



Neutral Citation Number: [2024] EWCA Civ 790

Case No: CA-2023-002515

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

Mr. Justice Robin Knowles CBE
Judgment given on 8 December 2023

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Friday 12 July 2024

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE SNOWDEN
and
LORD JUSTICE FRASER

Between :

**PROCESS & INDUSTRIAL DEVELOPMENTS
LIMITED**
(a BVI corporation)
- and -

**Defendant/
Appellant**

THE FEDERAL REPUBLIC OF NIGERIA

**Claimant/
Respondent**

Alexander Milner KC and Henry Hoskins (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellant**
Mark Howard KC and Tom Ford (instructed by **Mishcon de Reya LLP**) for the **Respondent**

Hearing date : 30 April 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This is a rolled-up application for permission to appeal, with appeal to follow if permission is granted, against the decision of Mr. Justice Robin Knowles CBE (the “Judge”), in relation to the currency in which an order for costs (the “Costs Order”) was made, against which the Judge refused permission to appeal.
2. The Costs Order and refusal of permission to appeal were made at the conclusion of a successful application by the Federal Republic of Nigeria (“Nigeria”) under section 68 of the Arbitration Act 1996 (“section 68” and the “Arbitration Act”) to set aside two arbitration awards (the “Awards”) in favour of Process & Industrial Developments Limited (“P&ID”).
3. There are two issues before this Court. The first issue is whether section 68(4) of the Arbitration Act deprives this Court of jurisdiction to hear P&ID’s appeal. Section 68(4) provides,

“The leave of the court is required for any appeal from a decision of the court under this section.”
4. The second issue (which is only reached if this Court has jurisdiction and grants permission to appeal) is whether the Judge was right to order P&ID to pay Nigeria’s costs in sterling. Although Nigeria was billed by its English lawyers in sterling, and paid them in sterling, P&ID contends that Nigeria funded such payments by exchanging naira from its consolidated revenue fund, so that the Costs Order should have been in naira.
5. The issue is of some financial consequence, because the naira depreciated significantly against sterling in the period between Nigeria’s payments to its lawyers and the making of the Costs Order. Nigeria’s legal fees and disbursements are said to have amounted to around £43 million. P&ID asserts that payment of such fees and disbursements at the relevant times would have cost Nigeria a total of about 23 billion naira; but if P&ID is required to pay £43 million in costs now, that could be exchanged by Nigeria at the current rate to about 76 billion naira.

The background

6. The Judge’s Costs Order was made during a hearing on 8 December 2023 dealing with a number of consequential matters following his earlier substantive judgment on Nigeria’s application pursuant to section 68: see [2023] EWHC 2638 (Comm) (the “section 68 Judgment”).
7. In the section 68 Judgment, the Judge decided to set aside the two Awards that had been made in favour of P&ID in 2016 and 2017 by an arbitral tribunal comprising Lord Hoffmann, Sir Anthony Evans and Chief Bayo Ojo SAN. The Awards were for damages for repudiatory breach of a contract for the construction of a gas processing facility in Nigeria, and were for a total of US\$6.6 billion. The Judge found that the Awards had been obtained by fraud or procured in a way that was contrary to public policy within the meaning of section 68(2)(g). The specific findings by the Judge were that there had been bribery of a legal adviser at the Nigerian ministry that had awarded the contract to P&ID; that there was a failure to disclose the bribery in the arbitration

that amounted to perjury; and that P&ID had been provided with a significant number of Nigeria's confidential internal and privileged documents during the arbitration.

