Neutral Citation Number: [2019] EWHC 2735 (Ch)

Case No: BL-2018-001491

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE
ROYAL COURTS OF JUSTICE

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/10/2019

Before :

MR MICHAEL GREEN QC

(sitting as a Deputy Judge of the Chancery Division)

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Between :

(1) ANDREW MARTIN
(2) NICHOLAS GREENE
(3) COBAN 2017 LLP (formerly named STRUTT & PARKER LLP) — **Appellants / Defendants in the Arbitration**

- and –

MICHAEL HARRIS — **Respondent / Claimant in the Arbitration**

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- -

Mr Michael Jones (instructed by **Clyde & Co. LLP**) for the **Appellants**
Ms Elspeth Talbot Rice QC (instructed by **Harcus Parker Limited**) for the **Respondent**

Hearing date: 11 October 2019

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MR MICHAEL GREEN QC:

Introduction

1. This judgment deals with one disputed consequential matter arising from my judgment on the substantive issues handed down on 23 July 2019, reported at - [2019] EWHC 1962 (Ch) (**Judgment**)[1]. In the Judgment I answered the three questions put to me in favour of the Appellants and I set aside the arbitration Award dated 23 May 2018 (the Arbitrator called this his "*Final Award Part I*"). The parties managed to agree an Order reflecting the Judgment and this stated as follows:

> 1 The Arbitration Award of Mr Arthur Harverd dated 23 May 2018 be set aside.
>
> 2 The Respondent shall pay the Appellants' costs of this arbitration claim, such costs to be assessed on the standard basis if not agreed.
>
> 3 The Respondent shall make a payment on account of the costs set out in paragraph 2 above in the sum of £30,000 by 14 days after the date of the order.
>
> 4 A hearing be listed on the first available date after 16 September 2019 to deal with any further consequential matters, time estimate 2 hours.
>
> 5 Time within which to file and serve a Notice of Appeal be extended to 4pm on the date which is 21 days after the date of the hearing referred to in paragraph 4.

2. The costs of the appeal were therefore agreed to be paid by Mr Harris. There were two matters that the parties were unable to agree on:

> (a) Permission to appeal to Court of Appeal; and
>
> (b) the costs of the arbitration, which had been awarded to Mr Harris by the Arbitrator in a further Award, called the "*Final Award Part II*" dated 18 October 2018 (**Costs Award**).

3. Mr Harris has since confirmed that he is not seeking permission to appeal to the Court of Appeal. Therefore, the only matter that I have to deal with is the costs of the arbitration. One would have thought that this might be a fairly straightforward issue, to be dealt with in the same way as if the Court of Appeal had allowed an appeal and consequently reversed the first instance costs order. Mr Jones, on behalf of the Appellants, seeks an order that Mr Harris should pay the costs of the arbitration. However, Ms Talbot Rice QC, on behalf of Mr Harris, submitted that I have no jurisdiction in relation to the costs of the arbitration, whether in respect of setting aside or varying the Costs Award or to make a fresh order in respect of such costs.

[1] I will adopt the same definitions and abbreviations that I used in the Judgment.

4. Ms Talbot Rice QC's simple point is that the Arbitrator made two separate awards; (1) the substantive decision on the merits, the Award, which was appealed; and (2) the Costs Award, which was not. She relied on the fact that nothing was said in the Claim Form that the Appellants were also seeking to overturn the Costs Award. It is pertinent to point out that the Claim Form was issued on 19 June 2018, shortly after the Award was issued and therefore well before the Costs Award, so it is unsurprising that the Costs Award was not referred to in the Claim Form. Nevertheless, Ms Talbot Rice QC submitted that an amendment could have been made to the Claim Form after the Costs Award was issued and she went so far as to say that the Appellants could have issued a fresh Claim Form solely to appeal the Costs Award. She emphasised, by reference to a number of cases, that arbitration awards are final and can only be challenged in very limited circumstances; this includes costs awards which can similarly only be challenged on the narrow grounds set out in sections 67 to 69 of the Arbitration Act 1996 (**AA 1996**) but they do need to be challenged by way of a properly constituted appeal under one or more of those sections.

