Neutral Citation Number: [2021] EWHC 3384 (Comm)

Case No: CL-2021-000211

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2021

Before :

MR JUSTICE FOXTON

- -

Between :

FRANEK JAN SODZAWICZNY

Claimant

- and -

SIMON JOHN MCNALLY

Defendant

- -
- -

David Caplan (instructed by **Charles Russell Speechlys LLP**) for the **Claimant/Respondent**
Bajul Shah (instructed by **Lexent Partners Limited**) for the **Defendant/Respondent**

Hearing dates:8 December 2021
Further written submissions: 9 December 2021
Draft Judgment to parties: 9 December 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

"Covid-19 Protocol: This judgment was 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 is deemed to be [Listed Time & Date]."

Mr Justice Foxton :

Introduction

1. This is the Defendant's ("Mr McNally's") application to set aside part of the order made by Cockerill J on 18 April 2021 ("the Cockerill Order") granting the Claimant ("Mr Sodzawiczny") permission under s.66 Arbitration Act 1996 to enforce the Third Partial Award of 9 December 2020 ("the Award") "in the same manner as a judgment or order of the court". Mr McNally seeks to set aside that part of the Cockerill Order which applies to "so much of the [Award] as relates to the Property".

2. "The Property" is a property in Mallorca which gave rise to one set of the issues in an LCIA Arbitration (LCIA Arbitration no 183969 – "the LCIA Arbitration") involving claims by Mr Sodzawiczny against Mr McNally, Dr Gerald Martin Smith and Mr Simon Cooper, and for which Mr Stuart Isaacs QC was appointed the sole arbitrator ("the Arbitrator").

3. In the LCIA Arbitration, Mr Sodzawiczny alleged that he had agreed with Mr McNally that the Property would be acquired for his benefit by a Spanish SL (originally called McNally Properties SL, later renamed Treehouse Properties SL, and which I shall refer to as "Treehouse Spain") which was in turn owned by an Isle of Man Company (McNally Properties (SP) Limited, later renamed Treehouse Investments Limited, and which I shall refer to as "Treehouse IOM") the shares in which were held by Mr McNally. The relief sought by Mr Sodzawiczny in relation to the Property was as follows:

   i) a declaration that Mr Sodzawiczny was the ultimate beneficial owner of the Property;

   ii) a declaration that Mr McNally held and holds on trust any powers or interests he had or has, directly or indirectly, in relation to the Property on trust for Mr Sodzawiczny; and

   iii) an order that Mr McNally transfer or do whatever is necessary to effect the transfer of the Property or its indirect ownership to Mr Sodzawiczny.

4. There was a live issue between the parties in the LCIA Arbitration as to whether the factual basis for the declarations sought was established on the evidence. There was also a dispute as to whether Mr McNally was (any longer) in a position to effect a transfer of Treehouse Spain (which was the legal owner of the Property). It was Mr McNally's case that his shareholding in Treehouse IOM was diluted to 0.2% on 25 September 2014, as a result of an issue of shares to GAC Holdings Limited ("GACH"). However, two months later, Mr McNally executed documentation in Mallorca which, if the transaction had completed, would have transferred 100% of the shares in Treehouse Spain to Mr Sodzawiczny.

5. It is also relevant to note in this context that Mr Sodzawiczny advanced a number of serious allegations against Mr McNally in the LCIA Arbitration. Those allegations were essentially upheld by the Arbitrator who found that Mr McNally was adept at using trusts, similar structures and nominee arrangements to hide the true beneficial ownership of entities in the ownership structures he established.

6. The Arbitrator found that Mr McNally had procured the acquisition of the Property for Mr Sodzawiczny and holds or held any interest in the Property on trust for Mr Sodzawiczny (Award, [372]). The Arbitrator noted that no issues had been raised by Mr McNally (who was represented in the LCIA Arbitration, as he is now, by Mr Bajul Shah) as to the terms of the declarations and orders sought. The Arbitrator considered the issue of relief at Award, [457]-[463]:

    i) He found that Mr Sodzawiczny was the ultimate beneficial owner of the Property ([460]).

    ii) He referred to the declarations and order sought by Mr Sodzawiczny (as set out at [3] above), noting that no argument had been advanced by Mr McNally "as to the terms of any declaration or order" ([460]).

    iii) He held that it was "appropriate to grant the Claimant declaratory relief and consequential orders" ([462]), from which it follows that the Arbitrator must have been satisfied that (i) the factual basis for the declarations sought had been made out and (ii) there was no obstacle to an order being made against Mr McNally in the terms sought.