8. At the consequential hearing, the Judge gave a ruling ordering P&ID to pay Nigeria's costs of and occasioned by the proceedings under section 68 to be assessed on the standard basis if not agreed. The Judge then heard argument on the currency in which such costs should be paid.
9. Nigeria's argument was simple. It contended that it had instructed English solicitors in relation to litigation in England, had been invoiced by them in sterling, and had paid the bills in sterling. It therefore contended that in accordance with the indemnity principle, the order for payment of its costs should be in sterling.
10. In opposition, P&ID contended that the purpose of an award of costs was to compensate Nigeria for its losses sustained by reason of paying the costs of the proceedings under section 68. It relied upon the analysis of John Kimbell QC (sitting as a Deputy High Court Judge) in Cathay Pacific Airlines v Lufthansa [2019] EWHC 715 (Ch) ("Cathay Pacific") and contended that Nigeria had in reality suffered such losses in naira because it could be presumed to have taken naira from its central government funds and converted the naira into sterling to fund the payment of its lawyers' bills.
11. In that regard, P&ID relied upon a letter dated 23 November 2023 from Nigeria's solicitors that stated,

“...Our client has paid invoices relating to its costs in these proceedings on a regular basis since the outset of the proceedings. As the Federal Republic of Nigeria, it is self-evident that our client primarily transacts in Naira (and, indeed, we understand it has regularly exchanged Naira for Sterling on the foreign exchange market to discharge costs liabilities in relation to these proceedings) ...”

In addition, P&ID's skeleton argument before the Judge asserted that,

“Nigeria's National Assembly approves its budget and appropriates funds in Naira, and Article 80 of Nigeria's Constitution requires that “all revenues or other moneys raised or received by the Federation... shall be paid into and form one Consolidated Revenue Fund of the Federation”. It should be inferred that it is from this Consolidated Revenue Fund, denominated in Naira, that Nigeria must have paid its costs, and that any costs award it receives will likewise be paid back into this same fund.”

Nigeria's counsel did not contest those assertions.

12. In his ruling on the currency point, the Judge referred briefly to the court's general discretion in relation to costs under CPR 44.2 and then stated,

“4. I have had the advantage of argument from Mr. Milner KC for P&ID, which presses for an approach that would treat

costs in the same way as damages might be treated or an indemnity granted by a contract. On one view of the case of Cathay Pacific, the learned deputy judge found a point of comparison between the costs jurisdiction and discretion, and the approach where there is an indemnity in a contract. I am not able to accept that that parallel is sound for present purposes. The word “indemnity” features in the phrase “indemnity principle” when one is dealing with costs, but its purpose there is to describe the objective of preventing a successful party recovering a sum in excess of their liability to their own solicitor.

5. In the present case, if costs had been incurred in naira, then this court in the exercise of its discretion might have found more that favoured the argument addressed by P&ID. But in the exercise of this court’s discretion, the short and neatly expressed proposition from Mr. Ford for Nigeria prevails.”

The Judge also gave further rulings on the applicable rates of interest and the amount of an interim payment on account of costs (£20 million).

13. The Judge then heard argument on the question of permission to appeal against the order setting aside the Awards under section 68. He reserved judgment, reflecting the fact that it was common ground that if he refused permission, section 68(4) would prevent any appeal being heard. In a subsequent written ruling given on 21 December 2023, the Judge refused permission to appeal.
14. At the hearing on 8 December 2023, Mr. Milner KC then applied for permission to appeal against the Judge’s order that the costs ordered should be paid in sterling, submitting that this was a discrete point of law. The Judge stated,

“Attractively put, if I may say, and thank you for the concision. I am going to decide now to refuse you permission to appeal on that point. So you have that outcome.”
15. In response, Mr. Milner indicated that he anticipated being instructed to seek permission to appeal to this Court, and asked for a stay of the order for an interim payment on account. The Judge refused that application for a stay and then added,

“I don’t know if there is something to think about, whether section 68(4) affects the costs point for appeal purposes, but you can think about that and take the course you are minded to take.”
16. P&ID subsequently sought permission to appeal from this Court against the currency of the Costs Order. In its statement of objection to the grant of permission under paragraph 19 of CPR Practice Direction 52C, Nigeria contended that section 68(4) deprived this Court of any jurisdiction to hear such an appeal. Accordingly, Males LJ directed that the application for permission to appeal should be heard on a “rolled-up” basis with the appeal to follow if permission was granted. Males LJ also granted a limited stay of the order for an interim payment on terms.

