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Case No: CL-2022-000123
CL-2021-000606

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2023

Before :

THE HON MR JUSTICE BUTCHER

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Between :

	BPY	**Claimant**
	- and -	
	MXV	**Defendant**

- -
- -

Gaurav Sharma and Joseph Gourgey (instructed by **Jackson Parton**) for the **Claimant**
Marcos Dracos (instructed by **Cooke, Young & Keidan LLP**) for the **Defendant**

Hearing dates: 16-17 November 2022

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Approved Judgment

This judgment was handed down remotely at 10am on Friday 20 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher :

1. Application is made under s. 68 of the Arbitration Act 1996 ('AA') by the Claimant ('BPY') challenging an award dated 7 June 2021 ('the Merits Award') and a related costs award dated 15 September 2021 ('the Costs Award') made in a London-seated LCIA arbitration before a sole arbitrator. BYP contends that there were serious irregularities within the meaning of s. 68 AA in the manner in which the arbitrator reached her conclusions in the Merits Award, as well as to the basis of her Costs Award; and that it has suffered a substantial injustice in consequence. It seeks an order setting aside the Merits Award and the Costs Award.

Factual Background

2. BPY is a company registered in and incorporated under the laws of Belize. Its ultimate beneficial owner is Mr A, a Ukrainian national. The Defendant ('MXV') was, at the time the arbitration was initiated, also a company registered in and incorporated under the laws of Belize. It is now registered in and incorporated under the laws of Nevis. Its ultimate beneficial owner is Ms B, a Ukrainian national.

3. Mr A and Ms B had a close business relationship before they fell out in or about February 2013. After they fell out, there has been litigation on several fronts between them. The matter at issue in the arbitration with which the present applications are concerned was as to whether the parties had made three binding sale and purchase agreements (the 'PSAs') dated 8 December 2011. BPY contended that the PSAs were valid and binding agreements, under which MXV owed sums which it had failed to pay. Specifically, BPY contended that the first PSA was for the sale by it to MXV of certain specified securities for Eur 369,061.00 and US$ 12,954,837.25; the second PSA was for the sale by it to MXV of certain other specified securities for US$ 2,006,317.50; and the third PSA was for the sale by it to MXV of a quantity of gold for US$ 1,690,800.23. It was common ground that between 9 December 2011 and 5 January 2012 BPY had transferred the securities and gold referred to in the PSAs from its account at Clariden Leu to MXVs account at Clariden Leu ('the BPY Transfers').

4. BPY's case was that the purpose of these transactions was to provide Ms B with the collateral she would need to raise financing to participate in the empire of agricultural businesses which Mr A had built up. MXV's case was that Ms B had already been a partner in the agricultural businesses, and that the BPY Transfers were made pursuant to an agreement between the parties to divide assets, which agreement was recorded in the minutes of a meeting held in Kyiv on 21 November 2011 between Mr A and Ms B. Those minutes recorded that the parties 'wished to split highly liquid assets, which include monetary funds and bonds (both corporate and sovereign)'. On MXV's case, the PSAs were sham transactions which had not been intended to give rise to any payment obligations. By contrast, on BPY's case, the minutes of the meeting of 21 November 2011 were not authentic; and there was no basis for the BPY Transfers other than the sales recorded in the PSAs.

5. It was also common ground in the arbitration that on 19 February 2013, MXV made two payments to BPY in the sums of US$ 35,000 and US$ 26,000. It was BPY's case that these payments ('the February Payments') were made to discharge a debt under the first of the PSAs. BPY also contended that on 25 February 2013 it had received a letter from MXV, signed by its sole director Mr D, which acknowledged the existence of

MXV's continuing obligations to pay the monies set out in the PSAs ('the DAL'). MXV challenged the validity of the DAL, and of what was called 'the DAL Receipt', namely a further copy of the DAL signed by Mr D but which Mr C, BPY's director, had initialled and dated and on which he had written 'received'.

The Arbitration

6. On 12 and 19 November 2018 BPY referred the disputes as to whether there were sums due under the PSAs to arbitration in London under the LCIA Rules. There were three references, which were consolidated on 19 December 2018. Ms G ('the Arbitrator') was appointed as sole arbitrator on 5 December 2018.

7. The arbitration proceedings were long and complex. They lasted approximately three years, and in their course the Arbitrator issued 62 procedural orders, which dealt with a wide range of disputed matters, from routine procedural directions to more complex applications for document production, security for costs and the exclusion of documents on the grounds of privilege.

8. The core issue, however, was whether BPY could enforce claims under the PSAs. MXV defended that claim on two main grounds:

(1) It contended that even if the PSAs were genuine and enforceable agreements, the claims were, on their own terms, statute-barred; and

(2) It contended that the PSAs were sham agreements and that, as already mentioned, the BPY Transfers had taken place pursuant to a restructuring of a business which was at the time jointly owned by Mr A and Ms B. MXV's case was that Ms B had been unaware of the existence of the PSAs until 2015 when she had found out about them in the course of other proceedings.