5. Mr Jones for the Appellants said that this cannot be right and that the Court in this situation has jurisdiction under the present Claim Form to deal with the Costs Award either pursuant to its powers under section 69(7) of the AA 1996 or pursuant to an implied ancillary power to make a costs order consequential on the successful appeal on the substantive Award. There is a surprising dearth of authority in relation to this. That could be because no one has previously thought to challenge the jurisdiction of the Court in these circumstances. It is not the most attractive or meritorious of arguments for someone who has lost an appeal and had the substantive award set aside to say that they should be entitled to retain the costs order in their favour because the Costs Award, which followed the event, has not been specifically appealed. However unattractive and unmeritorious the argument may appear, I do need to be satisfied that I have jurisdiction to deal with the Costs Award.

The Costs Award

6. It is clear that the Arbitrator followed the general rule, as prescribed in section 61 AA 1996, that costs should follow the event. The Arbitrator also made an order for an interim payment on account of those costs in the sum of £110,000, which sum was paid to Mr Harris within the 14 days set out in the Costs Award.

7. However the Arbitrator was actually reluctant to deal with the costs of the arbitration because of the outstanding appeal. He considered that the outcome of the appeal could significantly affect the costs of the arbitration and would therefore have preferred to leave his decision on costs until after the appeal had been determined. At paragraphs 6 and 7 of the Costs Award, the Arbitrator said this:

> "6 As the Part I Award is the subject of an appeal I was at first reluctant to determine any costs issues pending the outcome of the appeal.
>
> 7 However as a date for the appeal hearing has not yet been fixed and the parties are still in discussion as to their approach to HMRC about the capital gains tax liability, I consider in the circumstances of the case it is appropriate to

determine two of the costs issues now, accepting that my determination on the substantive issues may be overturned in the High Court."

8. The Arbitrator incorporated detailed Reasons into the Costs Award. In paragraph 8 (iii) he recorded one of the submissions made on behalf of Mr Harris as follows:

> "(iii) In the event that the [Appellants'] appeal is successful or that on a full assessment Mr Harris recovers less than [the interim payment on account] Mr Harris will repay the interim sum awarded or the difference."

To my mind, that was a fairly clear indication that Mr Harris accepted that, if the appeal was successful and the Award set aside, he would at least pay back any interim payment on account. Ms Talbot Rice QC however submitted that there was no concession of that sort and that it was in any event conditional on the Appellants actually appealing the Costs Award as well as the Award. I am afraid that I do not accept that and I do not think that that was how it was viewed by the Arbitrator.

9. In paragraph 28 of his reasons for the Costs Award, the Arbitrator relied on Mr Harris' assurance that the interim payment would be repaid in the event of a successful appeal and on that basis ordered £110,000 to be paid by the Appellants on account of costs. He said (underlining added):

> "28 I am satisfied that <u>in the event that the [Appellants'] appeal is successful</u>, or that on a full assessment the Claimant recovers less than £110,000.00 he will be able to repay the interim costs award or any difference between his interim costs award and the final detailed assessment of costs."

The Arbitrator then, in paragraph 30, reserved the final detailed assessment of costs

> "pending the outcome of the appeal and/or further submissions of the parties."

10. In my view, both the Arbitrator and the parties were anticipating that, if the Appellants succeeded in overturning the Award, or Final Award Part I, then the Costs Award, or Final Award Part II, would also be overturned and the interim payment on account would have to be returned by Mr Harris. That was apparently conceded on behalf of Mr Harris. It seems to me that that was the basis on which the Costs Award was made and the underlying consensus as to what would happen if the appeal succeeded, as it has.

11. I do not consider that when Mr Harris and the Arbitrator referred to the appeal succeeding, they were referring to an appeal against the Costs Award which they recognised at the time would have to be made separately from the substantive appeal against the Award. They were simply referring to the extant appeal by the Appellants against the Award and assumed that, if that was successful, the Costs Award would similarly fall. As the Costs Award followed the event, so everyone expected that if the "event" changed by reason of a successful appeal, the costs of the arbitration would follow that "event" and be reversed. I do not see, contrary to Ms Talbot Rice QC's

submissions, that anyone contemplated at the time that the Costs Award would itself have to be specifically appealed in order for it to be reversed.