Section 68

17. The Arbitration Act provides three grounds upon which an arbitral award may be challenged. They are section 67 (substantive jurisdiction), section 68 (serious irregularity) and section 69 (appeal on point of law).

18. Section 68 provides in material part,

“(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 –

...

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

(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.”

19. It is common ground that “the court” in section 68(4) means the first instance court hearing the application challenging the arbitral award and not an appellate court.

20. The first issue for determination in the instant case is therefore whether the Judge’s decision to make the Costs Order in sterling rather than naira was “a decision of the court under this section” for the purposes of section 68(4).

Recent Authorities

21. The meaning of section 68(4) and the identically worded section 67(4) has been explored in three relatively recent decisions of this Court. Those cases are Manchester City FC v Football Association Premier League [2021] EWCA Civ 1110 (“Manchester City”); National Iranian Oil Company v Crescent Petroleum Company International [2023] EWCA Civ 826 (“NIOC”); and Czech Republic v Diag Human [2023] EWCA Civ 1518 (“Diag Human”).
22. In Manchester City, the FA Premier League had commenced arbitration proceedings against the well-known professional football club to obtain certain information and documents said to be relevant to an investigation into the club’s compliance with UEFA’s financial fair play regulations. The tribunal held that it had substantive jurisdiction to hear the proceedings and a challenge to that decision by the club under sections 67 and 68 of the Arbitration Act was dismissed by the Commercial Court following a hearing in private. The Commercial Court judge then gave a subsequent judgment in which she decided to publish her judgment dismissing the club’s challenge under sections 67 and 68. She refused permission to appeal that publication decision.
23. The Court of Appeal (Sir Geoffrey Vos MR, Sir Julian Flaux C and Males LJ) held the judge’s publication decision did not fall within sections 67(4) or 68(4) so that her refusal to give permission to appeal did not prevent an appeal being heard by the Court of Appeal. In explaining that decision, Sir Julian Flaux C (with whom the other members of the Court agreed) stated, at [39]-[40],

“39. Citation of [certain] cases provoked a debate between counsel and the court as to where the line was to be drawn between decisions which would be caught by the limitation on the right of appeal in the relevant section of the 1996 Act and decisions which would not. Males LJ posited the example of a case management decision about how a section 68 application should be dealt with. As I said at the time, that would seem to be an example of something which is part of the process of reaching a decision under section 68, so would be caught by the limitation on the right of appeal. Sir Geoffrey Vos MR suggested to Lord Pannick [counsel for the club] that a consequential decision on a section 68 application, for example as to costs, would also be caught by the limitation.

40. Lord Pannick made it clear that he was not inviting this court to lay down any general principles applicable in every case, but only to determine that this court had jurisdiction to hear the appeal from the publication judgment. I agree that it is not necessary for present purposes to determine the more difficult question whether case management decisions either side of the substantive decision under, say, section 67 or 68, for example as to how a hearing is to be conducted or as to costs, would be caught by the limitation in subsection (4) of each section. Whilst such case management decisions may be said to be part of the process of reaching the substantive decision, the question whether the substantive decision should be published is a distinct

question separate from the decision itself. In the present case, the judge's decision that the merits judgment and the publication judgment should be published was an application of common law principles as set out in the decision of this court in Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co [2005] QB 207. It was not a decision of the court *under* sections 24, 67 or 68 and was, therefore, not caught by the limitation on the right of appeal. In those circumstances, I am satisfied that this court has jurisdiction to hear this appeal ...”

24. NIOC concerned a decision by the Commercial Court that a party had not, by reason of section 73 of the Arbitration Act, lost the right to object under section 67 that an arbitral tribunal had exceeded its substantive jurisdiction. The Commercial Court refused permission to appeal that decision. The Court of Appeal (Males LJ, Nugee LJ and Falk LJ) held that the decision that the right to object under section 67 had not been lost was “a decision of the court under [section 67]” for the purposes of section 67(4) and hence could not be appealed without the permission of the Commercial Court.
25. At [60]-[63], Males LJ (with whom the other members of the Court agreed) stated a number of principles which he derived from earlier authorities, including Manchester City,