7. These various findings were then reflected in the dispositive of the Award which (as amended by a Memorandum issued by the Arbitrator on 5 January 2021):

    i) "grants the Claimant a declaration that he was and is the ultimate beneficial owner of the Property" ("Declaration (1)");

    ii) "grants the Claimant a declaration that Mr McNally held and holds any powers or interests which he had or has, directly or indirectly, in relation to the Property on trust for the Claimant" ("Declaration (2)"); and

    iii) "orders Mr McNally to transfer or do whatever is necessary to effect the transfer of the Property (or its indirect ownership) to the Claimant" ("the Transfer Order");

    the Arbitrator reserving jurisdiction over "all other requests and claims, including questions of costs and interest, to one or more future awards".

8. Mr McNally's application seeks to set aside the Cockerill Order so far as it concerns Declarations (1) and (2) and the Transfer Order.

S.66 Arbitration Act 1996

9. S.66 of the Arbitration Act 1996 provides:

    "(1) 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 sought to be enforced shows that the tribunal lacked

substantive jurisdiction to make the award. The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1996 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

10. S.66, therefore, provides for two alternative orders the court may make to assist with the enforcement of an arbitration award –ordering that the award may be enforced in the same manner as a judgment or order of the court "to like effect" and entering judgment in the terms of the award. The second of those options was introduced by s.10 of the Arbitration Act 1934, supplementing the power to provide relief in the form of the first option introduced by s.12 of the Arbitration Act 1889. The power now provided for by s.66(2) was introduced following the Report of the Committee on the Law of Arbitration chaired by Sir Frank MacKinnon (1927, Cmd No 2817, [17]), and was intended to provide for those cases in which a judgment was necessary, either for the purposes of enforcement abroad (including in Scotland) or in order to serve a bankruptcy notice (in the light of the decision in Re A Bankruptcy Notice [1901] 1 KB 31). There is an important difference in the status of the two orders. An order giving the award creditor permission to enforce an award in the same manner as a judgment does not result in a court order which is amenable to the court's contempt jurisdiction: ASM Shipping Ltd of India v TTMI Ltd of England [2007] EWHC 927 (Comm), [26]. By contrast, an order of an appropriate kind which is entered as a judgment under s.66(2) is potentially subject to this jurisdiction.

11. It has long been recognised that s.66 (whichever option is followed) is intended to provide a summary form of procedure which achieves the outcome otherwise obtainable by an action on an award (see for example Mustill and Boyd, *Commercial Arbitration* (2nd), 419, Coastal States Trading (UK) Ltd v Mebro Mineraloelhandelsgesellschaft GmbH [1986] 1 Lloyd's Rep 465, 467 and West Tankers Inc v Allianz SpA (The Front Comor) [2012] EWCA Civ 27, [36]-[38]).

12. It is clear that the court has a discretion as to whether to make an order in either form ("may, by leave of the court"). The Department Advisory Committee ("DAC") on Arbitration Law, in their *Report on The Arbitration Bill* (February 1996) considered whether the Act should incorporate guidance as to the circumstances in which the court should refuse to make an order under s.66, consultees on the draft bill having raised in particular the position of awards on matters which were not arbitrable, or where enforcement of the award "would improperly affect the rights and obligations of those who were not parties to the arbitration agreement." The DAC was initially attracted to including specific provision in s.66 identifying these as two cases where enforcement would be refused ([373]-[374]). However, in their *Supplementary Report on the Arbitration Act 1996* of January 1997, the DAC decided against that course ([32]).

13. The guidance as to the criteria by reference to which that discretion is to be exercised (so far as relevant to the present application) can be summarised as follows:

i) Leave should readily be given to enforce an award as a judgment (Middlemiss & Gould v Hartlepool Corporation [1972] 1 WLR 1643, 1646H, rejecting the

more cautious approach previously suggested by Scrutton LJ in In re Boks & Co and Peter Rushton & Co Ltd [1919] 1 KB 491, 497).

ii) Despite some suggestions to the contrary (see e.g. Margulies Bros Ltd v Dafnis Thomaides & Co (UK) Ltd (No 2) [1958] 1 Lloyd's Rep 205, 207 and Tongyuan (USA) International Trading Group v Uni-Clan Ltd 19 January 2001, transcript pages 19-20), it is now clear that a declaration made by the arbitrator can be the subject of an order under s.66: see African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG [2011] 2 CLC 761, [20]-[22]; The Front Comor [2011] EWHC 819 (Comm), [28]; [2012] EWCA Civ 312, [36]-[37].

