Neutral Citation Number: [2022] EWCA Civ 1665

Case No: CA-2022-002199

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND
AND WALES COMMERCIAL COURT (KBD)
The Hon Mr Justice Butcher
CL-2021-000196 and CL-2021-000529

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2022

Before:

LORD JUSTICE LEWISON
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE BIRSS

- -

Between:

S3D INTERACTIVE, INC.	**Appellant/ Defendant**
- and –	
OOVEE LIMITED	**Respondent /Claimant**

- -
- -

Jonathan D C Turner (instructed by **Richard Slade and Company Ltd**) for the **Appellant**
Chris Aikens (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: 6 December 2022

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Approved Judgment

This judgment was handed down remotely at 11.00am on 19 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Popplewell :

Introduction

1. Shortly after the hearing of the appeal the parties settled their disputes, and accordingly, by a consent order, the proceedings were discontinued and the relevant paragraphs of the order under appeal were set aside. However since the appeal raises a point of general interest we think it right to give judgment explaining how we would have disposed of the appeal in the absence of settlement.

2. Section 42 of the Arbitration Act 1996 ('the Act') empowers the court to make an order requiring a party to arbitral proceedings to comply with a peremptory order of the tribunal. This appeal raises a short point as to whether there is a threshold requirement that the Court must first investigate and be satisfied of the jurisdiction of the tribunal over the substantive dispute referred to it before the Court can make such an order.

3. Sections 41 and 42 provide as follows:

> **"**41 Powers of tribunal in case of party's default.
>
> …
>
> (5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.
>
> 42 Enforcement of peremptory orders of tribunal.
>
> (1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.
>
> (2) An application for an order under this section may be made—
>
> (a) by the tribunal (upon notice to the parties),
>
> (b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or
>
> (c) where the parties have agreed that the powers of the court under this section shall be available.
>
> (3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.
>
> (4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time."

The facts

4. The underlying dispute between the parties related to rights and obligations arising out of the successful development of a video game. The Appellant ('S3D') asserted claims against the Respondent ('Oovee'), including claims for infringement of intellectual property rights. The parties compromised claims that they had against each other in relation to the game by a License Agreement dated 2 August 2016 ("the

License Agreement"). Under the License Agreement Oovee granted S3D a right to develop 'enhancements' to the game in return for which S3D was required to pay Oovee a royalty.

5. The License Agreement contained, as its Clause 17, an arbitration agreement providing for arbitration in London in accordance with the London Court of International Arbitration Rules ('the LCIA Rules').

6. Oovee commenced arbitration by filing a Request for Arbitration on 31 January 2020. Oovee's principal claim in the arbitration was a contractual claim for royalties pursuant to clause 2 of the Licence Agreement. Oovee also advanced claims for breach of intellectual property rights.

7. Dr Georg von Segesser was appointed sole arbitrator on 13 July 2020.

8. Following the close of pleadings in the arbitration, a Mid-Stream Case Management Conference ('MSCMC') hearing took place on 3 March 2021. It addressed three jurisdictional objections to parts of the claim and counterclaims, the content of which is irrelevant to the appeal. There was no challenge to the jurisdiction of the tribunal in relation to Oovee's royalty claim. At the hearing, after argument was concluded, the Arbitrator gave his "comments with regard to the jurisdictional objections briefly". After the hearing of the MSCMC, on 22 March 2021, the Arbitrator sent an email to the parties, enclosing a copy of the transcript of the hearing, and confirmed his views on the jurisdictional issues about which he had heard argument at the MSCMC.

9. On 31 March 2021, S3D issued an arbitration claim form claiming, pursuant to s. 67 of the Act, an order setting aside the 'Award as to jurisdiction' which S3D contended had been made at the MSCMC and/or in the Arbitrator's email of 22 March 2021.

10. Meanwhile, in S3D's Statement of Defence and Counterclaim filed on 15 January 2021, S3D had referred to itself as having sold all its assets in April 2020 to a company called PAE Smart Investments Inc, a company owned by Embracer Group AB. As a result, Oovee's solicitors, Pinsent Masons LLP, had written to S3D's legal representatives on 1 February 2021 asking S3D to confirm how it intended to fund any financial award or an award of costs if one was made against it at the end of the arbitration. Having had no response which it considered satisfactory, on 10 March 2021, Oovee submitted an application to the Arbitrator for an order for security for the amount in dispute and for Oovee's legal costs and arbitration costs ('the Security Application').