9. The Arbitrator decided that there should be the hearing of a preliminary issue on limitation. The main issue in relation to limitation was whether there was an acknowledgement of debt or part payment for the purposes of s. 29(5) Limitation Act. BPY relied, as being such acknowledgements/part payments, on the DAL, the DAL Receipt and February Payments. MXV contended that all these had been arranged between Mr C and Mr D without the knowledge of Ms B. It challenged the DAL documents on the basis that they were backdated forgeries, and the February Payments on the basis that they related to other matters.

10. After a significant hearing, the Arbitrator made an Award on Preliminary Issue dated 11 February 2020 ('the Preliminary Issue Award'), running to 336 paragraphs. In that Award, the Arbitrator held that the DAL documents were not backdated forgeries and that the February Payments 'related to' the PSAs and not to other matters. Accordingly she dismissed the limitation defence, holding that these constituted a sufficient acknowledgement of the alleged debt for the purposes of s. 29 Limitation Act.

11. After the Preliminary Issue Award, the parties filed detailed memorials in relation to the remaining issue, which, in brief, was MXV's case that the PSAs were sham agreements which had not been intended to create legal relations on the terms set out in them. An evidentiary hearing was held on 7-12 December 2020. Thereafter the Arbitrator produced the Merits Award, which runs to 770 paragraphs, covering some

259 pages of single spaced text. The Arbitrator concluded that the PSAs 'were entered into for a purpose other than creating payment obligations between the Claimant and the Respondent, including, but not limited to, the intention to deceive third parties; and not, as alleged by the Claimant, for the purpose of creating legal relations, in particular for Ms B to obtain collateral against which she could raise funds for the Agricultural Business' (paragraph 604). On that basis she dismissed BPY's claim.

12. Thereafter, following two rounds of written submissions on 21 June 2021 and 5 July 2021, the Arbitrator made the Costs Award on 15 September 2021. This included a decision, in respect of the hearing on the merits, that BPY should pay 85% of MXV's costs, and should bear all the arbitration costs.

The Arbitration Claims

13. On 3 July 2021 BPY issued an Arbitration Claim challenging the Merits Award. It proceeded to make submissions in the arbitration in respect of the costs of the arbitration without prejudice to its challenge to the Merits Award.

14. On 13 October 2021, following the Costs Award, BPY filed a further challenge to the Costs Award under s. 68 AA. On 4 February 2022 Andrew Baker J ordered that the two challenges should be dealt with together.

Section 68 AA

15. S. 68 provides as follows:

> Challenging the award: serious irregularity.
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> 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) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
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> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
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> (d) failure by the tribunal to deal with all the issues that were put to it;
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> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

16. Section 33 AA, referred to in sub-section 68(2)(a) provides for a general duty on an arbitral tribunal to:

> ‘(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.’

17. BPY contends that the potentially relevant sub-paragraphs of s. 68(2) are (a), (b), (d) and (g).

18. There was no significant dispute as to the approach which the court should take on an application under s. 68 AA. The principles, with specific reference to applications based on s. 68(2)(a), were helpfully summarised by Popplewell J in Reliance Industries Ltd v The Union of India [2018] EWHC 822 (Comm) at [14], as follows:

> (1) "In order to make out a case for the Court's intervention under s. 68(2)(a), the applicant must show:
> (a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting

his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;
(b) amounting to a serious irregularity;
(c) giving rise to substantial injustice.

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

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

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

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

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

(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome."

The Grounds of Challenge

19. BPY put forward four grounds on which it said that there had been serious irregularities which gave rise to substantial injustice. I will consider each in turn.

Ground 1

20. This ground was based on s. 68(2)(a) and an alleged breach of s. 33 AA on the part of the Arbitrator. The nature of the complaint was that the Arbitrator decided that there had been dishonesty in the making of the PSAs when such a case had not been properly put to the witnesses accused of having fabricated the sham PSAs.

21. As it was developed in argument, the complaint involved more precisely: (1) that MXV's case of 'shams' required it to put forward, and put to the relevant witnesses, a case as to who the 'sham' PSAs were designed to deceive and how or why they were to be deceived by the PSAs, but this was not done; and (2) that the finding in paragraph 705 of the Merits Award that Mr A, Mr C and Mr D, after the execution of the PSAs 'decided to use [them] for a purpose other than its original paper trailing purpose' was a finding of fraud and conspiracy to commit a fraud, which was a case which had not been pleaded or put to any of the witnesses.

22. In my judgment this complaint fails on a number of different levels. Four particular points or groups of points arise.

23. In the first place, the Arbitrator adopted the following as the legal test for the establishment of a 'sham' (at paragraphs 483 and 487 of the Merits Award):

'[483] The Tribunal finds it convenient to adopt Mostyn J's definition, legal test and principles of a sham transaction in *Bhura* [viz Bhura v Bhura [2014] EWHC 727 (Fam) at [9]], as summarised below:

(1) The parties must have intended their act to give to third parties or to the court the appearance of creating between them legal rights and obligations different from the actual legal rights and obligations (if any) which they intend to create.

