Neutral Citation Number: [2020] EWHC 2790 (Comm)

Case No: CL-2019-000632

In Private
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2020

Before :

MR JUSTICE FOXTON

- -

Between :

A

Claimant

- and -

B

Defendant

- -
- -

Daniel Margolin QC (of Joseph Hage Aaronson LLP) and Adam Baradon (instructed by **Joseph Hage Aaronson LLP) for the Claimant**
Richard Power (instructed by **JMW Solicitors LLP**) **for the Defendant**

Hearing dates: 12 and 13 October 2020
Draft judgment to parties: 15 October 2020

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.

- -
Mr Justice Foxton
- -

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed 10:00 AM Wednesday 21st October 2020"

Mr Justice Foxton :

INTRODUCTION

1. This judgment follows the application by the Claimant to enforce an arbitration award issued by consent (the "Consent Award") pursuant to s.66 of the Arbitration Act 1996.

2. The Consent Award was made on 4 December 2018 by the sole arbitrator in an LCIA arbitration commenced by the Claimant. On 14 October 2019, the Claimant applied for leave to enforce the Consent Award pursuant to ss.101(2) and 66(1) of the Arbitration Act 1996. On 17 October 2019, Teare J gave the Claimant permission to enforce "the operative part of the Award" in the sum of $39,111,604, but gave the Defendant liberty to apply to set that Order aside, and stayed execution until the time for bringing such a challenge had expired ("the October Order").

3. The Defendant applied to set the October Order aside on 7 November 2019. That application came before Moulder J. For the reasons set out in a judgment reported as A v B [2020] EWHC 952 (Comm), she set the October Order aside:

    i) so far as it concerned s.101(2), because that applied to awards made outside the United Kingdom and did not apply to the Consent Award as an English award; and

    ii) so far as it concerned the application under s.66(1), because the court did not have power to enter judgment in the terms adopted because "the circumstances require a further adjudication, namely that there had been a failure to pay an instalment and the payment had become due" ([30]).

4. On this last issue she found, on the evidence before her, that the Defendant had raised a triable issue as to whether the Claimant was entitled to enforce the Consent Award in the amount claimed, and she gave directions for a hearing to determine whether or not permission to enforce the Consent Award should be given. This is that hearing.

THE WITNESSES

5. I heard evidence from three witnesses:

    i) For the Claimant, from the Claimant himself and from D, a Ukrainian lawyer whose law firm represented the Claimant.

    ii) For the Defendant, from C, the CEO of the Defendant's investment vehicle.

6. I found the Claimant's evidence confused and at times inconsistent, particularly (and, perhaps, less surprisingly) when it came to the operation of the detailed provisions of the parties' agreements. In parts of his evidence, he sought to align his answers with the Claimant's legal case. I have, therefore, approached his evidence with caution. I do, however, accept his evidence that he was not involved in the detailed implementation of the agreements and that he relied on his professional advisers (lawyers and accountants) to protect his interests, both in drafting the documents and in effecting payments. I also accept that he had become suspicious of (and exasperated by) the Defendant by the time they met on 4 and 11 October 2019.

7. I found D a careful witness, who was closer to the detail than the Claimant. On one topic – when giving evidence as to her understanding as to the Claimant's obligation to give notice of the bank account to which payment was to be made – I formed the impression that D was taking care to give evidence which aligned with the Claimant's case. I have no doubt that D would have been similarly concerned to protect the Claimant's interests at the meetings on 4 and 11 October 2019, and in particular would have taken steps to ensure that if binding agreements were concluded or assurances intended to be acted on were given at the meetings, they would have been properly documented and their scope carefully delineated.

8. C was a polished witness who also had a good grasp of the detail. It is to C's credit that he accepted that, at the 4 and 11 October 2019 meetings, it was his understanding that no binding agreements had been reached because any contractual variation had to be in writing. He also gave commendably frank evidence that the timing of the payment made on 17 October 2019 had not been influenced by anything said or done by the Claimant. The overall effect of his oral evidence was rather different to the impression given in C written evidence, which appears to have been stretched in an attempt to establish a triable issue.

9. In relation to all three witnesses, however, as is so often the case, I have found the inherent probabilities and the contemporaneous documents the most reliable guides to what happened.

10. I did not hear evidence from the Defendant. It was said that until the service of the Claimant's witness statement on 07 July 2020, neither side was calling evidence from a principal, and that this explained the Defendant's absence. I do not accept this explanation. It is the Defendant who is arguing for the existence of agreements or understandings which departed from the ordinary meaning of the language in the written agreements. In any event, no explanation was offered as to why the Defendant had not provided a witness statement responding to the Claimant's statement of 7 July 2020. In these circumstances, it is open to the court to draw adverse inferences against the Defendant applying the principles summarised in Wisniewski v Central Manchester HA [1989] PIQR 324, 340.

THE FACTUAL BACKGROUND

The Arbitration

11. The background to this dispute is largely set out in the judgment of Moulder J at [5] – [15] which I will not repeat. The arbitration to which these proceedings relate arises out of the settlement of two earlier LCIA arbitrations by two settlement agreements dated 7 April 2015:

    i) The Claimant and the Defendant entered into a deed of settlement under which the Defendant agreed to pay to the Claimant amounts defined as the Principal Sum and Accrued Interest (c. $45 million in total) in quarterly instalments. The parties agreed that certain of the terms of the settlement would be recorded in a consent award.

ii) Two companies affiliated to the Claimant and the Defendant, X Co and Y Co respectively, entered into a settlement agreement, under which Y Co agreed to pay X Co $2 million.

12. Disputes in relation to those two settlement agreements led to a further LCIA arbitration which was itself compromised, on the eve of the hearing, by a further settlement agreement ("the 2018 Settlement Agreement") dated 30 November 2018, under which the Defendant agreed to pay the Claimant just over $38m in instalments.

13. It is significant that the dispute which arose in relation to the two 2015 settlement agreements was a disputed agreement – "the May Agreement" - which the Defendant alleged had been concluded and which it was said had extinguished his liability to the Claimant and transferred it to a third party.

14. In addition to settling the parties' disputes, the 2018 Settlement Agreement contained a specific acknowledgement by the Defendant that the alleged May Agreement was not a legally effective agreement. C accepted in his evidence that the Defendant had agreed that the alleged May Agreement was not binding because it was not in writing, as the two 2015 settlement agreements required.

The Consent Award

15. The Consent Award was entered into pursuant to the 2018 Settlement Agreement, and the material provisions had the same numbering as paragraphs in the Consent Award as they did as clauses in the 2018 Settlement Agreement.

16. The material provisions of the Consent Award are as follows:

> "2.1 The Respondent will pay the Claimant:
>
> 2.1.1 The sum of USD$34,632,475.62 (the 'Principal Sum');
>
> 2.1.2 Accrued interest on the Principal Sum, being USD$10,229,128.56
>
> …
>
> 2.3 Payment must be paid to the bank account of any of the Claimant's companies and/or payment agents as may be nominated by the Claimant in writing prior to payment. Nomination shall be capable of change by the Claimant 10 business days prior to payment.
>
> 3.1 The Respondent must make a payment of USD$2 million on or before 31 December 2018, in partial discharge of the sum referred to in clause 2.1.1 above…
>
> 3.2 Thereafter, and subject to clauses 3.3 to 3.5 below, the Respondent must make a payment of USD$1.25 million every quarter, payable on or before 1 January, 1 April, 1 July and 1 October of each calendar year (the 'Instalments') until payment in full of the Principal Sum ('the Final Settlement Date').