11. On 16 April 2021, S3D indicated that it would not be paying its contribution to the costs of the arbitration.

12. On 20 May 2021 a hearing of Oovee's Security Application took place. On 5 July 2021 the Arbitrator asked for some further information, including as to S3D's corporate structure, and confirmation of the apportionment of funds received by S3D following the corporate transaction of April 2020. S3D then provided some further statements. On 25 August 2021, the Arbitrator issued Procedural Order No. 8 ('the Security Order'). He stated that "the irresistible conclusion is that [S3D] has been dissipating assets". He ordered that S3D should by 8 September 2021 issue a bank guarantee in favour of Oovee or make a deposit pursuant to Article 25(1)(i) of the

LCIA Rules in the sum of US$10,902,576, as security for any future award issued in favour of Oovee in the arbitration; and in the sum of US$250,000 as security for the costs of the counterclaim.

13. On 8 September 2021 S3D stated to the Arbitrator that it would not be able to make payment of the cash deposits or obtain the bank guarantees. S3D also failed to pay its share of the costs due to be paid to the LCIA and, as a result, by his Procedural Order No. 10 of 11 October 2021, the Arbitrator ordered that S3D's counterclaims were deemed withdrawn.

14. On 29 March 2022 Oovee sought from the Arbitrator a peremptory order, pursuant to his powers under s. 41(5) of the Act, to the same effect as the Security Order, save as to the provision of security for costs of the counterclaim which had been overtaken by the deemed withdrawal of the counterclaim. The order sought was therefore that S3D should issue a bank guarantee or provide a deposit as security for a future award in the sum of $10,902,576 as ordered by the Security Order.

15. On 16 June 2022 the Arbitrator granted the application and issued Procedural Order No. 13 ('the Peremptory Order'). In the Peremptory Order, the Arbitrator stated that S3D's "financial situation is not a sufficient cause for failure to comply with the Sole Arbitrator's order". The Peremptory Order required the security to be provided by 27 July 2022.

16. Thereafter, in the summer of 2022, S3D contended that it had learned of conduct on the part of Oovee which, it said, constituted a repudiatory breach of the arbitration agreement. S3D alleged that Oovee and its solicitors had made extensive disclosures to its public relations consultants, Portland PR Limited, and directly to journalists, of materials created for the purposes of the arbitration and of other documents and information which are confidential to the arbitration proceedings. This, S3D said, was a breach of Oovee's obligation of confidentiality under Article 30.1 of the LCIA Rules and of the implied obligation on the parties to treat the arbitral proceedings as confidential. S3D contended that as a result of these breaches, journalists contacted three witnesses whose evidence S3D had intended to adduce in the arbitration, and the witnesses had informed S3D that they would not now give evidence on the grounds that they felt they could not rely on their evidence being kept confidential because of the contact made by the journalists. On 26 July 2022, S3D's lawyers sent a letter saying that it was accepting these repudiatory breaches on the part of Oovee as terminating the arbitration agreement, bringing the arbitration to an end, and divesting the Arbitrator of any jurisdiction in the reference.

17. The security required by the Peremptory Order was not provided by the deadline of 27 July 2022.

18. S3D thereafter made an application to the Arbitrator for permission from the tribunal to make an application to the Court under s. 32 of the Act declaring that the jurisdiction of the tribunal had been extinguished by the letter of 26 July 2022 accepting Oovee's breaches of confidentiality as repudiatory. Oovee made its own application that the Arbitrator should grant it permission under s. 42(2)(b) of the Act to permit it to make an application to court under s. 42(1) to require S3D to comply with the Peremptory Order. After receiving submissions, the Arbitrator dealt with the two applications in Procedural Order No. 14 on 30 September 2022. He refused

S3D's s. 32 application on the grounds that he would himself determine the question of jurisdiction pursuant to his power conferred by s. 30 of the Act and Article 23(1) of the LCIA Rules; and that he would do so together with his determination on the merits following the evidentiary hearing scheduled for December 2022 at which there would be the opportunity to examine witnesses on the matters relevant to the jurisdiction dispute. The Arbitrator granted Oovee permission to make an application to the court under s. 42(2)(b) of the Act on the grounds that there was no justifiable reason for Oovee's failure to comply with the Peremptory Order and so as to maintain the status quo pending resolution of the jurisdictional challenge.