(2) The parties must hold an expressed common intention that the acts or documents are not to create the legal rights and obligations which they gave the appearance of creating. The test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

(3) A sham transaction will remain a sham even if a party merely went along with the sham not either knowing or caring about what he or she was signing.

(4) The Tribunal may examine external evidence, including the parties' explanations and circumstantial evidence, such as subsequent conduct of the parties.

…

[487] As established above, a sham contract is a document which seeks to deceive others and/or a document which gives the appearance of having created different legal rights to those actually created. Accordingly, the Tribunal finds that a sham contract is, by nature, a species of fraud as it necessarily involves a degree of dishonesty. The Tribunal notes the passage in *Midland Bank Plc v Wyatt* [1996] BPIR 288 in which the judge found that it was not necessary to establish a fraudulent motive to prove that the transaction was a sham, or a pretence transaction. Accordingly, the Tribunal rejects the Claimant's contention that, in order to prove that the PSAs are a sham the Respondent needs to prove "multiple and serious frauds by the Claimant". Such a statement would wrongly widen the applicable legal test.'

24. As is apparent from the above, and in particular the first sentence of paragraph 487, the Arbitrator considered that, as a matter of law, a sham could be established by a showing

that the document seeks to deceive others 'and/or' is one which gives the appearance of having created different legal rights to those actually created. Thus the Arbitrator was proceeding on the basis that a document may be a sham, even if it does not seek to deceive others, but is one which gives the appearance of having created different legal rights to those actually created. Further, the Arbitrator rejected the submission that, as a matter of law, it was necessary, for a finding of sham, that a fraudulent motive be established. If these were incorrect statements of the law, which I am not suggesting they were, they were in principle amenable to an appeal pursuant to s. 69 AA. Any such errors did not constitute serious irregularities within s. 68 AA.

25. In the second place, I consider that BPY's case on Ground 1 conflates two matters. The first is whether the PSAs were intended to have legal effect such that there was an obligation on MXV to pay under them. The second is the motive for which the PSAs were entered into. The first of these was the key and fundamental issue in the arbitration. The second, though potentially relevant to an assessment of the first issue, was not central. This is reflected in the List of Issues for the Merits Hearing, which was settled by the Arbitrator, and which she used as the structure for the Merits Award. The third issue in that List of Issues was in the following terms:

'… do the PSAs create payment obligations between the Claimant and the Respondent?

3.1 What was the nature of the arrangements between Mr A and Ms B prior to the conclusion of the PSAs?

3.2 Were the PSAs entered into:

(a) as alleged by the Claimant, for the purpose of creating legal relations, in particular for Ms B to obtain capital against which she could raise funds for the Agricultural Business?

(b) Or alternatively, as alleged by the Respondent, for a purpose other than creating payment obligations between the Claimant and the Respondent, including, but not limited to, the intention to deceive third parties?

3.3 What is the relevance of the Minutes of the Meeting of Owners of the Group of Companies dated 21 November 2011?'

26. As is apparent from this formulation of the issue, the key question was whether the PSAs created payment obligations. MXV's case was that they had not, because they had been entered into for 'a purpose other than creating payment obligations', 'including, but not limited to, the intention to deceive third parties'. Thus, MXV's case was not specific as to the purpose of the PSAs, but was that they were for some other purpose than creating legal relations, which other purpose might have been an intention to deceive third parties, but which might have been something else (hence the words 'but not limited to'). Furthermore, as the formulation of the issue made clear, it was recognised that relevant to the question of whether the PSAs created payment obligations was what had been the arrangements between Mr A and Ms B prior to the conclusion of the PSAs. This was significant because, if the two were already partners in the business, she would not have needed collateral against which to obtain capital in order to *enter* the business, and it would have supported her case that the BPY Transfers were a division of the assets of what was effectively a jointly owned business.

27. The fundamental issue, as identified above and in item 3 in the List of Issues in the arbitration, was fully and thoroughly investigated at and after the evidentiary hearing. I do not consider that there is any plausible case that the s. 33 AA duty was not complied with in this regard. Specifically, the Arbitrator did give both parties a reasonable opportunity of putting its case and of dealing with that of the other party. She heard very extensive evidence from witnesses including Mr A, Mr C, Mr D and Ms B, as well as many others. There was a detailed examination of what had been the arrangements between Mr A and Ms B prior to the date of the PSAs. The Arbitrator considered the material, including both documents and testimony, relating to the point at paragraphs 500-546 of the Merits Award. There is, in my judgment, no possible argument that her conclusions on this issue in paragraph 546 were the result of any failure to comply with the s. 33 AA duty.

28. Similarly, there was a detailed investigation of the relevance of the Minutes of the Meeting dated 21 November 2011. She considered BPY's case that they were forged. She considered the fact that a contemporary email from Mr C to Credit Suisse had attached a redacted copy of the Minutes. She considered also other documentation relevant to whether the Minutes were authentic. She addressed the question of how far the Minutes were consistent with each party's case. Her conclusions that (a) the Minutes could be relied on as true and contemporaneous evidence to test the parties' cases, and (b) that they provide for an agreement between Mr A and Ms B regarding how to structure their joints assets, including the division of certain assets and a roadmap for the continuation of a joint business, were clearly not, in my view, reached following or in consequence of any breach of s. 33 AA.