> 3.3 In the event that the Respondent fails to pay…the *instalments* or any part thereof on or before the requisite date, the sums referred to in clause 2.1.1 and clause 2.1.2 above… will become due and owing in full and payable immediately.
>
> 3.4 In the event that the Respondent fails to procure a pledge of the shares of the [G Co] within 7 business days of this Agreement and in accordance with clause 7 below, the sums referred to in clauses 2.1.1 and 2.1.2… will become due and owing in full and payable immediately.
>
> 3.5 In the event that any payment is made by or on behalf of [E Co] (or any nominee or agent or assignee thereof) or any payment received by or on behalf of [F Co] (or any nominee or agent or assignee thereof) pursuant to or in respect of the Partial Award … such that the payment … exceeds the Principal Amount (the "Acceleration Event") the Principal Amount … will become due and owing in full and payable on the 14th calendar day after the Acceleration Event occurring. The Respondent will not be held liable for any technical error or delay by any bank or like institution handling any payment under this clause. If reasonable confirmation and evidence (such as the payment instruction) is provided to the Claimant that the relevant instructions were provided to the bank for debiting of the payer's account, any delay in payment arising from such cause will not trigger an event of default under this Agreement and specifically will not give rise to a payment of the Accrued Interest as defined at clause 2.1.2 above. If payment is not received by the Claimant within 21 calendar days of the Acceleration Event, notwithstanding the reasons, the Principal Amount and Accrued Interest (or any unpaid part thereof) s will become due and owing in full and payable immediately.
>
> 3.8 The Respondent shall procure that all payments made by or on behalf of [E Co] or any payment received by or on behalf of [F Co] pursuant to … the Partial Award… are paid to the Claimant".

17. Clauses 3.4, 3.5 and 3.8 of the Consent Award require further explanation. A company called F Co had obtained a final arbitration award ("the Partial Award") for an amount of several hundred million dollars against E Co. F Co in turn owed G Co (a company affiliated to the Defendant), a sum of approximately half the amount of the Partial Award, but still several hundred million dollars.

Events after the Consent Award

18. By the beginning of July 2019, the Defendant had paid the Claimant $5.75 million.

19. On 1 October 2019, E Co issued a press release stating that it had reached a settlement with F Co (albeit it said nothing about the terms of the settlement agreement). On hearing the announcement of the settlement, the Claimant contacted the Defendant to arrange a meeting.

20. That meeting took place on 4 October 2019 and was attended by the Claimant, D, the Defendant and C. It is common ground that at that meeting the Claimant asked to see a copy of the settlement agreement between E Co and F Co, and that the Defendant

told the Claimant that there would be some delay in paying the 1 October 2019 instalment due to banking issues. However, the contents of the meeting are otherwise in dispute. The Defendant contends as follows:

i) He told the Claimant that E Co had only paid a proportion of what had been hoped for - $200m – and that F Co was using that amount to make payment to other parties.

ii) The Defendant offered to explore putting alternative security in place, now that G Co would no longer be receiving a payment, and to discuss the potential acceleration of the amounts due.

iii) Against that background, the Claimant and the Defendant entered into an agreement ("the 4 October Agreement"), by which the Claimant agreed not to enforce his rights under the Consent Award pending the agreement of alternative security and/or future acceleration of the instalments.

21. That account is strongly disputed by the Claimant. On 8 October 2019, the Claimant's English solicitors wrote to the Defendant's solicitors, stating that the Claimant was in breach of the Consent Award as a result of failing to pay the instalment due on 1 October. It was said that full payment was now due, either under clause 3.3 or because there had been an Acceleration Event under clause 3.5.

22. There was a further meeting between the same individuals on 11 October 2019 at which the Defendant claims that the 4 October Agreement was reiterated and/or restated ("the 11 October Agreement"). Once again that suggestion is strongly disputed by the Claimant.

THE PLEADED ISSUES

23. The Defendant resists enforcement on the following grounds:

i) There was an agreement and/or common understanding between the parties that the Defendant would accommodate the different bank accounts to which the Claimant sought to direct payment but that the Claimant would not rely on any delay caused by KYC issues arising in relation to any account nominated as a basis for accelerating the debt.

ii) Alternatively, the Claimant was required to give 10 business days' notice of any account to which payment was to be made, but did not do so.

iii) As to clause 3.5, the Defendant says that in agreeing the 2018 Settlement Agreement and thereafter, it was the common understanding of the parties that E Co would pay F Co a substantial payment and that would result in the Defendant receiving an amount greater than the Principal Sum. There was never an understanding that the Principal Sum would fall due if the Defendant or his companies were not paid as a result of the settlement and/or if money was not paid to F Co. Accordingly, no Acceleration Event had occurred because G Co had not been paid and/or E Co's payment had been made to third parties and not F Co. Alternatively, the Claimant is estopped by

convention (arising from the shared understanding) from asserting that the Acceleration Event has occurred.

iv) Further, by the 4 October and/or 11 October Agreements, the Claimant waived and/or agreed not to enforce any right to accelerate payment or is estopped by representation and/or by convention from relying on the fact that the Defendant did not pay the October quarterly instalment by 1 October 2019 and/or the occurrence of the Acceleration Event.

THE NATURE OF THE ISSUE BEFORE THE COURT

24. The Defendant's arguments raise issues as to the effect of the Consent Award on its proper construction, whether as a matter of fact the acceleration provisions have been triggered, and whether there was any subsequent variation of the terms of the Consent Award or events which preclude reliance on its terms. At first sight it might be thought curious that these issues are being decided by the court, particularly in circumstances in which the 2018 Settlement Agreement pursuant to which the Consent Award was brought into being itself contains an LCIA Arbitration clause.

25. However, the Defendant has at no stage argued that the issues which arise in relation to the enforcement of the Consent Award are matters which should be determined in LCIA arbitration. Moulder J referred to this issue in her judgment at [38]:

> "I note that the claimant is not relying upon the terms of the 2018 Settlement Agreement in support of its application to enforce the Award, other than as forming part of the factual context to the question of whether there was a binding oral agreement reached between the parties on 4 October 2019. Accordingly this is not a reason why the dispute would need to be resolved through a further arbitration. (I note that the particular arbitrator is now functus officio so the matter cannot be referred back to the arbitrator)."

In this last paragraph, Moulder J was referring to clause 4 of the 2018 Settlement Agreement, which declared that the tribunal would "become functus officio upon the making of the Consent Award".

26. Both parties were clearly agreed before Moulder J that the issue of whether the full debt had become payable was one which the court could determine. The court's order of 24 April 2020 provided that "the Court shall determine the [Claimant's arbitration claim] following a trial under section 66 of the Arbitration Act of the disputed issues in the October Application". The parties have served pleadings and evidence for the purposes of that trial. In those circumstances, it is clear that I have jurisdiction finally to determine the issues which arise, and no one suggested otherwise.