19. On 6 October 2022 Oovee issued the Claim Form seeking the enforcement order under s. 42 of the Act. Oovee also made applications (1) that its s. 42 application should be expedited and heard at the same time as S3D's s. 67 application, issued as long ago as March 2021 in relation to the jurisdictional disputes addressed at the MSCMC, which was already listed for 31 October 2022; and (2) for alternative service on S3D by service on its solicitors. These procedural applications were dealt with by Foxton J on the papers and without notice to S3D. By order dated 7 October 2022 Foxton J granted them and set a timetable for the service of S3D's evidence in relation to Oovee's s. 42 application which would permit its being heard on 31 October 2022.

20. On 21 October 2022 S3D issued an application ('the Set Aside Application') for orders (1) declaring that the court had no jurisdiction to hear Oovee's application for a s. 42 enforcement order because the arbitration agreement had been terminated; and (2) discharging Foxton J's order on the grounds of material non-disclosure.

The Judgment

21. Butcher J heard the applications on 31 October 2022, with additional submissions on 1 November 2022, and handed down judgment on 14 November 2022. His rulings on the s. 67 challenges, which related to the jurisdictional disputes addressed at the MSCMC, not the subsequent allegation of termination for breach of confidentiality, are not material to the current appeal. In granting the s. 42 order, and dismissing the Set Aside Application, the Judge's essential reasoning was as follows:

    (1) The existence of an extant challenge to the jurisdiction of the arbitrator does not mean that it is no longer a 'tribunal' for the purposes of s. 42. It is open to a tribunal to defer its decision on jurisdiction to an award on the merits, and there will be cases where it is convenient for the tribunal to be able to ask the court to enforce a peremptory order in the meantime. Sections 30 and 31 of the Act also used the expression 'tribunal' in circumstances where the jurisdiction of that tribunal was subject to challenge. To hold otherwise would enable a party to thwart the possibility of s. 42 being invoked to support the arbitral process merely by raising a spurious jurisdictional challenge. The Judge was therefore satisfied that the conditions in s. 42(2)(b) were fulfilled and that it was a matter for his discretion whether to make the order.

    (2) Helpful guidance as to the principles governing the exercise of discretion are to be found in the judgment of Teare J in *Emmott v Michael Wilson & Partners (No2)* [2009] EWHC 1 (Comm) [2009] Bus LR 723 at [53]-[59], [62].

(3) The fact that the jurisdiction of the tribunal is contested is not of itself and without more a good reason to refuse to make an order under s. 42. There are other circumstances where the court can make orders which seek to support the arbitral process, and to secure the enforceability of an award, even though the jurisdiction of the tribunal is contested. This is the case with orders under s. 70(6) and (7) of the Act, which can be exercised in respect of applications under s. 67. Furthermore, unless the court were able to make orders under s. 42 notwithstanding an extant challenge to the jurisdiction of the tribunal, it would permit a recalcitrant party, simply by challenging the tribunal's jurisdiction, to prevent the court exercising a power which is there precisely to help support the tribunal in the face of recalcitrance.

(4) On the other hand, the fact that the jurisdiction of the arbitrator is challenged is a material, and may be a very material, factor in whether the court should grant an order under s. 42. How significant it is will depend on a number of matters, including:

a. the apparent strength of the challenge, if the court can take a view on this;

b. what it is that the tribunal has ordered which the court is being asked to require compliance with; and

c. the stage in the proceedings at which the challenge to the jurisdiction of the tribunal is made.

(5) The only assessment the court could make as to the strength of S3D's case on termination was that that it was arguable. He therefore had to determine the s. 42 application on the basis that there was an arguable but unresolved case that the jurisdiction of the tribunal had been terminated. There is no appeal from that finding which was plainly correct. The Judge did not have the material before him to enable the merits of the argument to be investigated, and it would have required a hearing with oral evidence from witnesses, as the Arbitrator correctly identified in his decision that it should be determined together with the merits following the December evidentiary hearing. Before us Mr Turner accepted that case management considerations would have made it inappropriate for the Judge to seek to embark upon such an inquiry.