29. Furthermore, the Arbitrator clearly gave each party a reasonable opportunity of developing its case and dealing with the other party's case as to other material which dealt with the purpose of the PSAs. This material included documentary evidence indicating that, in 2014, Mr C had himself said that the PSAs 'didn't envisage the money settlements and repay', and were for 'tax planning reasons'. This material, and the opposing cases in relation to it, was reviewed by the Arbitrator in detail in paragraphs 567-604 of the Merits Award.

30. In light of the above, I do not consider that BPY has come anywhere near establishing that there was a breach of s.33 AA in the way in which the Arbitrator dealt with the essential issue between the parties, namely whether the PSAs had been intended to create payment obligations.

31. In the third place, BPY's chief complaint amounted to a contention that its witnesses had not been properly challenged as to the motives for the making of the PSAs, and had not had a proper opportunity of answering the suggestion that they were made for the purpose of deceiving others. As already indicated, I do not consider that this was a fundamental issue. In any event, this complaint is based on a contention that there had been a failure by MXV to comply with what BPY called 'the rule in Browne v Dunn [1894] 6 R 67' and a failure by the Arbitrator to give effect to that failure by refusing to make adverse findings as to matters not properly put. For the reasons I will give, I do not consider that this is a criticism which can be made in this case.

32. In Browne v Dunn Lord Herschell LC, at 70-71, said that it is generally necessary 'where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination

showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged', so that the witness can provide an explanation which he 'might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed.'

33. The so-called 'rule in Browne v Dunn' is not, however, even in proceedings in court, an inflexible one, or one which does not admit of exceptions. The position was set out in Edwards Lifesciences LLC v Boston Scientific Scimed Inc [2018] EWCA Civ 673, at [62]-[69] per Floyd LJ, as follows:

> 62. Phipson on Evidence (19th Edn. 2016) summarises the obligation to cross-examine a witness in the following way at paragraph 12-12:
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> > "In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general the CPR does not alter that position. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected. However, the rule is not an inflexible one. For example, if there is a time-limit imposed by the judge on cross-examination it may not be practicable to cross-examine on every minor point, particularly where a lengthy witness statement has been served and treated as evidence-in-chief. Thus, in practice there is bound to be at least some relaxation of the rule. Failure to put a relevant matter to a witness may be most appropriately remedied by the court permitting the recall of that witness to have the matter put to him."
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> 63. As made clear by cases from *Browne v Dunn (1894) 6 R. 67 HL* to *Markem v Zipher [2005] EWCA Civ 267; [2005] R.P.C. 31* , the rule is an important one. However, it is not an inflexible one. Procedural rules such as this are the servants of justice and not the other way round.
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> …
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> 65. … I would agree, as a general matter, that the rule requiring important positive evidence to be challenged is a rule which is not simply for the benefit of the witness (whose honesty or professional reliability is challenged) but is also designed to ensure the overall fairness of the proceedings for the parties. In Markem Jacob LJ, giving the judgment of the Court of Appeal, with which Mummery and Kennedy LJJ agreed, put it this way at [56]:
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> > "… procedural fairness not only to the parties but to the witnesses requires that if their evidence were to be disbelieved they must be given a fair opportunity to deal with the allegation." ….
>
> 66. The rule applies with particular force where a witness gives direct evidence of a fact of which he has knowledge and which it is proposed to invite the court to disbelieve. Fairness to the witness and to the parties demands that the witness

should be challenged on his factual evidence so as to give him the opportunity of affirming or commenting on the challenge, or on a positive matter which it is proposed to set against his evidence.

67. Not every situation however calls for a rigid application of the rule. At least part of the unfairness which the rule is intended to address is the lack of any opportunity for a witness to respond to a challenge to his evidence. In the present case there was more than one round of expert evidence. Boston put in three rounds, so each expert had more than ample opportunity to comment on the views of the other. The battle lines between the experts were clearly drawn in the pre-trial exchange of reports. The potential for unfairness to the witness in such circumstances is much reduced.

68. Even in the case of evidence of fact, it is no longer the law that every aspect of a witness' evidence needs to be challenged head-on. Foskett J expressed this in terms with which I agree in *Various Claimants v Giambrone & Young [2015] EWHC 1946* at [21].:

> "I do not accept that merely because the suggestion that what he said in his witness statement was untrue (or simply misguided) was not put specifically to him (a proposition that inevitably he would deny) means that I am bound to accept his position. It is, of course, important to be fair to a witness, particularly if serious imputations as to the witness' honesty and integrity are being made, and there may be other areas of a witness' evidence that need to be challenged head-on, but the days of the "I put it to you" cross-examination on other matters have long since gone."'