27. So far as the position more generally is concerned, Hamblen J recognised that the court has a certain fact finding jurisdiction when leave is sought to enforce an award as a judgment in Sovarex S.A v Romero Alvarez S.A [2011] EWHC 1661 (Comm) at [46]-[49]:

> "46. Given that the court has the power under CPR Part 62 to give appropriate directions to enable issues of fact to be determined, there is no obvious reason why the enforcing party should be compelled to start proceedings all over again

> by commencing an action on the award, thereby potentially wasting both time and costs. S.66 is meant to deal with enforcement generally and there is nothing in s.66 itself or in the CPR which requires an alternative mode of procedure to be adopted in the event of the application being challenged on the facts. Consistent with the Overriding Objective the priority must be to progress matters sensibly and cost effectively rather than to waste time and costs for formalistic reasons….
>
> 48. For all these reasons I consider that the court does have the power to direct that there be a determination of disputed issues of fact under s.66 and that there is no necessity for this to be done by way of action on the award. No doubt there will be cases where it will still be appropriate for the proceedings to continue as if it was an action, particularly where the dispute is one of some complexity. However, in a case such as the present which involves relatively straightforward issues of fact such as are determined on a s.67 application, I consider it is appropriate for the issues to be dealt with under s.66 and for appropriate directions to be given under CPR Part 62.7.
>
> 49. Alternatively, if that be wrong, I would have ordered that the proceedings should continue as if they had been begun by a claim form in an action on the award and would have given the same directions as I am going to give in respect of the determination of the s.66 application so that the end procedural result would be the same."

28. However the factual issue in Sovarex – whether the arbitrators had jurisdiction – was clearly one which it was for the court to determine (at least ultimately), and this is also the position when an issue arises on enforcement as to whether a claim is arbitrable or whether proceedings have been conducted unfairly (as in Honeywell International Middle East Ltd v Meydan Group LLC [2014] EWHC 1344 (TCC)). What, however, if the issues raised in response to a s.66 application do not concern the arbitration process or the jurisdiction of the arbitrators, but whether conditions set out in the award have occurred or the provisions of the award have been affected by subsequent events?

29. To the extent that an arbitration has resulted in a final award, the interface between court and arbitration proceedings is very different to that which arises in relation to a prospective or pending arbitration. Not only does a final award render the tribunal *functus officio*, but enforcement of the award is essentially a matter for national courts rather than arbitral tribunals, so much so that, at least under English law, the award itself gives rise to a cause of action enforceable in court, and the award can be turned into a judgment of the court or enforced as if it were. If an award is entered as a judgment, that generates another cause of action (an action on the judgment) which is itself capable of being sued upon in court. Disputes relating to attempts to enforce the award through national courts are matters for the relevant court, not a dispute to be referred to arbitration.

30. As I have noted, an English arbitration award creates a new cause of action – the implied promise to honour the award – which has long been recognised to give a claim which can be brought before the English court in an action on an award (Purslow v Baily (1704) 2 Ld Raym 1039; Hassneh Insurance Co of Israel v Mew

[1993] 2 Lloyd's Rep 243; Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] 1 WLR 1041, [9]). Judgment in such actions is not limited to giving the relief set out in the award, but extends to awarding interest under s.35A of the Senior Courts Act 1981 (Coastal States Trading (UK) Ltd v Mebro Mineraloel-handelsgesellschaft GmbH [1986] 1 Lloyd's Rep 465). It has never, so far as I am aware, been suggested that such claims could be subject to a successful stay argument in favour of arbitration. Equally, it has long been recognised that, in trying an action on an award, it may be necessary for the court to resolve a dispute as to whether the award was settled or varied by subsequent agreement (Smith v Trowsdale (1854) 3 E & B 83).

31. If that is the position when an action is brought on an award, what of the position when summary enforcement is sought under s.66? I can see no reason why the court is not able, if it is willing as a matter of discretion to do so, to resolve in the context of a contested s.66 application disputes of a type which might be raised as a defence to an action on an award. In Sovarex at [49], Hamblen J noted that if necessary, he would have ordered that the proceedings be treated as having been begun by a claim form (and, presumably, he would have treated permission to serve out as having been granted on the basis that the implied promise to perform an English arbitration award is to be treated as a claim to enforce a contract governed by English law) "so that the end procedural result would be the same." As Professor Merkin has noted:

> "Procedural differences aside, the alternative methods of enforcing an award generally stand or fall together. In each case the action is one based on a debt owed to the claimant, and for the most part any defence which defeats a summary application will also defeat an action on the award"

(*Arbitration Law*, Informa UK, para. 19.8).

32. There will be cases in which, although it has issued a final award, the tribunal nonetheless retains jurisdiction in relation to certain issues arising as to its implementation (for example when the award grants specific performance in favour of the claimant conditional upon the reciprocal performance of the claimant's obligations, and when the tribunal expressly retains jurisdiction over any issues arising from the carrying of its order into effect, which might include whether the claimant has performed its part of the bargain). This might be a context, therefore, in which both the court (when asked to enforce a final award) and the extant arbitral tribunal have jurisdiction. If the claimant brought a s.66 application to enforce an order contained in the award which was conditional in this sense, and issues arose as to whether the condition had been satisfied, there would be a very compelling case for the court to refuse an order under s.66 on discretionary grounds, as it is entitled to do (West Tankers Inc v Allianz SpA [2012] EWCA Civ 27, [38]). Similarly, in the event that an action was brought on the award in these circumstances, there would appear to be a strong case for the court to stay proceedings under its inherent jurisdiction.

33. In this case, however, as I have stated, the tribunal which issued the Consent Award is *functus officio.* If, therefore, the issue had been raised as to whether it was open to the court to determine, in the context of the s.66, the issues raised by the Defendant in answer to the application, or whether those matters had to be determined in a fresh arbitration, I would have held that I could, and should, determine them.

THE APPROACH TO THE INTERPRETATION OF THE CONSENT AWARD

34. It is accepted that the Consent Award is to be construed as a contract. The Claimant argues that the Consent Award is to be construed against the background of the 2018 Settlement Agreement. I accept that submission which is consistent with the approach taken to the construction of consent orders in court proceedings and judgments. In Sirius International Insurance Co (Publ) v FAI General Insurance Ltd [2004] 1 W.L.R. 3251, in the context of construing a Tomlin order, Lord Steyn (with the support of the rest of the court) said this at [18]:

> "The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."

35. In Weston v Dayman [2006] EWCA Civ 1165, [5] Arden LJ considered that statement and held that it meant that a consent order was considered "like a contract", and there are similar statements in Viagogo AG v Competition and Markets Authority [2019] EWHC 1706 (Ch) and Pourghazi v Kamyab [2019] EWHC 1300 (Ch)).

36. However, a further issue arises as to the interrelationship between the substantive provisions of the 2018 Settlement Agreement, and the Consent Award, and in particular the following clauses:

    i) Clause 8.1 which provided that "the Agreement constitutes the entire agreement between the Parties and supersedes all prior correspondence, representations, agreements, negotiations and understandings between them with respect to the matters covered herein".

    ii) Clause 8.2 which provided that "no variation, waiver, rescission or amendment of this Agreement shall be effective or enforceable unless made in writing and signed by or on behalf of the Parties".

    iii) Clause 8.3, which provided that "a failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy …".

    iv) Clause 8.4, which provided that "each of the Parties acknowledge and agree that it has not entered into this Agreement in reliance on any statement or representation made by any party to this Agreement other than as expressly incorporated into this Agreement".

37. The Consent Award came into being because, by clause 4.1 of the 2018 Settlement Agreement, the parties agreed to seek such an award, and the parties further agreed:

> "The Consent Award may be enforced independently from and without reference to this Agreement".