iii) If the relief granted by the award is not sufficiently clearly stated, that will be a reason to refuse a s.66 order. This was the position in Margulies Bros Ltd, where the award was intended to identify an amount payable by one party to the other but did not identify sufficiently clearly the amount or how it was to be calculated (as that decision has been explained in Tongyuan, p.8 and African Fertilizers, [21]). That includes cases in which the effect of the award cannot be framed in terms which would make sense "if those were translated straight into the body of a judgment" (Tongyuan, p.8) or where the operative parts of the award which would fall to be enforced are inconsistent or ambiguous (Moran v Lloyd's [1983] QB 542, 550: "the executive power of the state to enforce an award is not to be invoked in an inconsistent or ambiguous form").

iv) That applies to an award of injunctive as well as declarative relief (e.g., Birtley & District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No 2) [1960] 1 QB 1, 19).

v) In the event of such ambiguity or inconsistency (and by analogy with the position under s.100 and following of the Arbitration Act 1996), for the reasons explained in Norsk Hydro ASA v State Property Fund of Ukraine and others [2002] EWHC 2120 (Comm), [17]-[18], the court is "neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions." If, therefore, the terms of the award are such as to render enforcement by the court's processes inappropriate without some form of elaboration or refinement, then, save in cases of true slips or changes of name, enforcement will be refused. To do otherwise "necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal." However, "the court should not … be astute to find difficulties of construction of awards or, for that matter, judgments, where none really exist" (Tongyuan, 11).

vi) As is clear from the terms of the DAC Reports quoted at [12] above, an application under s.66 will be refused to the extent that the award concerns a dispute which, under English law, is not arbitrable. This is one manifestation of the court's power to refuse enforcement on public policy grounds, as to which see Soleimany v Soleimany [1999] QB 785.

vii) As noted above, the DAC reports also make it clear that an order may be refused where it "would improperly affect the rights and obligations of those who were not parties to the arbitration agreement". It is not necessary to determine the

precise scope of this ground but it must include those cases in which the courts would refuse injunctive relief or specific performance because of the existence of a prior third party right the impact of such an order would have on third parties (see *Snell's Equity* 34th para. 17-035 and the reference to this principle of equity in the s.66 context by Clare Ambrose in Sterling v Rand [2019] EWHC 2560 (Ch), [80]).

viii) The court will not itself enter a declaratory judgment under s.66(2) in the terms of a declaration already made by the arbitrator if it is not in the interests of justice to do so, for example because such a declaration is not necessary: The Front Comor, [28] (Field J), [38] (CA).

14. One issue which the authorities do not directly address is how far, when the relief granted by the arbitrator is relief which is discretionary under English law (such as a declaration, injunctive relief or an order for specific performance), the arbitrator's decision to grant such relief is conclusive on the s.66 application, or whether the court is required to make that determination *de novo*:

i) In favour of the latter view is the fact that an application under s.66 is intended to be a summary form of procedure which does not differ in substantive terms from an action to enforce the award: see [11] above. An action on an award is rationalised as a conventional contractual claim to enforce the implied promise to comply with the award (see *Mustill & Boyd* page 417 and London Steam-Ship Owners' Mutual Insurance Association Limited v The Kingdom of Spain, the French State (The Prestige (Nos 3 and 4)) [2021] EWCA Civ 1589, [108]). Historically at least, the grant of discretionary relief on the conclusion of such an action has been treated as being subject to the general considerations governing the granting of such relief in contractual claims (see *Mustill & Boyd, 417* footnote 12 and Blackett v Bates (1865-66) LR 1 Ch App 117, 124 where Lord Cranworth LC held that "the rights of the parties in respect of specific performance are the same as if the award had been simply an agreement between them". There is a statement to similar effect in *Fry on Specific Performance* (6th) [1593], which, when discussing orders for specific performance of arbitral awards, observes that "the interference of the court in these cases being in exercise not of any jurisdiction peculiar to awards, but of its ordinary jurisdiction as applied to the specific performance of contracts, it follows that many, if not all, of the principles applicable to ordinary actions of that nature must apply".

ii) While it might be said that the implied promise to honour the award must also extend to honouring any discretionary relief ordered by the arbitrator, the parties' agreement as to the suitability of discretionary relief does not in general oust the court's discretion to determine whether to order or withhold such relief (Warner Bros Pictures Inc v Nelson [1937] 1 KB 209, 220-221 and Awbury Technical solutions llc v Karston Management (Bermuda) Ltd) [2019] EWHC 233 (Comm), [57]-[58]).

iii) The granting of declaratory relief is also discretionary, albeit the factors conditioning the exercise of that discretion are essentially those of whether there is a "live dispute", the utility of any declaration and fairness as between the parties (Brent v Malvern Mews Tenants [2020] EWHC 1024 (Ch), [13]-[14]).