34. As that passage makes clear:

(1) The fundamental issue is one of fairness to witnesses and to the parties.

(2) Usually fairness will require that when a witness gives evidence as to a specific factual matter and the court will be asked to disbelieve him or her, he or she should be challenged on it so as to have an opportunity of affirming or commenting on the challenge.

(3) But this is not an inflexible rule. There may be cases in which there will be no unfairness because, looked at more generally, the procedures adopted in the litigation mean that a party and the relevant witness(es) have had ample opportunity to comment on the other side's case. It may also be the case that a particular matter does not have to be specifically put to the witness because it is obvious from other evidence which he or she has given as to what his or her response will be. Furthermore, the extent to which there needs to be cross-examination may depend on the procedures which have been adopted by the court (for example in setting time limits for cross-examination).

35. In arbitration proceedings, subject to any specific agreement between the parties otherwise, the tribunal is likely to have a wide discretion as to how to conduct proceedings. The LCIA Rules expressly provide for this. Subject to compliance with the general duties enshrined in s. 33 AA a tribunal may adopt a procedure which does not involve oral cross-examination of witnesses, whether on a particular point or at all.

This includes in a case in which it is said that a witness is not telling the truth, although in some cases fairness will necessitate cross-examination.

36. In the present case, I am in no doubt that the Arbitrator did not contravene the general duties in s. 33 AA by reason of the way in which she proceeded in light of what was, and was not, 'put' in cross-examination of BPY's witnesses.

37. Thus, first, the Arbitrator had to deal with a case in which it was proposed that some 30 witnesses should give evidence in the course of six days. On 27 November 2020 BPY sought a specific ruling concerning cross-examination at the evidentiary hearing, requesting that 'the parties here to agree and/or the Tribunal to direct that in this hearing only the key matters in dispute need be challenged: e.g. allegations of dishonesty and the central aspects of each party's case'. MXV responded that it planned to challenge most evidence, but 'the way it will be done is up to [its] counsel.' The Arbitrator issued a direction that: 'I do not expect all points of witness evidence to be expressly challenged in cross-examination. It will remain for me to decide what weight to accord to the evidence before me, regardless of whether it has been expressly dealt with in cross-examination.' BPY did not seek further clarification as to what evidence the Arbitrator could give weight to without cross-examination. The evidentiary hearing proceeded on the basis of this indication on the part of the Arbitrator. I do not consider that there was any unfairness in the Arbitrator proceeding in accordance with the direction which she had given, and which was not questioned by the parties.

38. Further, and in any event, the relevant witnesses were challenged on their evidence. This is far from being a case in which a witness is said in submissions by a party to have been dishonest, even though no such suggestion was put to the witness. MXV's case that various of the witnesses called by BPY had been dishonest and were lying was put in a very vigorous manner by MXV's counsel during the hearing: so much so that there were objections to it.

(1) Of particular significance is the cross-examination of Mr C. The point was put to him that what had been involved in late 2011 between Mr A and Ms B was a splitting of an extant joint business, to which Mr C said, inter alia, that this account was 'a lie'. MXV's counsel put to Mr C that his account of how the PSAs had been signed and how he had been communicating with Ms B about the signing of the PSAs and the transfer of assets was 'false'; and that his account of the production of the Minutes of the Meeting held on about 21 November 2011 was 'just completely made up to explain the inexplicable… plainly untruthful and senseless'. Mr C was cross-examined about the communications of 2014 in which he had himself indicated that it was never intended that the purchase price under the PSAs should be paid and that the PSAs were entered into for tax planning reasons: to which he responded that he had been lying then, but was now telling the truth. It was put to him that the PSAs 'were sham agreements, and you couldn't recover anything from MXV under them', and that he had known that but had changed his mind only in 2018. He disagreed with this, and said it was a distortion. It was put to him that 'you are lying on most essential facts in this reference … and [that that had] always been the case', to which he said that that was not a true statement. And after an interchange between counsel, in which MXV's representative had said that Mr C was telling stories, and BPY's counsel had said that 'goes a step too far', the Arbitrator had said she 'was very conscious of time'. She repeated that a little later, and referred to the fact that she wanted to give BPY's counsel an opportunity to re-examine.

(2) It was put to Mr D that he had not had any independent motivation in relation to the PSAs, and that he had simply gone along with Mr C, not caring what it was that he was signing. It was put to him that large parts of his evidence were untruthful. In addition, the Arbitrator herself asked him a series of questions about whether the PSAs had been discussed with Ms B, and in what terms, at the time.

39. In the light of the foregoing, I consider that BPY's main witnesses were given an adequate opportunity to address the thrust of the case against them, including the allegations of dishonesty which MXV was making. I do not consider, especially given the constraints of time, that there was any serious irregularity in the witnesses not to be asked, more than they were, about the motives for the execution of the PSAs or who it was intended that they should deceive. The point that no case that there was an intention to deceive a third party had been put by MXV was a point which could be, and was, deployed by BPY in argument (in its Post Hearing Brief). It was thus a point which the Arbitrator could take into account in assessing the weight of the evidence she had received.