12. The question then is whether the fact that the Costs Award was not specifically appealed deprives me of jurisdiction to make the order that all the parties and the Arbitrator anticipated me making. It would be most odd if that is the necessary outcome and would constitute, as it seems to me, a triumph of form over substance.

An Appeal against the Costs Award

13. By section 58 of the AA 1996, arbitration awards are deemed final and binding and only subject to challenge pursuant to specific provisions in the AA 1996. It states:

> "**58 Effect of award.**
>
> (1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.
>
> (2) This does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Part."

14. The only bases for challenge of an award under the AA 1996 are contained in sections 67, 68 and 69. Section 67 concerns challenges based on the arbitral tribunal's lack of jurisdiction. Section 68 concerns challenges based on serious irregularities affecting the arbitral tribunal, the proceedings or the award. Neither of these sections, as was accepted by Ms Talbot Rice QC, could be relied upon by the Appellants in seeking to challenge the Costs Award.

15. Ms Talbot Rice QC does, however, say that an appeal could be brought by the Appellants against the Costs Award under section 69 of the AA 1996. Section 69 is concerned with appeals based on points of law and this appeal was brought under that section (together with clause 22 of the 1989 Agreement), as explained in paragraphs 16 to 21 of the Judgment. Ms Talbot Rice QC submitted that the error of law that was made in the Costs Award was the same as that relied on in the substantive appeal; she said that as the Costs Award was parasitic on the Award, the errors of law that I found in the Award had similarly affected the Costs Award.

16. Mr Jones disputed this and said that there were no grounds under any of sections 67 to 69 of the AA 1996 which could sensibly be relied on in a Claim Form challenging the Costs Award. Where, as in this case, the Arbitrator has followed the general rule in section 61 of the AA 1996 that the costs follow the event, there cannot possibly have been an error of law in the Costs Award. The fact that it is wholly parasitic on the challenge to the Award shows that it is necessarily dependent on the outcome of the appeal against the Award and should follow that event. Indeed, it would actually be upholding the principle applied by the Arbitrator in ordering costs to follow the outcome of the appeal.

17. Ms Talbot Rice QC directed me to sections 1 and 58 of the AA 1996 in support of her argument that the powers of the court to intervene in arbitration awards are very heavily circumscribed so as to ensure the finality of arbitration awards and to respect the choice made by the parties to resolve their dispute by way of arbitration. She also referred to the speech of Lord Steyn in *Lesotho Highlands Development Authority v Impreglio SpA and ors* [2006] 1 AC 221 in which the ethos of the AA 1996 is explained and in particular how it seeks to restrict the ability of the court to intervene in the arbitral process. I fully accept those constraints and referred to those principles in paragraph 24 of the Judgment.

18. Ms Talbot Rice QC referred to three cases concerned with challenging costs awards made by arbitrators: *Blexen Ltd v G Percy Trentham Ltd* [1990] 4 EG 133; *King v Thomas McKenna Ltd* [1991] 2 QB 480; and *Cohen and ors v Baram* [1994] 2 Lloyds LR 138. However, these were all appeals against costs awards where there was something about the costs award itself that was potentially appealable. For example, in both the *Blexen* and *King* cases, the issue was whether the arbitrator correctly took account of, or should have taken account of, a settlement offer. Furthermore, the cases do seem to have turned more on the scope of the old power to remit the matter back to the arbitrator because he had made an obvious mistake or because of a mishap in the process under the Arbitration Acts 1950 and 1979. The cases are not analogous to this case in that they were not seeking to reverse the costs award consequent on success in the substantive appeal.

