jewish law is the curial law and it provides for remedies available to a Beth Din.

a) The parties chose London as the seat of the arbitration and for the 1996 Act to apply. English law allows parties to choose a different curial law, even if the seat is London. This is unusual and requires clear agreement since it can give rise to legal complications and uncertainty, for example in identifying the regime applicable to any challenge.
b) English law gives effect to a choice to refer disputes to arbitration in London in accordance with religious systems of law, subject to the mandatory provisions of the 1996 Act.
c) Section 4(5) of the 1996 Act provides that *"the choice of a law other than the law of England and Wales or Northern England as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about this matter".*
d) Rather than asking whether the parties were agreeing powers for the purpose of the proviso to section 48(5) the better analysis is to ask whether section 48 has any application, and whether the choice of Jewish law as the procedural law of the arbitration amounted to an agreement on all the non-mandatory provisions of the Act covered by Jewish law.
e) The parties expressly agreed on arbitration in accordance with the 1996 Act and a discretion for the Beth Din to apply other laws where appropriate under Jewish law. This probably means that the 1996 Act will apply as a residual framework to fill gaps, as well as by reason of mandatory provisions.
f) Section 48 is not a mandatory provision. Jewish law covers the matter of remedies including the Beth Din's powers to order specific performance of a contract relating to land. Section 48 accordingly does not apply.

Accordingly, I conclude that the Beth Din had power to order specific performance of a contract relating to land.

Even if the Beth Din lacked power to make such an order, does the Court have such power?

59 The Claimant argued that the court has power to make an order for specific performance even if the Beth Din lacks such power relying on *Vertex Data Science Limited v Powergen Retail Limited* [2006] EWHC 1340 (Comm) and the court's wide powers as described by *Russell on Arbitration* (8-023). The Defendants objected (raising their underlying objection on specific performance) and also suggesting that *Vertex* was not authority for the proposition because it covered a different question as to the scope of the court's primary jurisdiction on the merits.

60 It was not necessary for me to decide this question and the authorities put forward were not decisive. The court's discretion on enforcement is unfettered and it will have wide power to give effect to an award. However, it can only enforce the award: the power to order something different is limited. In this case I would have been willing to find that the court had jurisdiction under section 66 to make an order transferring the Property even if the Beth Din lacked powers to make such an order. More generally this would be a somewhat unusual

situation since (on the presumed basis) the award would be open to challenge on grounds of the tribunal's lack of power and the absence of power may give rise to other good reasons for refusing enforcement as a matter of discretion.

Should the Court exercise its discretion under section 66 to order a transfer of the Property?

61 The Claimant's position was a strong one, namely that an unchallenged award must be regarded as valid, and the court should recognise and enforce it. He relied on s.66 of the Arbitration Act 1996 and on the Court of Appeal's decision in *Middlemiss & Gould v Hartlepool* [1972] 1 WLR 1643, and also Hamblen J in *Sovarex v Romero* [2011] EWHC 1661.

62 He accepted that the court has a discretion on an application under s.66 but contended that the court must presume that an award is valid, and it is for the party resisting enforcement to prove otherwise. The Claimant alleged that there are only three grounds of challenge to the enforcement of an arbitration Award in England under part 1 of the 1996 Act: first, a challenge to substantive jurisdiction; secondly, a challenge for serious irregularity and thirdly, an appeal on point of law.

63 The Claimant argued forcefully that the Award was made nearly 5 years ago and it has been unchallenged. The Claimant were entitled to the benefits of that Award. Substantial sums of money had been advanced to the Defendants (and loans waived) on the basis of his agreement to sell the Property. The Claimant had asked the Defendants to agree to remission of the Award on specific terms and contended that they had failed to cooperate. Enforcement was required as a matter of fairness and to reflect the statutory policy that awards should be given effect.

64 The Defendants' starting point was that they would simply prefer that the enforcement application be dismissed. When pressed, they indicated a preference to start again wholly afresh with a new tribunal or for the Claimant to issue a new action on the Award. I indicated that these were unacceptable proposals, not least since no challenge had been made to the Award. On reconsideration the Defendants (through their counsel) made clear that they would be willing to agree to ask the Beth Din to reopen the matter on grounds of new evidence and would not oppose the joinder of Mr Stern.

Conclusions on discretion

65 Any arbitration award that has not been challenged is final and is treated as binding. It should ordinarily be enforceable, and s.66 should be a straightforward remedy for achieving that. The provisions of the 1996 Act are firmly in favour of giving effect to arbitration awards and enabling them to be enforced. The starting point is the statutory policy in favour of giving effect to an unchallenged award.