(6) S3D's argument that the existence of a challenge to the Arbitrator's jurisdiction meant that an order under s. 42 of the 1996 Act would not support the arbitral process overlooked the point that if S3D's case on termination was wrong, the Arbitrator did indeed have jurisdiction, and on that hypothesis the order would be supporting the arbitral process, which on that hypothesis would be the parties' agreed forum for resolution of their disputes.

(7) The timing of the reference, including the approaching final evidentiary hearing, meant that if the Court did not make an order under s. 42 now it would altogether have foregone the possibility of giving relevant support to the tribunal where there was a real possibility that the Arbitrator did have jurisdiction.

(8) The possibility of prejudice to S3D was reduced by the fact that the security would be returned or released to S3D if its jurisdiction challenge succeeded.

(9) In those circumstances the interests of justice were in favour of making the order.

22. The Judge granted permission to appeal on the single ground that S3D should be permitted to argue that in circumstances where there is a pending challenge to the jurisdiction of the arbitral tribunal, the Court, when considering whether to make an order under s. 42 of the Act, must decide that the arbitral tribunal does indeed have jurisdiction before making any s. 42 order; and that it was an error of law to make the s. 42 order in this case without so deciding.

The argument

23. Mr Turner's submissions in support of the appeal can be summarised as follows.

(1) Section 42(2) contains conditions which must be fulfilled before there is jurisdiction to make a s. 42 order. The relevant condition in this case, being the only one relied upon by Oovee, was that in sub-paragraph (b), namely that the application was made "by a party to arbitral proceedings with the permission of the tribunal".

(2) That condition is not fulfilled, in the absence of a determination of the jurisdiction challenge, because a tribunal which lacks jurisdiction is not a "tribunal" within the meaning of the subsection and a person is not a "party to arbitral proceedings" if the tribunal has no jurisdiction.

(3) Moreover s. 42 only applies "Unless otherwise agreed by the parties". Where the tribunal lacks jurisdiction, the parties have "otherwise agreed" because the whole arbitral process is consensual, and the parties do not agree to the enforcement of orders made by an arbitrator who they have not agreed should have jurisdiction over the disputes.

(4) This gives effect to the purpose of s. 42 which is to support the arbitral process. If the tribunal has no jurisdiction to make the peremptory order, the court is not supporting the arbitral process by enforcing an order the tribunal had no jurisdiction to make against a person who has not agreed to submit himself to such an order.

(5) There are first instance authorities which lend support to this approach, namely *Emmott v MWP (No 2)*, *Patley Wood Farm LLP v Brake* [2013] EWHC 4035 (Ch) (Peter Smith J) and [2014] EWHC 4499 (Ch) (Sir William Blackburne), and *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm) [2016] 4 WLR 2 (Burton J).

Discussion

24. The key to the issue of construction of s. 42 which arises on this appeal lies, in my view, in a consideration of the provisions of the Act which regulate how and when challenges to the tribunal's substantive jurisdiction may be made to the court.

25. It is convenient to start with s. 30 of the Act, which provides:

> "Competence of tribunal to rule on its own jurisdiction
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
> (a) whether there is a valid arbitration agreement,
> (b) whether the tribunal is properly constituted, and
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
> (2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

26. Section 30 applies the principle of *Kompetenz-Kompetenz*, which is of wide international application. It is enshrined in the UNCITRAL Model Law (The Model Law on International Commercial Arbitration adopted in 1985 by The United Nations Commission on International Trade Law) and is found not just in the arbitration law of many other countries and international conventions, but also in many of the institutional rules governing arbitration, including the LCIA Rules applicable in this case which provide:

> "23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.
>
> …
>
> 23.4 The Arbitral Tribunal may decide the objection to its jurisdiction or authority in an award as to jurisdiction or authority or later in an award on the merits, as it considers appropriate in the circumstances."

27. Because arbitration is consensual, a person cannot ultimately be bound by a jurisdiction decision of a tribunal to which it has not agreed to submit its disputes. Such a party therefore has the right to challenge jurisdiction in the courts, unless barred by failure to object timeously. However the Act regulates the way in which such a challenge may be made so as to meet, or at least mitigate, difficulties which would otherwise undermine the arbitral process.