40. Moreover, even if I had been of the view that there was a breach of the s. 33 AA duty in relation to the way in which the witnesses were cross-examined, I would not have considered that it was such as to cause BPY any substantial injustice. In this regard, the test to be applied is whether, had there been fuller cross-examination of the motives or lack of motives for entering 'sham' PSAs the Arbitrator might well have reached a different view and a significantly different outcome been produced. In my judgment this cannot be said. This is so, in particular, because the Arbitrator found: (1) that Messrs A, C and D were unreliable witnesses; and (2) that the BPY Transfers were made pursuant to a different agreement, recorded in the Minutes, which was to split assets already owned by Ms B. BPY has not made any convincing suggestion as to what evidence Messrs C, A or D could have given but did not give which might have made an impact on the Arbitrator's findings.

41. For completeness I should record that, in looking at this aspect of the case, and before reaching the conclusions I have expressed above, I considered the case of P v D [2019] EWHC 1277, [2020] 1 All ER (Comm) 174, upon which BPY relied. In that case, an award was successfully challenged on the grounds of a breach of the duty to act fairly and impartially where a witness was not cross-examined on a core issue on which the tribunal based its decision. MXV, for its part, did not accept that P v D was correctly decided, but submitted that, if it was, it was plainly distinguishable from the present case.

42. In my judgment the principle on which P v D was decided was simply that fairness to the witness and the parties had required that the relevant witness (Mr E) should have been cross-examined on what was said orally at a meeting. That the essential principle is one of fairness is not controversial, and is the principle I have endeavoured to apply above. As to the facts of P v D, they are in my judgment considerably removed from those of the present case. That was a case in which there was no cross-examination at all on the core issue in circumstances where the tribunal had itself suggested that such cross-examination would be appropriate ([15], [34]); where the issue was one of the credibility of conflicting accounts of what had been said; and where, though Mr E's evidence was not found unreliable, it was analysed by the tribunal in an unexpected way. In the present case, by contrast, the core issue of whether the PSAs were intended to create payment obligations was extensively cross-examined upon; BPY's relevant

witnesses were found to be unreliable; and the Arbitrator had indicated that she was not constrained if a particular point was not challenged in cross-examination. Accordingly, I agree with MXV's submission that P v D is distinguishable.

43. In the fourth place, BPY's second point under Ground 1, namely that the case reflected in paragraph 705 of the Merits Award had not been pleaded or put to the witnesses, and thus that there was a breach of s. 33 AA in relation to it, is equally unfounded.

44. What BPY complains of, in this respect, is that the Arbitrator in paragraph 705 of the Merits Award concluded that it was more likely than not that, in 2013:

> '… Mr A, Mr C and Mr D decided to use the PSAs for a purpose other than its original paper trailing purpose. They seized that opportunity, by making a formal demand, an acknowledgment of the alleged debt, and small payments allegedly under the PSAs, all without Ms B's knowledge. Whether that purpose was to create leverage in the exit negotiations which were ongoing at the time, or to preserve positions in any future litigation, the Tribunal cannot say.'

This is said by BPY to be 'a finding of fraud and conspiracy to commit a fraud' which had not been pleaded or put.

45. I agree with MXV, however, that the Arbitrator's finding as to the purpose behind the 2013 documents and transactions was not essential to her finding that the PSAs were not intended to be enforceable when made. This is reflected in the fact that the Arbitrator's reasons for concluding the latter were dealt with in paragraphs 500-605 of the Merits Award, and the issue of the purpose behind the 2013 documents and transactions, comparatively briefly, at paragraphs 699-708 thereof. By the point at which this issue is considered in the Merits Award, the conclusions on it were virtually foregone, in light of other findings of fact which she had made in relation to whether the PSAs were 'sham'. Thus these conclusions were not an essential building block of the Merits Award.

46. Furthermore, even if, contrary to my view, this finding should be regarded as an essential building block of the Arbitrator's analysis, it was a matter which was 'in play' in the arbitration (to use the language, for example, of Popplewell J in Reliance Industries Ltd v Union of India at [32]) and BPY had a proper opportunity to address it. This is apparent from the fact that BPY addressed precisely this issue in its pre-hearing Memorial (at paragraphs 187-188), to which MXV pleaded in paragraphs 180-181 of its Counter-Memorial. These arguments were summarised by the Arbitrator in paragraph 666 of the Merits Award. The Arbitrator's findings in paragraph 705 were, in my judgment, plainly ones which she was entitled to make, given that the issue was in play in this way.

47. Insofar as BPY's complaint is that there was no or no sufficient cross-examination of its witnesses on the purposes behind the 2013 DAL documents and February Payments, I do not consider that it has force, for reasons similar to those applicable to BPY's complaint about inadequate cross-examination as to who and how the PSAs were intended to deceive. The Arbitrator had directed that there was no obligation for every point to be put to a witness. The motives behind the 2013 documents/transactions could properly have been regarded as a secondary issue, given that MXV's case, which the

Arbitrator essentially accepted, was that the PSAs were a sham when created and the 2013 documents/transactions could not, as it was put in argument, 'un-sham' them.