The Court of Appeal in The Front Comor, [37] noted that where a party to an arbitration award had obtained declaratory relief and then brought an action on the award, the court "*if it thought appropriate* could itself make a declaration in the same terms", with s.66 being "a simpler alternative route to bringing an action on the award". There is scope for debate as to whether that requires the court to determine for itself whether a court declaration is appropriate at all (e.g. whether there is a sufficiently live controversy) or whether, as I think is likely to be the case, the issue for the court is the rather different one of whether there is any need for (in effect) a second declaration. While a s.66 order in respect of some forms of discretionary relief may allow the award creditor to use the conventional means for enforcing court judgments, in many cases, the granting of declaratory relief by the court will not add anything to the benefits the award creditor has obtained from the declaration by the arbitrator: The Front Comor, [28] (Field J).

iv) In approaching these questions it is also necessary to have regard to the principle of non-intervention enshrined in s.1(c) of the Arbitration Act 1996, and the strong English public policy which favours the enforcement of arbitration awards (IPCO (Nigeria) Limited v Nigerian National [2005] 1 CLC 613, [25]). Clearly the s.66 application is not intended to allow an award debtor, in general terms, to re-open battles which were (or should have been) fought in the arbitration.

15. I have concluded that the approach which I should adopt is as follows:

i) It will always be open to a court to refuse a s.66 order in respect of relief ordered by the arbitrator which is unclear, or which would not make sense if incorporated into a judgment.

ii) Similarly, as in most cases the making of a declaration by the arbitrator will give the award creditor the benefit which such relief is intended to bring, it will always be open to a court to refuse a s.66 order in respect of a declaration where no useful purpose would be served in doing so. This is not to interfere with or undermine the award, but to recognise that in such a case, the award represents sufficient relief in itself.

iii) Where the discretionary relief is prescriptive rather than declaratory, then the decision of the arbitrators on those issues relevant to the granting of discretionary relief which arise only as between the parties to the arbitration, and do not engage any independent interest of the court, should not normally be open to re-argument at the s.66 stage. That would include such issues as whether damages are an adequate remedy for the breach, whether the applicant applied for such relief with sufficient despatch, whether they acted with clean hands in the period up to the award, and (as in this case) whether Mr McNally owned or controlled the asset in respect of which the Transfer Order was sought.

iv) However, as the DAC Reports noted (see [12] above), the impact of discretionary relief on third parties is an issue which may lead the court to refuse a s.66 order. This concern can also be seen in the significance attached to the impact of the determination of a dispute on the rights of third parties when addressing the issue of arbitrability (see e.g., Fulham Football Cub (1987) Ltd v

Richards [2012] Ch 333, [40]). Arbitration is essentially a bilateral and consensual process, and the arbitration award binds only the parties to the arbitration agreement or those claiming through or under them (s.58(1) of the Arbitration Act 1996). By contrast, court judgments have the potential to impact third parties, and interested third parties are often able to apply to join in court proceedings to protect their positions (Sterling v Rand, [70]). For this reason, I am satisfied that it is open to the court faced with a s.66 application to determine whether third party interests provide a reason not to allow an award to be enforced as if it were a court judgment, or to enter a judgment in terms of the award, and any decision by the arbitrator on this issue will not be determinative at the s.66 stage.

v) Similarly, the court will reach its own determination as to whether granting a s.66 order in the terms of an award would engage independent interests of the court, such as difficulties for the court in supervising compliance with the order made by the arbitrator if the effect of the s.66 order were to require it to do so, or where the order concerns a contract of a kind for which it would not be appropriate for the coercive powers of the courts to be used to compel performance (e.g. certain contracts for personal service).

vi) In an appropriate case, there seems to be no reason why the court could not have regard to events which occurred after the making of the award when deciding whether or not to make a s.66 order. This might, in an appropriate case, include the applicant's conduct (as in Blackett, p.126).

vii) Different considerations are likely to apply where any attempt is made to engage the court's jurisdiction to commit the award debtor for contempt for failure to comply with a judgment entered in the terms of an award under s.66(2), but as this issue is not engaged by the s.66(1) order in this case, it is not necessary to consider what they might be.

16. I will now consider the application of these principles on the facts of this case.

Mr McNally's preliminary points

Was the Award made "pursuant to an arbitration agreement"?

17. Mr Shah for Mr McNally argues that Mr Sodzawiczny bears an initial burden of proving that the award was made "pursuant to an arbitration agreement", which, he says, requires Mr Sodzawiczny to prove that the Arbitrator had jurisdiction to make the orders relating to the Property. This submission is misconceived. These words appear in s.66(1), which is to be read together with s.5(1) of the Act, for the purpose of establishing that the procedure only applies to arbitrations conducted pursuant to a written rather than oral agreement. On the contrary, s.66(3) makes it clear that the burden of proving lack of jurisdiction lies on the party seeking to resist a s.66 order, and that the right to raise such an objection may be lost in the circumstances set out in s.73. The reverse burden of proof in a s.66 application is one of the advantages which the procedure offers an award creditor as compared with an action on the award (Sovarex v Romero Alvarez SA [2011] EWHC 1661 (Comm), [40]-[43]).