19. In my judgment, there was no basis under section 69 of the AA 1996 for challenging the Costs Award on the grounds of error of law. A separate Claim Form issued by the Appellants in respect of the Costs Award would not only have looked very strange but also it would potentially have been demurrable. An amendment to the existing Claim Form to make clear that the Appellants were also seeking to overturn the Costs Award would at least have given notice to Mr Harris of what the Appellants wanted the Court to do but could not have affected the jurisdictional question if a separate Claim Form was not possible. I therefore find that there was no requirement for the Appellants separately to have appealed the Costs Award in order for the Court to have jurisdiction.

Jurisdiction over the costs of the arbitration

20. Mr Jones submitted that the Costs Award falls with the successful appeal against the Award. He then argued that the Court has power to make a fresh order as to the costs of the arbitration, either through an implied ancillary power under the AA 1996 or pursuant to the power to vary under section 69(7) of the AA 1996. I was referred to an extract from *Merkin's Arbitration Law* at para.18.75 at which the following is stated:

> "The award of costs must be in the form of an award, and for this purpose may be included in the substantive award, or may be dealt with separately in a supplementary award, but whether costs are dealt with in the main award or in a separate award, any award as to costs stands or falls with the substantive award, so that, if the substantive award is overturned by the court, the award as to costs ceases to have effect."

21. The only authority cited in support of the latter proposition is the Court of Appeal decision in *Davis v Witney UDC* (1899) 15 TLR 275. That case concerned an arbitration under the Public Health Act 1875 in respect of damage allegedly caused by sewage works close to the Plaintiff's property. In fact, the Defendant local authority had abandoned the works before they had started but the arbitrators awarded the Plaintiff £10 by way of damages and £221 0s. 10d for solicitor and client costs. This was all contained in one award. The Divisional Court overturned the award, both as to damages and costs[2], on the grounds of want of jurisdiction and this decision was upheld by the Court of Appeal. A. L. Smith LJ is reported to have held as follows[3] (all underlinings added):

> "The award was, in his Lordship's opinion, bad on the face of it, because the submission was a limited one, claiming compensation for damage by the execution of the works, and the works were never begun and the sewer was abandoned, as appeared on the face of the award, and yet £10 was awarded as compensation. The award was therefore made without jurisdiction upon this point, and it was bad *in toto*. <u>The condition upon which the arbitrators awarded costs was that the plaintiff succeeded upon the claim for £10 compensation. In his opinion, if the award was set aside on the ground of want of jurisdiction, the costs awarded went with the award.</u> In "Capell v Great Western Railway Company" (11 Q.B.D., 345) the sole question was whether the plaintiff could bring an action to recover the costs awarded to him before he made out a title to the land to convey it to the railway company, and the court held that he could. There was no suggestion there that the award was bad. The award in the present case was bad *in toto*."

Collins LJ agreed with A.L.Smith LJ although he had some misgivings on the costs point:

> <u>"He agreed that in ordinary cases the costs awarded would fall with the award</u>. But this arbitration was instituted upon the footing that the sewer would be made, and some costs were unquestionably incurred before the abandonment of the intention to make the sewer, and his Lordship felt some misgiving whether in these circumstances the arbitrators had not jurisdiction to deal with the costs. But, at the same time, he thought that the better view was to regard them as costs incident to the other claim, which was outside the submission, and they therefore fell with the award. This would be without prejudice to any right which the plaintiff might have to claim the costs of the arbitration, which had been rendered abortive by the defendants' abandonment of the notice of their intention to make the sewer."

Romer LJ also concurred:

> "As regards the submission, the arbitrators were bound by the limited words thereof, and it followed that they had no jurisdiction to award the £10 compensation. <u>Consequently, the costs could not be awarded, as they were awarded on the footing that the plaintiff succeeded in obtaining £10 compensation</u>."

[2] Channell J disagreed in relation to costs but as the junior judge in the Divisional Court withdrew his judgment and agreed that both the damages and costs awards should be set aside.
[3] The Times Law Reports do not report the verbatim judgment.

22. Mr Jones said that, even though it was concerned with a different Act, *Davis v Witney UDC* is authority for the proposition that an award of costs by arbitrators falls with the substantive award if it is successfully appealed. He accepted that it is not authority for the Court having jurisdiction to make a fresh order as to the costs of the arbitration.