28. Section 30 itself assists in relation to two such difficulties. The first is that articulated in the Departmental Advisory Committee Report on the Draft Arbitration Bill chaired by Lord Justice Saville ("the DAC Report"). In relation to the provision in the draft Bill which became s. 30, the Committee said at [138]:

> "The great advantage of this doctrine [*Kompetenz-Kompetenz*] is that it avoids delays and difficulties when a question is raised as to the jurisdiction of the tribunal. Clearly the tribunal cannot be the final arbiter of a question of jurisdiction, for this would provide a classic case of pulling oneself up by one's own bootstraps, but to deprive a tribunal of power (subject to court review) to rule on jurisdiction would mean that a recalcitrant party could delay valid arbitration proceedings indefinitely by making spurious challenges to jurisdiction."

29. In this respect s. 30 promotes the principle of speedy finality and efficient case management reflected in section 1(a) of the Act. Section 1 provides:

> "General principles.
>
> > "The provisions of this Part are founded on the following principles, and shall be construed accordingly—
> >
> > (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> >
> > (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
> >
> > (c) in matters governed by this Part the court should not intervene except as provided by this Part."

30. The second arises from the principle of party autonomy enshrined in s. 1(b) of the Act and the principle of minimum intervention enshrined in section 1(c). It not infrequently happens that the factual and legal issues which arise in a jurisdiction challenge overlap with those which fall to be resolved as part of the merits of the parties' disputes. The possibility that the jurisdiction challenge can only conveniently and efficiently be decided together with the determination of the merits of those disputes is recognised by s. 31(4) of the Act and Article 23.4 of the LCIA Rules which provide that the jurisdiction challenge may be determined together with the merits rather than in a separate award. It is a course which is regularly adopted in arbitrations when it is dictated by efficient case management. Indeed, as the DAC Report observes at paragraph 146, in some cases it may be simply impracticable to rule on jurisdiction before determining merits. In such cases, if the parties were always required to seek a determination of the jurisdiction challenge from the court without consideration by the tribunal, they would be submitting issues as to the substantive merits of their disputes to the court rather than to their chosen tribunal. In the event of a failed challenge, it would be the court, not the tribunal, which determined part or all of their disputes. That is the antithesis of their contractual bargain in the arbitration agreement.

31. The Act complements the *Kompetenz-Kompetenz* powers of the tribunal with a careful circumscription of how and when a party may make an application to the court to challenge jurisdiction. Section 30(2) provides that a challenge to the tribunal's jurisdiction determination may only be made in accordance with the provisions of Part 1 of the Act. Those provisions only allow a jurisdiction challenge to be made to the Court by a party who has participated in the proceedings in one of three ways.

32. The first and primary way is by an application under s. 67 which provides:

> "Challenging the award: substantive jurisdiction.
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part."

…

33. The second is by resistance to enforcement of an award under s. 66, which provides in s. 66(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."

34. The third is by an application under s. 32 which provides:

"32. Determination of preliminary point of jurisdiction.

(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

(2) An application under this section shall not be considered unless—

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the court.

(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.

> (4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending."
>
> …

35. Section 72 provides that a person who takes no part in the arbitral proceedings has, in addition to the right to apply under s.67, a right to challenge jurisdiction in court by proceedings for a declaration or injunction or other appropriate relief. I do not need to address the scope of such rights because it will be rare, if ever, that s. 42 will be invoked against a party who takes no part in proceedings, and s. 42 must be construed in the context of the typical situation, which arises in the present case, of a party participating in the arbitration.

36. Of the three available routes for such a participant to make a jurisdiction challenge, only s. 32 envisages the court intervening before, or without, the tribunal having first exercised its *Kompetenz-Kompetenz* jurisdiction. Section 67 is only available as a challenge to an award. Where a person has participated in an arbitration they lose their right to challenge jurisdiction unless the objection is made before taking a step to contest the merits and as soon as possible after the matter alleged to be beyond the tribunal's jurisdiction is raised: section 31. Therefore any award which can be the subject of a challenge by such a participant under s. 67 will be an award in which the tribunal addresses its substantive jurisdiction, either in a separate jurisdictional award or as part of an award on the merits. Section 66(3) only comes into play at the stage of an application to enforce an award, which again will necessarily have addressed jurisdiction where objection has been taken. Section 32, by contrast, envisages the Court assuming the task of determining jurisdiction before or without the tribunal having done so. However, as the DAC Report states at [147], it "provides for exceptional cases only; it is not intended to detract from the basic rule as set out in [s. 30]." The conditions in s. 32(2) are therefore restrictive. As Thomas J observed in *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 All E.R. (Comm) 70 at [44]-[45], the basic rule is that the tribunal will make rulings on jurisdiction in the first instance and that recourse to the court under s. 32 is very much the exception. Its exceptional nature is borne out by the fact that there are no more than a handful of reported cases in which it has been successfully invoked as an appropriate procedure.