The obligations in the Consent Award were the payment obligations set out in the 2018 Settlement Agreement. The Consent Award itself provided in its Recitals:

> "(B) The Parties have agreed terms of settlement which include a provision that the Parties agree to request the Tribunal record the settlement in the form of an award of the Tribunal …
>
> (C) The Tribunal is willing to meet the joint request of the Parties to record the settlement between them in the form of an award".

38. Paragraph 1 of the Consent Award provided:

> "The Tribunal orders and directs that the agreement between the Parties as set forth below shall be recorded as an award of the Tribunal on agreed terms".

39. Given the very close relationship between the 2018 Settlement Agreement and the Consent Award, and the fact that the latter was brought into being in order to record aspects of the former "in the form of an award", I am quite satisfied that the contractual promises made by the Defendant in clause 8 of the 2018 Settlement Agreement apply as much when the Defendant seeks to raise issues as to the scope or continuing status of his obligations arising from the 2018 Settlement Agreement to resist enforcement of the Consent Award as it does in other contexts. In particular:

i) Any attempt by the Defendant to argue that there were other terms of the Consent Award not recorded on its face would, in circumstances in which the Consent Award is intended to record the payment terms of the 2018 Settlement Agreement and repeats those terms *verbatim*, amount to an argument that the terms of the 2018 Settlement Agreement were not themselves entire or complete. That would involve a clear breach of the Defendant's promise.

ii) Any attempt by the Defendant to argue that there had been an oral modification of the obligations in the Consent Award would, for the same reasons, involve an assertion that there had been an oral modification of the obligations created by the 2018 Settlement Agreement, something which the Defendant has agreed will not be effective.

iii) As a matter of English law, the effect of making an award is to replace the earlier cause of action which gives rise to the award with the cause of action on the award, in much the same way as a cause of action merges in a judgment: FJ Bloemen Pty Ltd v Council of City of the Gold Coast [1973] AC 115. If, therefore, clauses 8.1 to 8.5 do not apply in the context of an attempt to enforce the Consent Award, it is not clear when they do apply.

40. For these reasons, I am satisfied that the obligations assumed by the Defendant in clause 8 of the 2018 Settlement Agreement are valid, binding and applicable to the arguments which the Defendant now seeks to raise in response to the Claimant's s.66(1) application. It is nothing to the point that those clauses were not repeated in the Consent Award itself. That would have been unnecessary, and clauses of this kind sit more naturally in the parties' settlement agreement than in the terms of an arbitration award.

41. There is no doubt as to the legal effect of entire agreement clauses (Inntrepreneur Pub Co Ltd v East Crown Ltd [2000] 2 Lloyd's Rep 611) and "no oral modification" clauses (MWB Business Exchange Centres Ltd v Rock Advertising Limited [2018] UKSC 24). "No waiver" clauses raise the bar for establishing the elements of a waiver plea, but they do not forestall the application of the doctrine altogether (Tele2 International Card Co SA v Post Office Ltd [2009] EWCA Civ 9, [56] and CDV Software Entertainment AG v Gamecock Media Europe Ltd [2009] EWHC 2965 (Ch), [91]).

WERE THE CONDITIONS FOR PAYMENT OF THE FULL AMOUNT IN PARA 2.1 OF THE CONSENT AWARD SATISFIED?

42. The logical place to start is to consider what the rights and obligations of the parties are under the Consent Award in the events that have happened, leaving aside any issues as to whether those rights have been varied, waived or the Claimant is estopped from relying upon them.

43. The Claimant contends that the full amount has become payable for two reasons:

    i) First, because the Defendant has failed to pay the instalments from 1 October 2019 onwards when due ("the Payment Default Argument").

    ii) Second, because the Acceleration Event provided for in clause/para. 3.5 has occurred ("the Acceleration Event Argument").

44. I will consider these issues, and the arguments which arise in relation to them, in turn.

THE PAYMENT DEFAULT ARGUMENT

The 1 October 2019 instalment

45. There is no dispute that the instalment due on 1 October 2019 was not paid on that date. On the evidence, I find that it was paid on 17 October 2019, and that the payment was nearly $10,000 less than the amount required. The Defendant contends, however, that:

    i) The Claimant did not give notice of the bank account into which payment was to be made until 23 September 2019, such that payment only became due 10 business days later.

    ii) The parties had agreed to waive the requirement to pay by 1 October 2019, by reason of the Claimant having previously accepted late payments without exercising his right to accelerate in respect of the April and July 2019 instalments.

    iii) The Claimant had agreed that delays in payment arising from KYC difficulties experienced by the Defendant in paying into the bank account designated by the Claimant would not count for the purposes of determining whether a payment was timely.

46. I have concluded that the Defendant is correct on this first argument, although that argument on its own does not take him very far:

i) The clear effect of clause 2.3 is that the Claimant must notify the Defendant of the bank account into which payment of that instalment should be made ("payment must be made to the bank account … as may be nominated by the Claimant").

ii) The final sentence of clause 2.3 provides that "nomination shall be capable of change by the Claimant 10 business days prior to payment". While that does not expressly impose a deadline for an original nomination, in my view it is implicit in that last sentence that there will have been a nomination at least 10 business days prior to payment, which can be changed up to that point. In particular, it would make little commercial sense for the Defendant to be entitled to at least 10 days notice before being required to make payment into a bank account which was not that originally nominated by the Claimant, but for there to be no notice period at all for a first nomination.

iii) I do not accept the Claimant's argument that, if no nomination is given 10 or more business days before the payment date, the Defendant remains obliged to make a payment by that date, but can do so to any account previously nominated by the Claimant. This argument would not work for the first instalment, and finds no support in the language of the 2018 Settlement Agreement. It would also have very surprising commercial consequences. For example where (as happened), the Claimant directed payment of part of an instalment to his lawyers (presumably for the purpose of covering legal expenses), it would seem to follow that the Defendant could pay the entirety of the next instalment to the lawyers if the Claimant did not nominate a recipient bank account in time.

47. It follows that I accept that the 1 October 2019 instalment did not fall due until 7 October 2019. However, as payment was not made on that date, this does not of itself provide an answer to the Claimant's claim that the full debt became due.

48. I have concluded that there is nothing in the second argument. Mr Power specifically confirmed that the Defendant did not "allege an oral agreement in relation to this. It's an agreement by conduct". While there was an attempt in closing to suggest that an understanding to this effect might have been discussed by the Claimant with C, there was no evidence from either of them to this effect. Even leaving aside the effect of clause 8.3 of the 2018 Settlement Agreement, the matters relied upon are far too equivocal to restrict the Claimant's exercise of his future contractual rights, whatever the legal label relied upon in making the attempt. Repeated acceptance of the late payment of a periodic debt will not of itself prevent the payee from exercising such rights as would ordinarily follow from late payment of a future instalment (see in the time charterparty context The Scaptrade [1983] 1 Lloyd's Rep 146, 150). The matters relied upon here do not begin to establish an agreement by conduct that the Claimant would not exercise the contractual rights which would arise if payment was not made on time.

49. I accept that, as a matter of practice, the Claimant did not claim the full debt merely because an instalment was a few days late, as the Claimant accepted in his evidence. The Defendant may well have hoped to benefit from a similar indulgence as and when the issue arose again. However, that was purely a matter of the Claimant's choice, and not because a legally enforceable agreement or understanding was reached to that effect. In any event, the 1 October 2019 instalment, although due on 7 October 2019,

was not paid until 17 October 2019, and therefore significantly later than any "grace period" the Claimant was generally willing to allow.