23. Ms Talbot Rice QC disputed the significance of this case. She submitted that it is easily distinguishable from the present as the costs were dealt with in the same award and the whole award was challenged. She also fairly pointed out that this was a want of jurisdiction case so that the arbitrators were found to have no jurisdiction over the matter, and that would necessarily include the costs. She directed me to paragraph 18.76(a) of *Merkin on Arbitration Law* where the *Davis* case is again relied on but specifically in the context of a want of jurisdiction case.

24. In my view the statement in paragraph 18.75 of *Merkin on Arbitration Law* (quoted in paragraph [20] above) is correct. Whether or not the costs award is included in the substantive award or not, should make no difference to the principle that a costs award that is consequential on the substantive award falls with it. Although the *Davis* case was a want of jurisdiction case, the Court of Appeal were clearly of the view that an award of costs based on the result of the substantive award would fall with that award. I see no reason why that should not apply to an appeal under s.69 of the AA 1996 based on errors of law, in particular when the Costs Award simply followed the event. The branch falls with the tree.

25. As I have said above, the two awards were actually called: "*Final Award Part I*" for the substantive Award; and "*Final Award Part II*" for the Costs Award. This nomenclature is indicative as to how the Arbitrator viewed them and whether there were really two separate awards or two parts of one Award. It would be illogical for there to be a different principle applying in respect of costs depending on whether the costs award was made in one document or another.

26. It is also material, in my view, that "*award*" is not defined in the AA 1996. The Claim Form only referred to the Award, specifically defined as the substantive Award dated 23 May 2018, because that was the only award in existence at the time it was issued. It was also the only part of the Award that was being challenged on points of law. It is reasonable to treat Part II of the Final Award dealing with the costs of the arbitration as being part of one overall award for the purposes of the AA 1996.

27. Section 69(7) of the AA 1996, gives wide powers to the Court on hearing a substantive appeal based on an error of law. It provides as follows:

> "(7) On an appeal under this section the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award,
>
> (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
>
> (d) set aside the award in whole or in part.

> The court shall not exercise its power to set aside an award, 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."

28. Mr Jones submitted that, given the wide powers given to the Court to interfere with the substantive Award, including to remake it by using the variation powers without remitting it back to the arbitrator, the Court must have power to remake the costs award consequent on it being set aside. He said that it would be anomalous if the Court did not have this power and that it can be implied into section 69(7) of the AA 1996 as an ancillary statutory power that Parliament must have intended the Court to have. He referred to *Bennion on Statutory Interpretation (7th Ed)* pp.299-300 in support of this proposition.

29. By way of alternative, Mr Jones submitted that the Court could use its power under section 69(7)(b) of the AA 1996 to vary the Award to provide for an award of costs in favour of the Appellants.

30. Ms Talbot Rice QC disputed that there was any power either to set aside the Costs Award or to make a fresh order in respect of the costs of the arbitration. Her main point was that unless there was a specific appeal against the Costs Award, whether by way of a separate Claim Form or an amendment of the existing Claim Form, the Court has no jurisdiction whatsoever in relation to the costs of the arbitration. I have dealt with this above and have held that the Court has jurisdiction to set aside the Costs Award without there needing to be a specific appeal against it. In relation to the alleged implied statutory power to make a fresh costs order, Ms Talbot Rice QC submitted that there cannot be any room for such a power to be implied into a carefully drafted and calibrated Act that was intended to restrict the Court's powers of intervention.

31. While I can see the attraction of doing so, I am reluctant to imply any ancillary power in relation to costs into the AA 1996. I am particularly reluctant to do so when I consider it is not necessary as there is another way of properly and effectively doing that which would be achieved by implying the ancillary power.

32. In my judgment, the powers set out in section 69(7) of the AA 1996 are not limited to the Award but include the Costs Award which is the second Part of the Arbitrator's "*Final Award*". The references to "*award*" in that section therefore include the Costs Award and on that basis the setting aside of the Award, carries with it the full suite of powers in relation to the Costs Award.