66 However, the Court has a wide discretion in deciding whether to enforce and domestic awards are not subject to the mandatory rules of the New York Convention. Section 66 is never a rubber-stamping exercise. While monetary awards will not automatically raise an investigation as to whether they are properly to be enforced, the enforcement of an award in the form of a declaration or a mandatory injunction is more likely to generate specific consideration. These are always regarded as discretionary remedies whenever granted, and the court's order in similar terms will only be granted if appropriate. The Court of Appeal in *West Tankers v Allianz* [2012] EWCA Civ 27 commented in respect of the question whether to enforce a declaratory award:

"*The purpose of section 66 is to provide a simpler alternative route to bringing an action on the award….The language of the section is permissive. It does not involve an administrative rubber stamping exercise. The court has to make a judicial determination whether it is appropriate to enter a judgment in the terms of the Award. There might be some serious question raised as to the validity of the Award or for some other reason the court might not be persuaded that the interests of justice favoured the order being made, for example because it thought it unnecessary."*

67 The Claimant's analysis of the grounds of challenge to enforcement covers the common grounds of challenge but it fails to address the broader discretion to decline enforcement where it would be contrary to the interests of justice. It is also clear from the express wording of sections 66 and 81 of the 1996 Act, and its legislative history, that the court has a wide discretion to decline to enforce an Award.

68 The court remains entitled to decline to enforce an Award on public policy grounds, and also where third parties' rights would be prejudiced or where there are issues as to the arbitrability of the dispute. This is apparent from the comments of the DAC Report on the effect of s.66:

"373. In our view the way we have drafted Clause 66 sufficed to cover all the cases where enforcement should be refused. However, since the Bill was published it has been suggested to us that it would be advisable to spell out in more detail two particular cases, namely those where the arbitral tribunal has purported to decide matters which are simply not capable of resolution by arbitration, whatever the parties might have agreed (e.g. custody of a child) and those where the tribunal has made an Award which (if enforced) would improperly affect the rights and obligations of those who were not parties to the arbitration agreement.
374 On the present wording, it does not follow that the Clause somehow sanctions enforcement in those cases. The reason for this is that the Clause does not require the Court to order enforcement, but only gives it a discretion to do so. That discretion is only fettered in a negative way, i.e. by setting out certain cases where leave to enforce an Award may be refused."

It later decided against an express reference to these categories of cases but stated in the DAC Supplementary Report in relation to section 66:

"33 However, on further reflection we concluded that it would be preferable, instead of having a list which would have to be expressed as not closed, to have no list at all instead relying on the fact that the opening words of the provision to not require the Court to order enforcement, but only give it a discretion to do so. …However, it will be noted that in what is now section 82 it is made clear (by an amendment to the Bill as introduced) that any rule of law relating in particular to matters which are not capable of settlement by arbitration or…on the grounds of public policy continues to operate."

69 Section 81 gives effect to this by providing:

"81 Saving for certain matters governed by common law.

(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to—
(a) matters which are not capable of settlement by arbitration;
(b) the effect of an oral arbitration agreement; or
(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy."

70 In exercising discretion as to enforcement of an order requiring a party to transfer real property relevant considerations will include the practicality and usefulness of enforcing the order (see *West Tankers*). The order of a court, unlike that of an arbitral tribunal, may be binding on third parties, and will ordinarily be public so the court may take into account different considerations to those that influenced the tribunal, especially where ownership of real property is in issue. I took these matters into account and also the new evidence of the parties' financial arrangements subsequent to the Award, workability, arbitrability, issues of public policy, the interests of third parties, as well as the overall interest in giving effect to a final arbitration award.

Arbitrability and workability

71 I raised the issue of arbitrability as to questions as to ownership of land, especially where there is a firm policy in this jurisdiction in favour of public registers of land ownership. An arbitration award determining ownership of real property could only bind the parties to the award, and a dispute as to a person's absolute ownership rights against all others may not be arbitrable. Arbitrability was not seriously challenged by the Defendants. I accept the Claimant's argument that there is a discernible trend towards expanding the range of disputes that are arbitrable, and that ownership of land does not fall within the normal categories such as crime and matters of public policy

72 However, determination of land ownership has strong aspects of public policy in all jurisdictions. A special value of property ownership is that it will bind third parties. A determination by an arbitral tribunal may have limited weight and that may affect decisions on enforcement. I accept the point put forward from the Court of Appeal's decision in *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 [84] stating that:

"*jurisdictional limitations on what an arbitration can achieve are not themselves decisive of the question whether the subject-matter in dispute is arbitrable*."