50. Mr Power suggested that I should conclude that there was such a binding agreement because it explained the Claimant's interest on 4 October in ascertaining whether an Acceleration Event had taken place. Why, Mr Power asked, would the Claimant have been interested in ascertaining whether an Acceleration Event had occurred which would trigger payment of the Principal Amount if the effect of the failure to pay on 1 October 2019 had given him the right to accelerate both the Principal Amount and Accrued Interest? However, the Claimant had an obvious practical interest in ascertaining what the position was so far as settlement between E Co and F Co was concerned, because this offered the prospect of the Defendant having the funds necessary to make an immediate and substantial payment. In any event, as I have found (whether or not the Claimant knew this), the 1 October instalment was not yet overdue on 4 October. Further, it was open to the Claimant, if he wished, to decide only to exercise a right of acceleration under clause 3.5 rather than clause 3.3.

51. I am also satisfied that there is nothing in the third argument. There is no provision in the Consent Award or the 2018 Settlement Agreement to this effect, and clause/para. 2.3 cannot be read as qualifying the Defendant's payment obligation in this way. In clause/para. 3.5, the parties did expressly address the issue of payment delays arising from "any technical error or delay by any bank or like institution handling any payment under this clause", but only in the context of the full amount becoming due following an Acceleration Event. The fact that the parties turned their minds to this issue, but only relieved the Defendant from the consequences of delay due to this cause in this specific context, tells very strongly against the suggestion that there was some wider agreement to this effect, not recorded in the 2018 Settlement Agreement or the Consent Award. While, as I have indicated, the Claimant was in practice willing to give the Defendant a grace period of a few days when banking issues delayed payment, there was no binding agreement to that effect.

52. In any event, the argument that there was from the outset an oral collateral agreement to this effect is not open to the Defendant as a matter of law, because of the "entire agreement" provision in clause 8.1 of the 2018 Settlement Agreement, and the argument that there was an oral modification is not open because of the "No Oral Modifications" provision in clause 8.2.

53. The argument based on some species of estoppel also fails. There was no evidence of any unequivocal representation or promise, or a common assumption which manifested itself across the line, to the effect that the Claimant would not exercise his right of acceleration if payments were received late due to technical banking difficulties. Nor was there any reliance on any such representation, promise or assumption by the Defendant, or circumstances which would make it inequitable for the Claimant to rely on his strict legal rights. At best for the Defendant, the reason he was late in making the October payment was not because he relied on something the Claimant had said or any understanding reached, but because of technical banking difficulties which prevented the payment happening any sooner. The structural difficulty in the Defendant's estoppel argument is obvious. To the extent that the payment was made late because of technical banking issues outside the Defendant's control, it was not late because the Defendant relied on some promise or assurance by the Claimant. But to the extent that payment was late for reasons other than technical

banking issues, such delay would fall outside the scope of the estoppel for which the Defendant contends in any event.

54. Finally, I should note that none of these matters answer the Claimant's case based on the fact that the payment in fact made on 17 October 2019 was nearly $10,000 light.

The January, April, July and October 2020 instalments

55. The Claimant also relied on the late payment of the 1 January and 1 April 2020 instalments. At the start of the hearing, I gave the Claimant permission to amend to advance a case by reference to the 1 July 2020 instalment, and reserved my decision on a similar application relating to the 1 October 2020 instalment, pending further information from the Defendant as to those issues said to be raised by the Claimant's reliance on that instalment which the Defendant could not fairly address at this hearing. In the end, it was not suggested that there were any such issues, and Mr Power was able to advance the Defendant's case in relation to the 1 October 2020 instalment. Accordingly, I will give the Claimant permission to amend to advance that case as well.

56. However, as I have rejected the Defendant's argument in relation to the 1 October 2019 instalment, it is not necessary for me to consider the Claimant's alternative arguments in relation to the January, April, July and October 2020 instalments.

THE ACCELERATION EVENT ARGUMENT

The meaning of the Consent Award on its proper construction

57. The terms of para. 3.5 of the Consent Award are clear. The trigger event for the obligation to pay the Principal Amount is satisfied if:

    i) a payment is made by or on behalf of E Co or received by or on behalf of F Co in respect of the Partial Award; and

    ii) the total amount paid or received "exceeds the Principal Amount" as defined in the Consent Award.

58. If that obligation arises, and is not discharged within 21 says, the full amount (the Principal Amount and Accrued Interest) became "due and owing in full and payable immediately".

59. The 2018 Settlement Agreement and the Consent Award were clearly very deliberately drafted to provide that **either** payment by E Co **o**r receipt by F Co "pursuant to or in respect of the Partial Award" in a sufficient amount would give rise to an Acceleration Event. Those conditions appear as alternatives in both clauses/paras. 3.5 and 3.8. It is also consistent with the drafting of those clauses/paragraphs, which define receipt by F Co in very wide terms including receipt by "any nominee or agent or assignee thereof".

60. That construction makes commercial sense. The 2018 Settlement Agreement and Consent Award were drafted on the basis that the Defendant was in a position to procure that payments made by E Co or received by F Co would be paid to the Claimant (clause/para. 3.8). That is consistent with the Claimant's evidence (which I

accept) that he was told that the Defendant was in a position to control F Co because a former manager of the Defendant was in a position to influence F Co's actions. In her witness statement on the Claimant's behalf filed on 14 October 2019, Ms Duncan records the Claimant's belief that F Co was in the Defendant's ownership or control. It would, on that basis, have made no commercial sense if the Defendant was able to avoid an Acceleration Event occurring by structuring a settlement between E Co and F Co in relation to the Partial Award so that any payment made by or on behalf of E Co was not made to F Co, but to someone else in discharge of E Co's liability to F Co.

61. Further, there is nothing in clause 3.5 which makes the Acceleration Event subject to a further condition that there should be a payment to G Co or otherwise to the Defendant. Nor can any such additional condition be implied, for that would be inconsistent with the express terms. I also reject any suggestion that there was any oral agreement to this effect. Such an agreement would be inconsistent with clause 3.8, which makes it clear that it was the Defendant who assumed the contractual risk of whether the money would find its way through to G Co:

> "The Respondent shall procure that all payments made by or on behalf of [E Co] or any payment received by or on behalf of [F Co] pursuant to … the Partial Award… are paid to the Claimant."

It would also fall foul of the entire agreement clause.

62. I accept that the parties anticipated that funds originating from E Co would be paid to F Co and from there find their way through to G Co. The 2018 Settlement Agreement and the Consent Award contained certain provisions intended to provide the Claimant with additional protections in this regard:

i) an obligation on the Defendant's part to provide the Claimant with a charge over G Co; and

ii) a warranty by G Co that it was owed a substantial loan by F Co.

However, crucially, there is nothing which made the occurrence of an Acceleration Event conditional on a payment by E Co to F Co, still less on payment by F Co to G Co.

63. It is likely that the Defendant over-promised what he was capable of delivering in the 2018 Settlement Agreement and Consent Award, and that he was willing to take the risk of doing so in order to obtain a settlement of the ongoing LCIA arbitration in which his position may well have been very weak. But having bought that breathing space at the price of offering those commitments, the Defendant must abide by them.