Was the dispute insofar as it related to the Property arbitrable?

18. Mr Shah also argues that the court should refuse a s.66(1) order in respect of those parts of the Award which relate to the Property because those disputes were not arbitrable. I accept that if an award purports to determine issues which are not arbitrable as a matter of English law, then the court should refuse a s.66(1) order for what would, in effect, be reasons of public policy (see Riverrock Securities Limited v International Bank of St Petersburg [2020] EWHC 2483 (Comm), [67]).

19. Mr Shah contends that, in this case, the Award purported to give Mr Sodzawiczny a right or interest in foreign land, and that such a dispute is not arbitrable because the Arbitrator's determination falls foul of the long-standing rule in British South Africa Company v The Companhia de Mocambique [1893] AC 602. The issue of whether the Mocambique rule would deprive an arbitration tribunal sitting in England (which is a private, non-sovereign, tribunal) of jurisdiction to determine a claim so far as it involved a determination of title to foreign land is not one which appears to have been subject to any authority. Nor has the linked question of whether, even if such a dispute is arbitrable, the court would be required to refuse s.66(1) or (2) relief in relation to such an award. It might be said that such an order would not involve the English court adjudicating on an issue of title to foreign land, any more than an order permitting the enforcement of a foreign judgment to the same effect by a court of the situs jurisdiction would (or, indeed, an award of an arbitral tribunal sitting in that jurisdiction). For present purposes, I shall assume in Mr Shah's favour that the Mocambique rule would have one or other of these effects, without in any way endorsing that assumption.

20. However, as Lord Mance noted in Pattni v Ali [2007] 2 AC 85, [26]), "it has long been accepted in England that an English court may, as between parties before it, give an in personam judgment to enforce contractual or equitable rights in respect of immovable property situated in a foreign country". In this case, the Award (only) adjudicates on what were said to be fiduciary duties owed by Mr McNally to Mr Sodzawiczny in relation to the Property (see Award, [458]). Mr Shah argued that this exception "has only been engaged where the defendant actually has an interest in the foreign land", and said that in this case, it did not apply because Mr McNally did not himself have such an interest. I am unable to accept this submission. If the Mocambique rule would not apply to a claim against Mr McNally that he held legal title in the Property on trust for Mr Sodzawiczny, I cannot see how it could apply to a claim that Mr McNally held rights in relation to companies in the ownership structure through which the Property was held. Such a claim is even more remote from the adjudication of title to foreign land at which the Mocambique rule is aimed. For the same reason, I am unable to accept Mr Shah's submission that the dispute relating to the Property was not arbitrable because it recognised an interest in Spanish real property which was not (or might not be) recognised under Spanish law. That argument fundamentally misstates the level at which the rights asserted in the LCIA Arbitration operate (namely as between Mr Sodzawiczny and Mr McNally).

21. Mr Shah advanced other public policy arguments as to why no s.66(1) order should be made:

    i) It was said that the Award did (or might) deprive Treehouse Spain of its interest in the Property when it had not had an opportunity to be heard on that issue, and thereby contravened Article 6(1) of the European Convention of Human Rights (a "no deprivation without representation" argument). However, (i) the Award makes findings only as to the obligations owed by Mr McNally to Mr

Sodzawiczny, and it orders no relief against Treehouse Spain (still less relief which deprives it of its interest in the Property), and (ii) the Award would only bind Treehouse Spain if it was Mr McNally's privy (in which eventuality Treehouse Spain will have had the opportunity of effective participation in the LCIA Arbitration through Mr McNally).

ii) It is said that disputes as to the ownership of interests in land, or perhaps foreign land, are not arbitrable. The former cannot conceivably be correct (see for example s.48(5)(a) of the Arbitration Act 1996, which carves out only a specific form of relief in relation to land from those remedial powers which an arbitral tribunal is presumed to have, but clearly presupposes such disputes are otherwise arbitrable). As to the narrower formulation, even if I were willing to make that significant assumption in Mr McNally's favour, this was not such a dispute, for the reasons given at [20] above.

Mr Sodzawiczny's preliminary point

22. Mr Sodzawiczny also takes a preliminary point, namely that the criticisms which Mr McNally now makes of the Declarations and the Transfer Order were matters which could have been raised by way of a challenge under s.68 of the Arbitration Act 1996 on the basis that they gave rise to a serious irregularity, and that, having failed to bring any such challenges within the permitted period, Mr McNally cannot raise the arguments now to resist Mr Sodzawiczny's application for a s.66(1) order.