48. In any event, it has not been shown that any substantial injustice was caused by the way in which the 2013 documents/payments were dealt with. It is not clear what further arguments could have been deployed which were in substance different from the arguments which were presented; and given all the findings of the Arbitrator on other issues, I do not consider that it can be realistically said that more cross-examination in relation to the motives behind the 2013 documents/payments 'might well' have caused her to reach a different view and produced a significantly different outcome.

Ground 2

49. This ground was also based on s. 68(2)(a) and an alleged failure on the part of the Arbitrator to comply with the s. 33 AA duty. BPY's case was that 'a fair-minded and informed observer would conclude that the [Arbitrator's] findings in the absence of cross-examination of [BPY's] witnesses on [MXV's] deceit case; its findings at paragraph 705 of the Merits Award as to the 2013 documents; and its decisions on costs meant that there was a real possibility that the [Arbitrator] was biased'.

50. As is apparent from this, the case as to apparent bias is based on two matters: the first is the subject-matter of Ground 1, itself having two aspects; the second is the Arbitrator's awards as to costs.

51. In relation to that part of this Ground which relies on the matters raised under Ground 1, little more needs to be said. There is, in my judgment, no sustainable case that the Arbitrator failed to comply with the s. 33 AA duty in how she proceeded in either of the respects alleged; and no case that in proceeding as she did there was an appearance of bias.

52. As to the second matter, BPY relies upon the fact that in the Costs Award, MXV was awarded 50% of its legal costs and 75% of the arbitration costs for the Preliminary Issue Award, and upon the Arbitrator's decision not to order MXV to pay BPY's costs, as well as the arbitration costs of the Preliminary Issue Award. BPY contended that, as it had won the Preliminary Issue, these costs awards gave rise to an appearance of bias.

53. I do not consider that there is anything in this complaint. Under Rule 28.4 of the LCIA Rules, the Arbitrator had a discretion in relation to the award of costs. The rule provides that the tribunal should make costs decisions 'on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise.' In the Costs Award, the Arbitrator considered the parties' respective submissions in considerable detail. She rejected MXV's case that costs should be awarded on an indemnity basis. Her decision not to award costs to BPY was a rational one, based on the fact that 'the Preliminary Issue stemmed from [BPY's] claim, which was ultimately dismissed entirely on the merits'. But she also held that MXV could not recover all its costs of the Preliminary Issue bearing in mind that it had raised and then lost the Preliminary Issue, and also taking into account various conduct issues. Her decision was well within her discretion; was reasoned; and does not give any appearance of bias.

Ground 3

54. BPY's third ground is based on s. 68(2)(b) AA. BPY's contention is that the Arbitrator exceeded her powers by making findings in the Merits Award which were irreconcilable and inconsistent with findings made in the Preliminary Issue Award, and in relation to which the Arbitrator was *functus officio*. More specifically, BPY's case was that:

(1) In the Preliminary Issue Award, the Arbitrator had made findings which precluded any further arguments to the effect that: (a) the PSAs were created at a date after 4 January 2013; (b) the Letter of Demand was created at a date after 4 January 2013; (c) the DAL was created after 22 February 2013; (d) the February Payments were made other than in respect of the PSAs.

(2) She herself had accepted in the Merits Award that she was unable to entertain such arguments.

(3) A further finding of fact which was part of the essential findings of the Preliminary Issue Award was that the DAL constituted an acknowledgement of the debts under the PSAs. Again, she was *functus* in relation to this.

(4) Despite her saying and apparently accepting in the Merits Award that she could not 'revisit matters which were "necessarily established as the legal foundation or justification of [her] conclusion in the Preliminary Issue Award"', she had done so in the Merits Award.

(5) In particular, BPY argued, she had found in the Preliminary Issue Award that the February Payments and the DAL were 'made for the purpose of discharging an alleged debt under the First PSA' and for 'acknowledging the debts allegedly due under the 3 PSAs', but had reversed that finding in the Merits Award in concluding that the February Payments were 'not effected to satisfy a genuine debt'. Equally, in the Preliminary Issue Award she had found that the DAL and the DAL Receipt were acknowledgements of a debt; and her implicit finding that these were simply acknowledging a sham debt was inconsistent with this.

(6) Had the Arbitrator not committed this serious irregularity she would not or might not have found that the PSAs were shams.

55. I can deal with this ground relatively shortly, because I consider it to be clearly unfounded.

56. It is right that the four matters identified in paragraph [54(1)] above were the subject of findings in the Preliminary Issue Award. The Arbitrator accepted them as the basis on which the Merits Award proceeded. They were not, however, contradicted by the Merits Award. The Preliminary Issue Award had decided only that the relevant post-2011 actions of Messrs C, A and D were 'related to' the PSAs, but had not decided whether they were 'related to' sham PSAs or PSAs which had been intended to create payment obligations.