The alleged common understanding or assumption

64. In the alternative, the Defendant alleges that there was a common assumption shared by the Claimant and the Defendant, which gives rise to a binding estoppel, that clauses/paras. 3.5 and 3.8 do not mean what they say, and that an Acceleration Event would only occur if E Co made a payment in respect of the Partial Award which was actually received by F Co, rather than paid or passed onto a third party.

65. It is interesting to see how this issue developed:

i) The evidence filed in relation to the s.66 application did not address this issue head-on. Ms Duncan's witness statement of 14 October 2019 merely said that an Acceleration Event "may have occurred". She summarised the Claimant's position as being that "when [E Co] paid out on the Award (or it was enforced), the Defendant would make immediate payment of the Principal Sum to the Claimant". The Acceleration Event was said to arise when "any payment is made by or on behalf of [E Co] in respect of the award". However, Ms Duncan also referred to a statement by C at the 4 October 2019 meeting that he was not sure that F Co "had received any payment and that he believed that the funds were being held by its lawyers".

ii) C's response asserted that F Co was not under the Defendant's control, and that F Co "had entered into separate agreements with third parties in relation to the sums claimed in the arbitration and that [F Co] would not be paying [G Co]". The thrust of the Defendant's position at this point, therefore, was that an Acceleration Event would only occur if F Co had paid G Co, albeit C stated that he also did not know if E Co had made a payment to F Co. C did not suggest that the 2018 Settlement Agreement was subject to a binding common understanding that an Acceleration Event would only occur if there had been payments to F Co and on to G Co, but instead stated:

> "At that meeting [on 4 October 2019] the Defendant and the Claimant recognised the need for the terms of the 2018 Settlement Agreement to be revisited bearing in mind the new reality due to the change of circumstances surrounding the [F Co] award".

iii) In response on 22 November 2019, D focussed on the Defendant's argument that payment had to be made to G Co. In that context, she stated:

> "In clause 3.5 of the 2018 Settlement Agreement, the Defendant agreed (in essence) that if [F Co] receives from [E Co] an amount greater than the Principal Amount, he is to pay the outstanding Principal Amount within 14 days".

I reject any suggestion that this summary of the "essentials" of clause 3.5 – which I have found to be inaccurate – was the result of a binding common assumption that clauses 3.5 and 3.8 would operate otherwise than in accordance with their express terms. Rather, it reflected the focus on the Defendant's argument as then being advanced.

iv) The Defendant served his Defence on 11 May 2020. That did plead a common assumption as to the operation of clause/para. 3.5, albeit not the common assumption which Mr Power advanced on his behalf at the hearing:

> "It was the common understanding and/or shared assumption of the parties that [E Co] would pay [F Co] under the Partial Award … and that if [E Co] paid under the Partial Award this would result in [G Co] being paid an amount equal to or greater than the Principal Amount … It was never the parties' intention that, in circumstances where [F Co] received a

> significantly smaller sum from [E Co] and was unable to (and/or did not) pay G Co, and/or where [G Co] had no chance to access the funds paid by [E Co] because they were paid out to third parties, the Principal Sum and Accrued Interest would fall due".

Once again, the principal thrust of this Defence was that the common assumption was that funds had to reach G Co for an Acceleration Event to occur.

v) C's third witness statement, served on 9 June 2020, stated:

> "I explained to the Claimant my very limited understanding which was that [F Co] was paid around $200 million against a claim of [a significantly larger sum]. I also understood that [F Co's] creditors had already ear-marked that money and that [G Co] was unlikely to receive anything. My understanding is that [E Co] paid the settlement money directly to third party creditors via [F Co's] lawyers".

His evidence as to the alleged common assumption was essentially in the same terms as the pleading, suggesting that the common assumption was as follows:

> "If [E Co] paid under the Partial Award this would result in [G Co] being paid an amount equal to or greater than the principal sum, enabling [the Defendant] to pay the principal amount in short order, and that the Acceleration Event would only occur in those circumstances …
>
> It was never the parties' intention that, in circumstances where [F Co] received a significantly smaller sum from [E Co] and was unable to or did not pay [G Co], or where [G Co] had no chance to access the funds paid by [E Co] because they were paid out to third parties, that the Principal Sum and Accrued Interest would fall due".

However, he offered no evidence (either in his witness statement or at the hearing) as to how he became aware of the alleged common assumption or how it had manifested itself.

vi) It was to that case, and the suggestion that money had to reach G Co, that the Claimant's evidence was particularly directed. Thus the Claimant's witness statement of 7 July 2020, when addressing C's evidence of the alleged common assumption, stated "the Acceleration Event is expressed very clearly to arise if [F Co] receives an amount greater than the Principal Sum". Once again, I do not accept that this inaccurate summary of the effect of the terms of clause 3.5 reflected a binding common assumption as to its operation. It merely reflected the fact that the Defendant's case, to which the Claimant was responding, had focussed on the need for money to reach G Co. In any event, in the same statement, the Claimant summarised his understanding of clause 3.5 in different terms:

> "This Acceleration Event is described at clause 3.5 of the Consent Award – if any payment is made by or on behalf of [E Co] or received by or on behalf of [F Co]".

The Claimant's third witness statement was similarly directed to the argument that funds had to reach G Co before an Acceleration Event could occur, but he did emphasise that the agreement had been carefully recorded by lawyers in the 2018 Settlement Agreement.

66. The Claimant gave inconsistent evidence in cross-examination as to his understanding of how clause/para. 3.5 was intended to operate. On occasions, he accepted Mr Power's suggestion that he and the Defendant understood when the 2018 Settlement Agreement was concluded that clause/para 3.5 would only operate if a payment was made to F Co. On other occasions, he suggested that what mattered was whether payments were made by E Co to companies controlled by the Defendant, and on yet further occasions that all that mattered was that the payment was made by E Co in respect of its liability to F Co, whoever the payee(s) might be. I have concluded that no one of these suggestions is any more reliable than the others, with the Claimant's inconsistency reflecting the fact that he was simply not closely involved in matters of this kind, which he left to his lawyers. Mr Power's response to another part of the Claimant's evidence which mis-summarised the legal effect of the 2018 Settlement Agreement – "well that's different to what the clause says" – is equally apposite here.

67. I am satisfied that there was no common understanding as to the operation of clause/para, 3.5 which has the effect that the provision does not operate in accordance with its clear terms. I have explained that clauses/paras. 3.5 and 3.8 both clearly provide as alternative routes to an Acceleration Event payments by or on behalf of E Co in respect of the Partial Award, or payments received by or on behalf of F Co in respect of the Partial Award. That was clearly a deliberate drafting choice and one which, as I have explained, makes commercial sense when viewed against the background (as I have found) of the Defendant leading the Claimant to believe that the Defendant was in a position to control F Co. It is, to my mind, inconceivable that the 2018 Settlement Agreement was approved and signed in this form without either party or their lawyers picking up the very significant difference between clauses 3.5 and 3.8 as drafted, and what is now said to have been the common understanding of the parties as to the deal done.