23. There is scope for argument, which I need not resolve, as to whether it is ever open to a party to resist a s.66 order based on a "serious irregularity affecting the tribunal, the proceedings or the award" when the time for bringing a s.68 challenge has expired. The issue is discussed by Professor Merkin, *Arbitration Law* (Informa, Loose-leaf) [19.13] and in Sterling v Rand, [46]. In this case, however, the substance of the challenge is advanced on the basis of:

i) the alleged uncertainty or ambiguity of the Award;

ii) the impact on third parties if a s.66(1) order is made;

iii) the utility of the court giving permission to enforce the declarations already made by the Arbitrator; and

iv) public policy.

24. Even if some of those complaints could have been relied upon as the basis of a s.68(2) application, I am not persuaded that the failure to bring such application precludes those matters being relied upon in opposition to a s.66 application. Reliance in the s.66 context does not involve a challenge to the Award, but the distinct question of whether the processes of enforcement of English court judgments should be available in respect of the Award.

Declaration (1): that Mr Sodzawiczny was and is the ultimate beneficial owner of the Property

25. Mr Shah's first complaint about Declaration (1) is that it is too vague. Mr McNally professed no inability to understand the declaration when it was sought in the same terms in the LCIA Arbitration and, as Mr Shah accepted, no submission that it should not be made because it was too uncertain or ambiguous was made to the Arbitrator. In my view, read in the context of the Award, the meaning of Declaration (1) is clear enough. The Arbitrator found that it had been agreed that the Property would be acquired on Mr Sodzawiczny's behalf through a corporate structure which Mr McNally would establish. Against that background, the reference to "ultimate beneficial ownership" is clearly a reference to the fact that it is possible to trace the ownership of the Property to a company, whose ownership can in turn be traced to another company, through to Mr McNally who holds such rights as he has so far as they relate to the Property beneficially for Mr Sodzawiczny (see [3] to [6] above).".

26. Mr Shah also objects to Declaration (1) on the basis that the Property is land in Spain and "it is simply not known whether the concept of an `ultimate beneficial' owner of land" is recognised by Spanish law. However, the effect of Declaration (1) is not that there is a particular direct legal relationship between Mr Sodzawiczny and the Property arising under a particular system of law. The effect of the declaration is that if the chain of ownership of the Property is followed to its endpoint, it is Mr Sodzawiczny who is the beneficial owner at the top of that chain.

27. Next, Mr Shah complains that it is uncertain what legal consequences flow from such a factual determination. There is something in that criticism, and had Mr McNally been willing to engage with this issue in the LCIA Arbitration, it is possible that Declaration (1) could have been drafted in more specific terms. I accept that, for this reason, there may be some scope for third parties to misunderstand the intent and effect of Declaration (1). However, as between Mr Sodzawiczny and Mr McNally, the meaning of Declaration (1) is, in my determination, clear enough: see [25] above.

28. That brings me to Mr Shah's final argument as to why the court should not grant a s.66(1) order in relation to Declaration (1): that there would be no utility in doing so. I asked Mr Caplan what additional benefit a s.66(1) order might bring over and above that which the making of Declaration (1) by the Arbitrator had brought. Mr Caplan suggested that there was a realistic prospect of the s.66(1) order improving Mr Sodzawiczny's position in the event of an inconsistent claim being advanced by Mr McNally in other proceedings. In circumstances in which no application has been made to enter judgment in terms of Declaration (1), it was not entirely clear to me what steps Mr Caplan contemplated would or might be made by way of "enforcement" of Declaration (1). In any event, I was not persuaded on the evidence before me that there was any realistic prospect of Mr Sodzawiczny's position in relation to the effect of Declaration (1) being improved by the court making a s.66(1) order in respect of the Declaration that the Arbitrator had already made, particularly in circumstances in which the effect of the Declaration may not always be clear to third parties (see [27] above) and in which I am willing to grant a s.66(1) order in relation to Declaration (2) and the Transfer Order (as I explain below).