73 This comment suggests that limits on the usefulness of arbitration may influence arbitrability (or at least flag it up) as well as public policy considerations. It also suggests that it may be difficult to identify a hard line between what is arbitrable and not, and this will be a question of discretion.

74 Overall, I conclude that the dispute before the Beth Din was arbitrable, not least because some of the public policy considerations can be addressed on enforcement. However, the arbitrability of disputes on land ownership may depend on the context. If this Award related to title to land in another jurisdiction, or it was a foreign award (subject to the New York Convention) then questions of arbitrability and public policy could entail different considerations.

75 The Defendants maintained an objection that the Award was unworkable. There were difficulties with the strict terms of the Award because the Claimant has no means to discharge the mortgage since he is not a party to it, and the mortgagee cannot be ordered by a tribunal to accept the funds of the Claimant or his nominee. There were also potential difficulties in taking account of the position of the existing interests on the title to the Property. However, I accept the Claimant's submission that the Award would require the Defendants to cooperate to achieve the redemption of the mortgage, and this would resolve the main uncertainty arising. Appropriate wording could also address the existing interests on the title. Accordingly I conclude that the Award is not unworkable on its face.

The significance of the new evidence

76 One of the reasons I adjourned the hearing in April 2019 was because I was not satisfied that the Beth Din had been given the whole story. Ordinarily this would make no difference at the enforcement stage. However, here there was an unusual lack of consistency between what the Claimant was putting forward to justify enforcement and what he had told the Beth Din. This was relevant to my discretion because if the Beth Din was misled or there was underlying illegality this could go to whether there were public policy grounds for refusing enforcement. A material change in circumstances then could also affect whether enforcement is in the interests of justice.

77 Taking account of the findings in the Award and the new evidence, I am satisfied that the Beth Din may not have been given the full relevant information regarding who was party to the Heskem, the financial arrangements surrounding it and the parties' subsequent performance, including the matters that have now been put before me, in particular that:

a) Mr Sterling was acting as undisclosed agent for Mr Shimon Stern in all matters relating to the transaction, including the conclusion of the Heskem and commencing and pursuing the arbitration;
b) Mr Stern was purchasing the Property in 2008 as the principal contracting party and Mr Sterling was only an agent;
c) Mr Stern was the true owner of the Property;
d) Since the date of the Heskem the Claimant had been claiming and receiving benefits to the value of around £400 per week on the basis that he had no ownership in the property and was obliged to pay rent to the Defendants.

78 The Defendants had objected to enforcement on grounds that the Claimant entered into the Heskem as agent for Mr Stern and was not competent to sue on it. At the hearing on 10 April 2019 the Claimant denied this allegation and maintained that the Claimant was the true owner of the Property and the contracting party and, *"Mr Stern was not a disclosed principal, but Mr Sterling's nominee, as the Award makes clear."*

79 In April I rejected the Defendants' objection as one that could have been made earlier. However, the Claimant has now raised new evidence putting forward a different case as to the role of Mr Stern and the Claimant. The Claimant's counsel properly accepted that on the basis of the case previously put forward the Defendants (and the Beth Din) may have assumed Mr Sterling was the true purchaser of this property. This might have led me to conclude that a jurisdictional objection was still available by reason of the change in case. However, the Defendants' counsel made clear that it had always been part of their case that Mr Stern was principal and that Mr Sterling was acting as agent and was not competent to sue on the Heskem. On this basis I remain of the view that the Defendants could always have objected at a much earlier stage to the Beth Din's jurisdiction on grounds that the Claimant was only an agent. However, it failed to do so and accordingly I maintain my decision that such objection was not a ground to resist enforcement of the Award. It may, however, remain open to the Beth Din to raise its own jurisdictional questions in the future.

The interests of third parties

80 Specific performance is an equitable remedy and will not be granted by an English court if it interferes with the rights of third parties or a party has not come to court with clean hands (see Snell's Equity, 33rd Ed at 17-039 & 044). This principle would apply even if the tribunal had powers under Jewish law to give similar relief. However, at the enforcement stage the court must be alert to avoid substituting its own views for that of the tribunal on the merits of the claim for relief awarded.