68. I accept that the Claimant, when he met the Defendant on 4 October 2019, may not have properly understood how clause 3.5 worked, any more than he had a clear understanding on this issue when giving evidence. I say "may not" because C gave evidence which suggested that in the run-up to and at that meeting there was a disagreement between the parties as to the operation of that clause and whether it was triggered by a payment by E Co. However, if there was such a misunderstanding, that was not because there was a binding common assumption as to how clause 3.5 was to operate, but (as I have stated) because the Claimant relied on his lawyers for technical matters of that kind. The Claimant's English lawyers, in their letter of 8 October 2019, did refer to clause 3.5 in terms consistent with the correct construction of that clause, saying that an Acceleration Event occurred "in the event that any payment is made by or on behalf of [E Co] in respect of the Partial Award … such that the payment exceeds the Principal Amount".

69. The Defendant's case as to the parties' understanding of how clause 3.5 would operate has also varied over the course of these proceedings. His initial case was that the parties had recognised one year on "the need for the terms of the 2018 Settlement Agreement to be revisited bearing in mind the new reality due to the change of

circumstances surrounding the [F Co] award". That became a case (not put to the Claimant in cross-examination, no doubt because it was obviously unsustainable) that the money had to reach G Co for there to be an Acceleration Event and/or that an Acceleration Event would not apply if the amount paid to F Co was a "significantly smaller sum" than the amount of the Partial Award. The case pursued at trial was that there was a common assumption that money had to be paid to F Co rather than, for example, to F Co's lawyers who then paid F Co's creditors. C's evidence on this issue was in the most general terms, and (as I have stated) did not identify when and how this common assumption was said to have been formed or manifested. There was no evidence from the Defendant at all.

70. This material comes nowhere near the cogency required for me to conclude that there was a binding common assumption between the Claimant and the Defendant, somehow overlooked by both their legal teams and other advisers when drafting the 2018 Settlement Agreement, that an Acceleration Event would only occur if there was a receipt by F Co.

71. In any event, even if (notwithstanding the clear terms of clauses/paras. 3.5 and 3.8) it was necessary that a "payment [be] received by or on behalf of [F Co] (or any nominee or agent or assignee thereof)" before an Acceleration Event occurred, then this condition was satisfied. Payment of funds to F Co's lawyers, which were then applied with F Co's agreement to discharge F Co's debts, were payments received "by or on behalf of" F Co. In this regard, it is very difficult to see how the parties can ever have contemplated a difference between the position where F Co assigned its right to the settlement payment to a third party (clearly covered by clause 3.5), and one where F Co agreed as a term of the settlement that liability under the Partial Award would be discharged by a payment by E Co to a third party (still less when the payment is made to F Co's own lawyers, who directed the payment to a third party under an agreement between F Co and E Co).

72. In these circumstances, it is not necessary for me to consider the other issues raised by the Claimant in response to the estoppel plea, including the arguments that:

    i) as a matter of law (applying Keen v Holland [1984] 1 WLR 251) an estoppel by convention cannot arise in relation to the effect of a term of contract which the parties are said to have entered in reliance on the common understanding (which must be pursued by a plea in rectification or not at all), as opposed to a common understanding acted upon after the contract has been concluded; and

    ii) the terms of the entire agreement clause in this case preluded such an argument.

Has an Acceleration Event occurred and with what consequences?

73. The following matters are not in dispute:

    i) A payment of $200m was made by E Co to F Co's lawyers in respect of the Partial Award.

    ii) This exceeded the Principal Amount.

iii) No payment of the Principal Amount has been made by the Defendant to the Claimant.

74. The only issue is when this payment took place. On the evidence I have heard, I have concluded that it is more likely than not that such payment had been made by 4 October 2019 when the parties met.

75. It follows that, subject to the alleged 4 and 11 October Agreements, the full amount of the Principal Amount and the Accrued Interest had fallen due by 25 October 2019.

THE ALLEGED 4 AND 11 OCTOBER AGREEMENTS

What happened at the 4 and 11 October meetings?

76. It is the Defendant's case that at the 4 October meeting:

i) He informed the Claimant that G Co would not be receiving any money as a result of the payment by E Co to F Co in relation to the Partial Award.

ii) The Defendant offered to explore "alternative security" and the possibility of an "accelerated payment schedule".

iii) The Claimant agreed not to enforce his rights "pending the parties agreeing alternative security arrangements and/or potential acceleration of future payments".

77. It is pleaded that these agreements or understandings were reiterated at the 11 October 2019 meeting. However, in his oral evidence, C offered a rather different account of the 11 October meeting, accepting that the Defendant's inability to provide the Claimant with a copy of the settlement agreement between E Co and F Co led to the meeting terminating before any negotiations took place, caused what C described as "the collapse of the agreement" and that the Claimant left saying he "wanted to think about his options".

78. It is common ground that the settlement agreement was discussed at the 4 October meeting, and I accept the evidence of the Claimant and D that the Defendant said he would obtain a copy of that agreement. I also accept that:

i) The Defendant made some reference to delay in paying the 1 October 2019 instalment because of technical banking issues.

ii) The Defendant stated that payments under the settlement between E Co and F Co would go to third parties.

iii) The Defendant expressed his willingness to continue to pay by instalments and to provide a new security over receivables under a court claim relating to certain petrol stations.

iv) The Defendant also offered the potential acceleration of payments.

79. However, I do not accept that there was any agreement or clear statement by the Claimant that he would not enforce his legal rights. When tested against the

surrounding facts, the documentary record and the inherent probabilities, I found that the evidence of the Claimant and D denying that there had been any such agreement or statements persuasive. While C gave evidence in his witness statement that there had been such an agreement, his oral evidence was in places rather more equivocal, suggesting that the "take-away" from the discussion was that the Claimant would "not need" to accelerate the full debt if a further agreement could be negotiated. Further, he accepted that he personally understood that there would be no legally binding agreement until a written agreement had been concluded.

80. There are a number of matters which reinforce that conclusion.

81. First, this would have been a remarkably uncommercial agreement for the Claimant to make. It would involve the Claimant giving up any right to accelerate the full debt for some indeterminate period in return for nothing more than the possibility that the Defendant would offer some further security or an accelerated payment schedule. And it would involve the Claimant acting in this way, even though he had asked at the 4 October meeting to see a copy of the settlement agreement between E Co and F Co, and when the Defendant had at the very least said he would try and get a copy of that agreement. As I have stated, I accept the Claimant's evidence that he was suspicious of the Defendant when attending these meetings – taking the view that "they were fooling us around" – and in these circumstances, it is highly improbable that the Claimant bound himself to stay his hand when he was receiving nothing of significance in return.

82. Second, the lack of any contemporaneous documents supporting the existence of the 4 October 2019 Agreement is striking. Leggatt J in Blue v Ashley [2017] EWHC 1928 (Comm), [65] noted:

> "It is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. In the twenty-first century, the prevalence of emails, text messages and other forms of electronic communications is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint".

Earlier in his judgment, at [49], Leggatt J had stated:

> "Because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances- tend to suggest that no contract was in fact concluded".

83. These observations apply with even greater force here given the background to the 4 October 2019 meeting. The arbitration settled by the 2018 Settlement Agreement had involved the Defendant seeking to resist a liability arising clearly on the terms of formal legal documents by an alleged, but disputed, oral agreement. Not only is it improbable that the Claimant would have entered into such an agreement on 4 October 2019 without ensuring its scope was properly and formally documented (particularly when D was present), but the Defendant and C, surely by this point fully alive to the forensic difficulties of relying on alleged oral agreements unsupported by

(internal or external) documentary corroboration, would themselves have taken steps to address that forensic vulnerability on this occasion.