33. Accordingly, I consider that I can vary, remit or set aside the Costs Award.

The appropriate order to make

34. Mr Jones submitted that the Costs Award should be reversed so that Mr Harris should be ordered to pay the costs of the arbitration. That position is strengthened by two factors: (1) the fact that the Costs Award followed the event; and (2) the apparent recognition by Mr Harris that he would at least have to repay the interim payment if he

lost the appeal. While I can see the force of both points, I am troubled by one aspect as to how this has been pursued.

35. There was no mention in the Claim Form, or the Appellants' skeleton argument or at the hearing of the appeal that the Appellants were seeking the costs of the arbitration. This only emerged after my Judgment was handed down and there was discussion between the parties as to the proposed draft Order. I understand that the Appellants were under the impression that there would be no real dispute, in the light of the apparent concessions by Mr Harris in relation to the Cost Award, that if the appeal was successful, the Costs Award would be reversed.

36. Ms Talbot Rice QC submitted that if Mr Harris had known that the Appellants were also seeking to overturn the Costs Award and for the costs of the arbitration to be paid by Mr Harris, he would have adduced evidence to challenge whether the Appellants should have their costs of the arbitration even if they were successful on their appeal. She said that there would be questions of previous reserved costs awards of the arbitrator and whether costs of amendments and abandonments of parts of their defence should have been allowed. Mr Jones countered this by saying that Mr Harris has known since at least the end of July 2019 that the Appellants would be asking the Court to make such a costs order yet Mr Harris has chosen not to put in any evidence whatsoever. Of course, Mr Harris considers that the Court does not have jurisdiction to deal with the costs of the arbitration and that may have been why he did not put in evidence for this hearing.

37. I should also mention that I asked Mr Jones if he was applying for permission to amend the Claim Form to include an appeal in respect of the Costs Award. He eventually confirmed that he was not making any such application, on the basis, I assume, that it was not necessary for the purposes of founding the Court's jurisdiction. He was correct about that and it would have been a fairly pointless amendment to make at this stage in terms of giving Mr Harris notice.

38. I am somewhat dubious about Mr Harris' alleged prejudice in having to deal with costs now but it does seem to me that before I make a specific costs order against him he should have the opportunity to put forward evidence and make submissions in relation to whether he should have to pay all of the Appellants' costs of the arbitration. I am clear that the starting point should be that Mr Harris should have to pay the Appellants' costs of the arbitration on the basis that this would be consistent with the general principle of the Costs Award and section 61 of the AA 1996. However, Mr Harris should be able to argue that, for whatever reason, he should not have to pay all of those costs.

39. The next question therefore is whether the matter should come back to me or should be remitted to the Arbitrator. I do not want the parties to have to incur any unnecessary further expense, particularly when that is just in relation to costs. I decided not to remit the Award to the Arbitrator for that reason but it seems to me that in relation to costs, which is still technically before the Arbitrator for the detailed assessment of the costs of the arbitration that he deferred until after this appeal, that it may be the best and cheapest way to proceed. The Arbitrator will be far more familiar than me with the course of the arbitration and he considered a number of issues in relation to costs in determining the Costs Award. While I would encourage the parties to come to an agreement in relation to the costs of the arbitration in the light of this judgment, and

particularly my view as to the proper starting point for the consideration of the costs, I do think that the fair and appropriate order for me to make in the circumstances is to remit the Costs Award to the Arbitrator.

Conclusion

40. By way of conclusion then I am satisfied that I have jurisdiction to deal with the Costs Award and that it should be set aside. As to whether Mr Harris should pay all or only some of the costs of the arbitration, I will remit that question back to the Arbitrator to determine in the light of this decision and the Judgment.

41. As for the costs of this hearing, I consider that they should be costs in the case and so payable by Mr Harris to the Appellants. Mr Harris has lost on the jurisdiction question, which was his only real defence to the application, and the hearing was only required in order to deal with that objection. It would be disproportionate for there to be a further hearing before me in relation to the costs of this hearing.