37. It is also worth emphasising that sections 32(4) and 67(2) make clear that whilst an application to the court under those sections is pending, the tribunal retains the power to make an award or a further award, respectively. An as yet unresolved challenge to jurisdiction is not to be treated as sufficient to disrupt or delay the arbitral process.

38. Against this background, it is evident that Mr Turner's construction is unsound. Section 42 is a provision which empowers the Court to support the arbitral process. The DAC Report says at [212]: "In our view there may well be circumstances where in the interests of justice, the fact that the court has sanctions which in the nature of things cannot be given to arbitrators (e.g. committal to prison for contempt) will assist the proper functioning of the arbitral process. This [section] is a good example of the support the Court can give to that process." It is one of a number of sections in which the Court is empowered to make orders to support the process. They should not be interpreted as requiring the Court first to satisfy itself of the jurisdiction of the tribunal

over the substantive dispute before the powers may be exercised, because to do so would cut across the careful structure of the limited circumstances in which the Court is entitled to address and determine a challenge to the jurisdiction of the tribunal during the course of the reference, a structure which is itself calibrated to assist the arbitral process.

39. Nor is there any support for Mr Turner's construction in the wording of the section. Section 42(2)(b) refers to a "party to the arbitral proceedings" and "the tribunal". Mr Turner's submission is that these mean a party to arbitral proceedings over which the tribunal has substantive jurisdiction, and a tribunal having substantive jurisdiction respectively. In fact, they simply mean what they say, namely a tribunal and a party in arbitral proceedings, irrespective of whether there is an unresolved issue as to the substantive jurisdiction of the tribunal.

40. This is not merely their natural meaning, and consistent with the scheme of the Act in the way I have described, but is the sense in which the same words are used in many other sections in the Act. By way of example, and without being exhaustive:

    (1) as the Judge observed, sections 30 and 31 refer to the "arbitral tribunal" in the context of it being a tribunal whose jurisdiction is subject to an unresolved challenge;

    (2) section 32 permits an application for a determination of the tribunal's jurisdiction by a "party to arbitral proceedings", which self-evidently means a party to arbitral proceedings involving an unresolved challenge to jurisdiction; section 32(4) provides that "the arbitral tribunal" may continue the proceedings and make an award while a section 32 application is pending: the arbitral tribunal referred to is, again, one whose jurisdiction is under challenge.

    (3) section 33 imposes the duty on "the tribunal" to act fairly and adopt appropriate procedures as between the parties; it would be absurd to suggest that such obligation did not apply where there was an unresolved jurisdiction challenge; indeed it must apply to the tribunal's handling of such a challenge under s. 30 as much as to any other aspect of the reference;

    (4) similarly section 34 provides that it shall be for "the tribunal" to decide all procedural and evidential matters, subject to the rights of the parties to agree any matter; "tribunal" must here include a tribunal which is subject to an unresolved jurisdiction challenge, especially given that such challenge may not be resolved, consistently with s. 30(4), until determination of the merits of the dispute;

    (5) section 36 provides that unless otherwise agreed "a party to arbitral proceedings" may be represented by a lawyer or other person chosen by him. Again it would be absurd if that did not apply to proceedings in which there is an unresolved jurisdiction challenge;

    (6) similar considerations apply to section 37 which gives "the tribunal" powers to appoint experts legal advisors or assessors; section 38 which confers powers on "the tribunal" to order security for costs, preservation inspection

etc of property, steps to preserve evidence, and for witnesses to give evidence on oath; section 39 which contains powers for "the tribunal" to make a provisional award; and section 41(5) containing the power for "the tribunal" to make a peremptory order;