84. However, not only is there no such documentary support, but on the contrary (and by way of a third significant factor weighing against the Defendant's argument), the documentary record is entirely inconsistent with the Defendant's case.

i) On 7 October 2020, D sent Ms Duncan of the Claimant's solicitors an account of the 4 October meeting which contains no reference to the 1 October 2019 instalment or any agreement relating to it, but which did refer to the Claimant's intention to accelerate the debt. That account records the matters I have set out in [78] above but states:

> "Despite this discussion we believe that we have to prepare ourselves for enforcement of the current security. Please let me know when you are prepared to discuss our further steps".

Had there been an agreement or assurance by the Claimant at the 4 October meeting not to exercise his rights, D would have said so.

ii) On 8 October 2019, the Tuesday after the Friday meeting on 4 October 2019, the Claimant's solicitors sent the Defendant's solicitors a letter stating:

> "Under Clause 3.2 of the Award, your client was obligated to pay an instalment of $1.25 million on or before 1 October 2019. No such payment has been made. Your client is therefore in breach of the Award. Under Clause 3.3 of the Award, payment in full, including Accrued Interest, is now due and owing".

There was no attempt on the Defendant's side to challenge this assertion or suggest it was contrary to a binding agreement reached two working days before. I did not find C's explanation for this failure (that there was no need to reply because there was to be a further meeting between the Claimant and the Defendant) convincing. Against the background of the disputes settled by the 2018 Settlement Agreement, the implications of not responding to this letter if there had been a binding agreement or enforceable assurance of the kind alleged would have been obvious.

iii) While the Defendant claims the 4 October 2019 Agreement was "reiterated" at a further meeting on 11 October 2019, when the Claimant issued his Arbitration Claim Form on 14 October 2019 seeking to enforce the Consent Award in its full amount, the Defendant's response was not to suggest that this was contrary to an agreement reached on 4 October and reiterated on 11 October 2019. Rather the Defendant's lawyer stated on 24 December 2019:

> "The payment on which we were late, which triggered the default, was eventually made".

85. Finally, in so far as an attempt is now made to argue that there was an agreement on 4 and/or 11 October 2019 that the Claimant would not exercise his rights arising out of the occurrence of an Acceleration Event, then in addition to these matters, it is

inherently improbable that the Claimant would have given such a commitment or assurance when he had not even seen the settlement agreement between E Co and F Co and when the Defendant had offered (at the very least) to seek to procure a copy.

86. In these circumstances, I have concluded that there was no agreement reached at the 4 or 11 October 2019 meetings to the effect the Defendant contends for, nor anything approaching an unequivocal promise or assurance by the Claimant that he would not enforce his legal rights arising from the late payment of the 1 October 2019 instalment, or such rights as would arise if an Acceleration Event had occurred. The Defendant may well have hoped the Claimant would stay his hand while other possibilities were explored, but he must have known he had secured no binding agreement or clear assurance to this effect.

Other deficiencies in the Defendant's case on the alleged 4 and/or 11 October 2019 Agreements

87. Given my conclusions on these primary issues of fact, I can deal with the other deficiencies in the Defendant's case on the 4 and/or 11 October 2019 meetings more briefly.

88. First, to the extent that the Defendant relies on an oral contractual variation:

    i) Any such oral agreement is precluded by the "No Oral Modification" clause in the 2018 Settlement Agreement (I deal with the suggestion that this argument can be defeated by an argument based on estoppel below).

    ii) There was no consideration for any such variation (applying the rule in Foakes v Beer [1884] 9 App Cas 605 and In re Selectmove Ltd [1995] 1 WLR 474). In this case, on his own evidence, all the Defendant says he offered in return for the Claimant's promise was an agreement to "explore" alternative security, and the "potential acceleration" of future benefits. Even if practical benefit of some kind is sufficient consideration in this context (and I do not think the facts alleged by the Defendant can be meaningfully distinguished from those in Foakes v Beer), there was simply no content to the Defendant's offer such that it can be said to have involved benefit of any kind to the Claimant, or detriment to the Defendant.

89. Second, so far as the Defendant relies upon various species of estoppel:

    i) Even on the Defendant's own accounts of the conversation, as advanced through C, there was nothing which was sufficiently clear or unequivocal to have founded an estoppel. At best, there were vague statements by the Defendant of indeterminate content and duration, on which the Claimant did not immediately close the door. That finding is also fatal to the argument that the Claimant waived his right to accelerate the full debt.

    ii) Indeed C accepted, in his evidence, that he understood at the 4 and 11 October meetings that there would be no binding agreement unless and until matters had been reduced to writing in a formal document.

iii) There was no reliance by the Defendant on the assurances or promises he says were made, nor are there any matters which would now make it inequitable for the Claimant to enforce his legal rights. C accepted that the 1 October 2019 instalment had been paid as quickly as the Defendant could pay it, and was not delayed because of any understanding with or assurance by the Claimant. There was no other pleaded form of reliance, nor any other reliance which was the subject of evidence. In any event the suggestions that holding some generalised discussions about a possible variation in terms, attending for what I have found was a brief and abortive meeting on 11 October 2019, or not answering the letter from the Claimant's solicitors sent on 8 October 2019 constituted reliance or made it inequitable for the Claimant to enforce his legal rights are hopeless – not only because of the wholly insubstantial nature of the acts in question, but because they were not taken on the basis of anything the Claimant had said, but as part of the Defendant's desire for his own purposes to negotiate a revised arrangement.

iv) As from 8 October 2019, it must have been clear to the Defendant that the Claimant was standing on his legal right to accelerate the debt.

90. Finally, the "No Oral Modification" clause presents a further obstacle to a successful estoppel plea arising from the 4 and/or 11 October 2019 meetings. Lord Sumption JSC delivering the majority judgment in MWB Business Exchange Centres Ltd v Rock Advertising Ltd, [16], held:

> "The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon the terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding the informality; and (ii) something more would be required for this purpose than the informal promise itself".

91. In circumstances in which the parties had agreed that oral promises would not have the effect of varying their contract, such a promise cannot of itself provide the necessary representation, promise or manifestation of a common assumption for an estoppel in the terms of the alleged variation, any more than an oral promise of guarantee which falls foul of s.4 of the Statute of Frauds 1677 can satisfy one of the ingredients for an estoppel in that context (Actionstrength Limited v International Glass Engineering IN.GL.EN. SpA [2003] UKHL 17).

92. In this case, there were no words or conduct at the 4 or 11 October meetings which could be said unequivocally to represent or promise that any variation would have effect notwithstanding its informality. That is not only fatal to any estoppel argument directed specifically to the "No Oral Modification" clause, but to any estoppel argument generally which seeks to give legal effect to the informal promise. That is because the Defendant's inability to overcome the "No Oral Modification" clause precludes reliance on the informal promise as one of the ingredients of the estoppel plea.

CONCLUSION

93. It follows that, despite Mr Power's skilful and steadfast submissions on the Defendant's behalf, the Claimant is entitled to enforce the award for the Principal Sum and Accrued Interest pursuant to section 66 of the Arbitration Act 1996 and to obtain judgment in the amount outstanding.

94. On the evidence before me, which was not challenged, the amount outstanding was $34,138,331.17 as at 3 July 2020. I will ask the parties to agree the figure at the date of the s.66 judgment, which will be the date of hand-down of this judgment.