81 Here, the interests of several third parties were engaged. Firstly, Mr Stern who had applied to enter a caution on the Land Register in 2014, and who was named as the Claimant's nominee in the Award. He has now made a statement in these proceedings and is not objecting to Property being transferred to Dunsmure Estates Ltd. He has not expressly given evidence of willingness to take title although at the hearing this was indicated. Further relevant parties are the mortgagees who contracted with the Defendants. They may not be willing to discharge the mortgage against funds from a third party. However, this could be overcome by requiring the Defendants to provide the necessary consents to enable the mortgage to be discharged. The other parties listed on the title to the Property must be taken into consideration although this can probably be resolved by a suitable wording. Hackney BC was the further party that I considered had an interest.

82 The Claimant suggests that Hackney BC is not a matter of concern as this is a matter that can be taken up by Hackney BC. He also suggests that the issue of housing benefit is not directly relevant to matters that were in dispute before the Beth Din and should not impact on the enforceability of the Award as there has been no suggestion of an unlawful scheme with respect to housing benefit. I do not accept that these submissions justify me making an order for enforcement.

a) The Claimant's receipt of housing benefit is directly relevant to the matters in dispute because it was the Beth Din's finding that the Claimant had taken responsibility under the Heskem to pay the mortgage. It was his evidence in these proceedings that he had taken over the mortgage, and that following the Heskem he had stopped paying rent, the First Defendant started paying him rent (and the Award stated that the Claimant had also been paid rent by the basement tenant Mr Israel Rand), and that "rent" was used to pay the mortgage. He put forward no supporting evidence of having paid the mortgage from his own funds or having received rent from the Defendants or Mr Israel Rand (and indeed the evidence suggested that the mortgage had not been fully paid). It appears likely that his housing benefit payments (and those of other tenants) were used to fulfil his obligation to pay the mortgage on what he told the Beth Din was his own property, or what he is now telling the court is the property of Mr Stern. This is directly relevant to his request for specific performance and would clearly be a matter concerning the rights of Hackney LBC.
b) His current evidence suggests that he failed to update Hackney LBC on important changes in circumstances following the Heskem. In particular, that the Property was owned by himself (the position he put to the Beth Din and also the Land Register) or Mr Stern (the position he now puts to the Court), and the Defendants were liable to pay him rent (the position he put to the Beth Din). He also had £50,000 to spend on the Property in 2010.
c) If I were to order the transfer of the Property to Mr Stern then Hackney would be prejudiced by that order since it would have no recourse against the Property as security for any claim if it chose to take up the matter as suggested.
d) The court has its own duty to inquire into the propriety of making any order and may raise its own concerns that housing benefit has been claimed on an incomplete or false basis.

Conclusions on discretion

83 It is a serious and unusual case where an unchallenged award is not enforced by the court. I have taken account of the arguments in favour of enforcement. I am acutely conscious that the parties agreed on arbitration to resolve their dispute in 2014 and the Beth Din gave a prompt decision after hearing both sides. However, I am not satisfied that it would be in the interests of justice to make an order that the Property be transferred into the name of Mr Stern or the Claimant. The new evidence put forward to justify this order is directly inconsistent with the case that was put before the Beth Din regarding the contracting party to the Heskem and the person to whom ownership of the Property was to be transferred. The new evidence

regarding housing benefit also suggests that relevant information was not made available to the Beth Din showing that performance of the Heskem may have involved the wrongful claim and receipt of housing benefit from Hackney BC (both before and after the hearing before the Beth Din). In these circumstances an order for specific performance would not be in the interests of justice, it could be contrary to public policy and it could damage the integrity (and reputation) of the Beth Din system.

84 Accordingly I decline to make the order sought. I do not dismiss the application because it remains open to the parties to address the matters that have given rise to serious concern and resolve them in their chosen tribunal (or for Hackney to take up the matter separately if it chooses). The simplest measure would be to ask the Beth Din to reopen their award on grounds of the new factual evidence before me. There is evidence (including correspondence from the Beth Din) that they have powers to reopen a matter on grounds of new evidence. In any event the parties could agree to remit matters back to them. As matters stand, I am not satisfied that I would have any power under the 1996 Act to order that the Award be remitted.

85 It is a matter for the Beth Din as to whether it will allow new evidence to be admitted or Mr Stern to be joined. It can decide the significance of the evidence. If the Defendants were unwilling to remit the matter to allow these concerns to be addressed or if the Beth Din decides that its Award remains unchanged then finality should prevail and it remains open to the Claimant to restore this application.