29. By way of a post-script, Mr Caplan argued that the issue for the court when it was asked to make a s.66(1) order so far as utility was concerned was whether there was utility in making such an order for the award *as a whole* rather than as to any particular declaration. He argued that in The Front Comor, where the issue of utility was discussed, the *only* relief in the award was declaratory in nature (although in fact

declaratory awards will frequently include orders as to costs, and the award considered by Beatson J in African Fertilizers did: see [5] above). I am unable to accept this submission. Even leaving aside the difficulty raised by a declaratory award which included a costs order, it would entail a different outcome under s.66(1) for the same arbitral declaration depending on what other relief the tribunal had ordered, and whether they had included that relief in the same award as the order for declaratory relief or in a separate partial award. It would also involve differential treatment if an application was made to obtain a s.66(1) judgment for only part of the award, as is clearly possible (see Continental Grain v Bremer [1984] 2 Lloyd's Rep 121, 124 and see also Merkin & Flannery, *The Arbitration Act 1996* (6th) [66.8])). Given the discretionary nature of the s.66 jurisdiction, I can see no reason why it should not be open to the court to grant a s.66 order in respect of some of the relief ordered by the arbitrator, not all of it, provided that the provisions are not interdependent, nor why the court cannot have regard to utility as a relevant criterion in doing so.

30. I am persuaded, therefore, that there would be no utility in making a s.66(1) order in respect of Declaration (1). That is not because the court entertains any doubt as to the efficacy of the Arbitrator's declaration as between Mr Sodzawiczny, Mr McNally, their privies and assigns, but because the court entertains no such doubt. As Toulson LJ noted in The Front Comor, [6];

> "Section 58 provides that, unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them, which plainly includes a subrogated insurer. In those circumstances, an independent observer might think it a pointless question whether such an award can be turned into a judgment of the court, since it is binding as a declaration of rights in any event, and in most cases he would be right."

31. This is such a case.

Declaration (2): that Mr McNally held and holds any powers or interests which he had or has, directly or indirectly, in relation to the Property on trust for the Claimant

32. Mr Shah suggests that Declaration (2) is unworkable or ambiguous in a number of respects because the words "directly or indirectly" are unclear. However, read in the context of the Award, it is clear that the words are intended to cover not simply rights Mr McNally has directly to the Property (and, as Mr Caplan confirmed, it is common ground that there never were any such rights, it having been agreed from the outset that the Property would be acquired by a company) but also any legal rights which Mr McNally has or had which enable him to take decisions in relation to the use and economic benefit of the Property, in particular rights in companies in the ownership structure. I do not accept that this language is too vague. As Mr Caplan points out, it is a standard feature of freezing order injunctions (see for example paragraph 6 of the Commercial Court form) which are enforceable by committal.

33. It was also suggested that Declaration (2) had no utility because Mr McNally "has no rights or interests in the Property itself" and "the declaration that he holds any rights and powers on trust for [Mr Sodzawiczny] has no practical utility or usefulness: there is nothing that he has which he can hold on trust for [Mr Sodzawiczny] as regards the Property". As to this:

i) As noted at [32] above, the real issue in the LCIA Arbitration was not whether Mr McNally held or holds an interest directly in the Property, but whether he held or holds an interest in the companies in the ownership structure through which the Property was acquired and owned.

ii) The argument that there is nothing which Mr McNally has which he can hold on trust as regards the Property is an assertion of contested fact which is inconsistent with the Arbitrator's decision to make Declaration (2) and the Transfer Order. In any event, Declaration (2) does not purport to determine what rights Mr McNally holds now in relation to the Property, merely to determine that such rights as he used to hold or still holds are held on trust for Mr Sodzawiczny.

34. Further, Declaration (2) is clear in its terms, expressly only addressing the position as between Mr McNally and Mr Sodzawiczny. An order under s.66(1) in respect of this declaration would be of obvious utility in circumstances in which Mr Sodzawiczny may wish to enforce or seek interim relief in relation to the trust obligations thereby recognised.

The Transfer Order: ordering Mr McNally to transfer or do whatever is necessary to effect the transfer of the Property (or its indirect ownership) to the Claimant

35. Mr Shah suggests that the Transfer Order is ambiguous or unworkable in three respects:

i) First, he says that the words "whatever is necessary" are ambiguous and unclear (positing the question of whether they required Mr McNally to take steps to discharge the mortgage over the Property or not). Mr Shah accepted that an order using the words "shall use reasonable endeavours" could not have been objected to on this basis (and it is, of course, possible that the Arbitrator would have made such an order if Mr McNally had engaged with the scope of the relief sought in the LCIA Arbitration and the Arbitrator had been persuaded by his submissions). This was so even though it is always possible to have an argument about whether "reasonable endeavours" require a particular step to be taken. The words "whatever is necessary" are, if anything, clearer, because they posit an absolute rather than relative obligation, but in any event the fact that there may be room for a factual dispute as to whether a particular step is necessary does not render the language unclear or unworkable, any more than a dispute as to what reasonable endeavours requires would.

ii) Second, it was said that the reference to transferring "indirect ownership" of the Property is unclear. However, read in context, it clearly means transferring the ownership of a company in the corporate chain which would bring with it (directly or indirectly) the ownership of the Property.

iii) Third, it is suggested that the word "or" is unworkable, because it is not clear whether the word provides for optional means of performance, and, if so, at whose option. I am satisfied that the order clearly gives Mr McNally the option of discharging the obligation by one of the specified means, and there is nothing unclear in an order in those terms (see e.g., s.3(2)(b) of the Torts (Interference with Goods) Act 1977).