57. There was, however, in my judgment, no finding in the Preliminary Issue Award such as that identified in paragraph [54(3)] above. Paragraph 266(3) of the Preliminary Issue

Award refers to acknowledgment of a debt 'allegedly due'. This was because the Arbitrator was careful in the Preliminary Issue Award not to prejudge the questions of the validity or enforceability of the PSAs. As she said in paragraph 150 of the Preliminary Issue Award:

> 'The context in which the PSAs were entered into is not agreed between the Parties. Further, the authenticity, validity and legality of the PSAs is contested by the Respondent. For the purpose of the Preliminary Issue, the Tribunal does not need to rule upon those issues. … the Preliminary Issue proceeds on the basis that the PSAs are valid and binding, although the Respondent has reserved its right to challenge the authenticity of the PSAs and their legality, should the present proceedings continue beyond the Preliminary Issue trial.'

58. Furthermore, I do not consider that the Arbitrator could have made, in the Preliminary Issue Award, a finding which had *res judicata* effect as to the validity or enforceability of the PSAs, because that was not an issue which was up for determination by the Preliminary Issue Award, and which the Arbitrator specifically reserved for subsequent consideration, if necessary.

59. Finally on this ground, I do not consider that, even if there could be said to have been an excess of power in relation to the four matters identified in paragraph [54(1)] above, it gave rise to any substantial injustice. There is no doubt that the Arbitrator had the power, in the Merits Award, to decide whether the PSAs were sham. In addressing that issue for the purposes of the Merits Award, the Arbitrator considered the DAL Documents and the February Payments, together with many other matters, including as to the circumstances in which the PSAs were entered into. I do not consider that a more faithful recognition of the conclusiveness of the four findings – if that is what there should have been – might well have led to a different conclusion as to the validity of the PSAs.

Ground 4

60. Ground 4 is based on an alleged irregularity within s. 68(2)(d) or (g) AA. BPY's case is that (i) the Arbitrator failed to deal with an issue put to her, namely whether certain documents, which may be called 'the DBI Documents', had been, as a matter of Ukrainian law, unlawfully obtained and should not have been admitted in evidence, and (ii) the admission of the DBI Documents meant that an award was procured which was contrary to public policy.

61. This ground relates to the fact that some, or at least one, of the documents on which MXV and the Arbitrator relied had been obtained from a digital binary image (or 'DBI') of Mr C's computer created in the context of Ukrainian criminal proceedings (which were referred to as 'the 1716 proceedings') initiated in August 2015 following a complaint by Ms B as to alleged misappropriation of Ukrainian assets of the business by Mr A, Mr C and associates. On 26 December 2016 the investigative authorities had conducted a number of searches, including of Mr C's flat, during the course of which his laptop was seized. As recorded in the Merits Award (paragraph 138(2)) MXV's legal representative, Mr F, was subsequently given a copy of the email correspondence extracted from Mr C's hard drive during the forensic investigation.

62. As Mr Sharma candidly and realistically acknowledged, this ground is a difficult one for BPY. In my judgment it is hopeless on a number of levels.

63. Specifically, while BPY applied to exclude from consideration at the hearing the DBI Documents which it contended were privileged, it did not ask the Arbitrator to exclude them on the grounds that they had been unlawfully obtained, retained or deployed. No submissions were made by either party as to when unlawfully obtained documents could or should be excluded. Consistently with this, and although of course not determinative in itself, the exclusion of the DBI documents was not on the List of Issues in the arbitration. BPY never complained that the Arbitrator had failed to deal with the admissibility of the DBI Documents as being unlawfully obtained or deployed.

64. In light of these points, I consider that the position is as follows:

(1) There was no 'issue' on this point which was put to the Arbitrator. The Arbitrator was not asked to consider whether the DBI Documents should be excluded by reason of the alleged unlawfulness of how they were obtained.

(2) In any event, BPY lost any right to object to the Arbitrator not having dealt with such an 'issue' by not having raised this objection at any stage in the arbitration.

(3) Given that it is not the case – and BPY did not contend – that documents illegally obtained are *ipso facto* inadmissible in an arbitration on the grounds of public policy, had BPY wished to contend that these documents should not be admitted it should have raised the point before the Arbitrator. As it did not, I consider that it has lost the right to make any such objection, pursuant to s. 73 AA. In any event, there is no evidence before the court on which I could conclude that the relevant documents were unlawfully obtained as a matter of Ukrainian law. No permission for expert evidence of Ukrainian law was applied for or obtained in relation to this application, and none complying with CPR Part 35 was put in.

(4) In any event, it has not been shown that there was any substantial injustice caused by the admission of any DBI Documents. The Merits Award relied on a considerable number of documents, of which only one appears to have been obtained only by way of the DBI route, and that was relied on by the Arbitrator principally as corroboration of other documents. I do not consider that it can be said that, had this document been excluded, the Arbitrator might well have reached different conclusions.

Conclusion

65. Neither considered individually nor together do the Grounds relied on by BPY demonstrate that there was any serious irregularity for the purpose of s. 68 AA. BPY's applications will accordingly be dismissed.