(7) section 42 itself is the first of four sections under the heading "Powers of Court in relation to Arbitral Proceedings"; the next section, section 43, allows a "party to arbitral proceedings" to use court procedures to secure attendance of witnesses with the permission of "the tribunal"; again it would be unrealistic to suggest that such power could not be exercised without the Court first determining any unresolved jurisdiction challenge, not least because the attendance of witnesses may be required for the very determination of the jurisdiction challenge by the tribunal under s. 30;

(8) the next section, section 44, contains much used powers of the court to preserve evidence and assets; in cases of urgency they may be made by "a party to the arbitral proceedings", and in other cases upon such application with the permission of "the tribunal"; it would substantially and unacceptably emasculate these powers if they were unavailable in the event of an unresolved challenge to the jurisdiction of the tribunal;

(9) section 67(2) provides that "the arbitral tribunal" may continue the proceedings and make an award while a section 32 application is pending: the arbitral tribunal referred to is one whose jurisdiction is under challenge;

(10) section 70(4) provides that where there is a s. 67 challenge to jurisdiction, the court may order "the tribunal" to state further reasons, the tribunal here being, ex hypothesi, one subject to an unresolved jurisdiction challenge.

41. It is an established principle that where the same words are used more than once in a statute, there is a presumption that they have the same meaning: Bennion, Bailey & Norbury on Statutory Interpretation 8th ed Section 21.3. As Leggat LJ said in *R (Good Law Project) v Electoral Commission* [2018] EWHC 2414 [2019] 1 All E.R. 365 at [13], it is generally reasonable to assume that the language has been used consistently by the legislature so that the same phrase when used in different places in a statute will bear the same meaning on each occasion. There is nothing to displace such presumption in the present case. Mr Turner's argument on the construction of the words "tribunal" and "party to arbitral proceedings" in s. 42(2)(b) is therefore unsound.

42. So too is his reliance on the words in the section "unless otherwise agreed". These refer to a specific agreement to oust the jurisdiction of the court to make an order under s. 42. They are not engaged by an argument that the tribunal lacks jurisdiction over the substantive merits of the dispute.

43. Mr Turner's argument is not only contrary to the careful structure of the Act regulating jurisdiction challenges, and the language of s. 42, but would have consequences which are inconsistent with the principles in s. 1 of the Act. If he were right, the only options for a Court faced with an application under s. 42 where the jurisdiction of the tribunal jurisdiction was in issue would be (1) to address and determine the issue of jurisdiction or (2) to decline to investigate it but then

necessarily to refuse the application. The first alternative is contrary to the principle of minimum intervention in s. 1(c). In this case the question of the Arbitrator's jurisdiction was properly before him pursuant to s. 30 of the Act and Article 23 of the LCIA Rules, and he had deferred that decision to be taken with his award on the merits, as he was entitled to do under s. 31(4)(b) and Article 23.4. He had declined to give permission for an application under s. 32, as again he was entitled to. Determination of his jurisdiction by the Court for the purposes of a s.42 application would therefore be an impermissible intervention to bypass the arbitrator's determination of his own jurisdiction pursuant to s. 30, and an intervention outside the scope of the permissible methods set out in the Act for a court challenge to jurisdiction. The second alternative is contrary to the principle in section 1(a) of promoting the efficacy of the arbitral process because it would enable a party to stymy s. 42 simply by raising a jurisdiction challenge unsuitable for summary determination, however unmeritorious. It would reintroduce the mischief which the DAC Report at [138] identified as that which s. 30 was enacted to avoid. As the Judge rightly observed, unless the Court were able to make orders under s. 42 notwithstanding an extant challenge to the substantive jurisdiction of the tribunal, it would permit a recalcitrant party, simply by challenging the tribunal's jurisdiction, to prevent the court exercising a power which is there to help support the tribunal in the face of recalcitrance.

44. There is nothing in the first instance cases relied on by Mr Turner which casts doubt on these conclusions. None raised or addressed the point which arises on this appeal, and the attempt to extract some implied support did not bear scrutiny.

45. For these reasons, and with little hesitation, I would have dismissed the appeal.

Lord Justice Birss :

46. I agree.

Lord Justice Lewison :

47. I also agree.