36. Mr Shah also argued that a s.66(1) order in respect of the Transfer Obligation would serve no useful purpose because Mr McNally is not in a position to comply with such an order, not having ownership (even indirectly) or control of the Property. In so far as that seeks to re-argue the position as it prevailed in the LCIA Arbitration, it is not open to Mr McNally to do so, for the reasons set out at [15(iii)] above. Mr Shah also relied upon the fact that, between the completion of the evidence and the publication of the Award, Mr McNally resigned his positions as a director of Treehouse Spain and Treehouse IOM, being replaced in the former capacity by Mr Cooper and in the latter by his brother, Mr Anthony McNally. However, the issue of whether Mr McNally had thereby rendered himself incapable of complying with the Transfer Order (assuming, contrary to his case, that he would otherwise have been able to do so) is a strongly contested one. The timing of Mr McNally's resignations, and the identity of those who replaced him, against the background of the findings in the Award, raise legitimate areas of enquiry as to whether or not this was simply an anti-enforcement tactic, with Mr McNally remaining in control, and I understand that these are live issues in proceedings Mr Sodzawiczny has brought against Mr McNally in the Isle of Man.

37. Further, the s.66(1) order in relation to the Transfer Order does not have any immediate impact on Mr McNally, nor foreclose for all time the possibility of him arguing that he is unable to comply with it. Nor does the order bring the court's committal jurisdiction into play (see [10] above). It simply makes the court's processes of enforcement available to Mr Sodzawiczny. As and when applications are made for particular types of enforcement orders, it may be necessary for the court to consider whether it is persuaded that Mr McNally is genuinely unable to comply with the Transfer Order, and what significance that would have, or for Mr Sodzawiczny to consider whether he wishes to seek other relief for what would (on this hypothesis) be Mr McNally's breach of contract in failing to honour the Award. This is not a reason, in my determination, to refuse a s.66(1) order now.

38. Finally, Mr Shah argued that the court should set aside the s.66(1) order in relation to the Transfer Order because of the adverse impact which such an order would have on third parties, in particular Treehouse Spain, Treehouse IOM, GACH (together "the Corporate Third Parties") and Bankinter, which has a charge over the Property in respect of the loan it made to Treehouse Spain to enable the purchase of the Property.

39. I accept that the effect of making an order under s.66 on third parties is a relevant consideration for the court (see [15(iv)] above). Taking the third parties identified by Mr Shah:

    i) It is said that Treehouse Spain may be adversely affected if the Transfer Order causes it to lose the Property, and Treehouse IOM and/or GACH may be adversely affected if the Transfer Order leads to their shares in Treehouse Spain being transferred from them. However, the Transfer Order is only directed to and binding on Mr McNally. If the Corporate Third Parties are "true" third parties, rather than Mr McNally's privies, the Transfer Order will not bind them. If they are Mr McNally's privies, they are not third parties in the relevant sense and no issue of third party rights can arise in relation to them. In any event, the order clearly requires Mr McNally only to take lawful steps to procure the transfer. If, exercising such powers of control as he has, Mr McNally is able to procure a transfer by the owner of the Property or relevant shares, that will not

involve prejudice to the Corporate Third Parties, merely a lawful transaction which the organs of management of those entities have decided to enter into.

ii) So far as Bankinter is concerned, there is no prospect of any transfer defeating its mortgage over the Property. The fiduciary obligations which Mr McNally has been found to owe to Mr Sodzawiczny cannot override Bankinter's registered charge over the Property. If Mr McNally performs the Transfer Obligation by effecting a transfer of shares in the ownership structure, the charge will remain over the Property. As Mr Caplan accepted, any direct transfer of the Property by Treehouse Spain would be subject to the mortgage, and effectively require Bankinter's consent unless the mortgage is discharged.

40. In any event, as I have noted above ([37]), a s.66(1) order has no immediate impact on Mr McNally and cannot have any impact on any true third parties. To the extent that any subsequent applications to use the court's enforcement processes can be shown appropriately to engage third party interests, there will be an opportunity for the court to take that consideration into account when deciding what relief to grant.

Conclusion

41. For these reasons:

i) Mr McNally's application to set aside the Cockerill Order so far as it concerns Declaration (1) is granted.

ii) Mr McNally's application to set aside the Cockerill Order so far as it concerns Declaration (2) and the Transfer Order is refused.