“60. First, the policy underlying section 67(4) and other equivalent provisions has consistently been stated as being to avoid delay and expense. Obviously this is not achieved by excluding appeals altogether, but by making the first instance court the sole gatekeeper to control whether permission to appeal should be given. Paragraph 74(iii) of the DAC Report, commenting on the equivalent provision in what became section 12(6) of the Act, demonstrates that it was intended that appeals should generally be limited to “some important question of principle”:

“Thirdly, we have made any appeal from a decision of the court under this Clause subject to the leave of that court. It seems to us that there should be this limitation, and that in the absence of some important question of principle, leave should not generally be granted. We take the same view in respect of the other cases in the Bill where we propose that an appeal requires leave of the court.”

61. It is worth noting that the policy set out in section 1 of the Act also includes, in addition to the avoidance of unnecessary delay and expense, a policy of non-intervention by the court in the arbitral process except as expressly provided in Part I of the Act.

62. Second, there are statements which suggest that a decision which is “part of the process” of reaching a final decision on a challenge to an award is a decision “under” section

67 or 68, as the case may be. More specifically, it was at least assumed in Sumukan that a decision under section 73 was “within the compass” of section 67 or section 68, and that the restrictions on appeal contained in section 67(4) and section 68(4) would therefore apply.

63. Third, there is no support in these cases for the view that only a decision finally disposing of a challenge to an award is capable of being a decision under section 67 or section 68. Nor is any distinction drawn between a decision that a party has lost the right to object and a decision that it has not done so.

26. Males LJ then concluded, at [64]-[66],

“64. Whether a decision that a party has not lost the right to challenge an award under section 73 is a decision under section 67 or section 68 for the purpose of section 67(4) and section 68(4) is a question of statutory interpretation. It must therefore be approached having regard to the object of the 1996 Act. The principles by which the Act must be interpreted are set out in section 1. They include the avoidance of unnecessary delay and expense and the limitation of court intervention in the arbitral process except where expressly provided.

65. In my judgment it is clear that section 73 is entirely ancillary to sections 67 and 68. It has no relevance or application independent of a challenge to an award under one or both of those sections. A decision whether a party has lost the right to challenge an award is undoubtedly “part of the process” for determining a challenge under section 67 or section 68 and is “within the compass” of those sections. It is a preliminary question, but not a question going to the court’s jurisdiction, the answer to which determines whether the court needs to consider the merits of the section 67 or section 68 challenge. “Decision” is a broad term and the determination of a section 73 issue is naturally to be regarded as a decision under section 67 or section 68 as a matter of language, whichever way it goes. There is no justification for saying that it is a decision under section 67 or section 68 if the section 73 issue is decided in favour of the award creditor (ASM Shipping), but not if it goes against the award creditor.

66. Moreover, it is in accordance with the policy of the Act, as consistently described in the case law, to interpret section 67(4) and section 68(4) as encompassing such a decision. It would be paradoxical to interpret those provisions to mean that only the first instance court can grant permission on the final decision to uphold or dismiss the challenge to an award, but that the Court of Appeal can give permission on preliminary or case management decisions when the first instance court has refused such permission. Although it may be said that the Court of

Appeal could be trusted not to give permission in unmeritorious cases, and would be unlikely to do so on case management decisions, even the process of applying for such permission would cause delay and expense, while leaving the status of the award in limbo until the application had been determined. The fact that there are other provisions of the Act, such as section 9 and sections 66 and 103, which may raise broadly similar issues as to the scope of an arbitration clause as arise under section 67, but which contain no equivalent restriction on the grant of permission to appeal, is nothing to the point.”

27. Diag Human concerned an attempt to appeal a decision of the Commercial Court dismissing an application for an order pursuant to section 70(7) of the Arbitration Act that money payable under an arbitration award should be brought into court pending determination of a challenge to the award under sections 67 and 68. The Commercial Court refused permission to appeal its decision. The Court of Appeal (Males LJ, myself and Falk LJ) held that the dismissal of the application for an order under section 70(7) was “a decision of the court under [sections 67 and 68]” for the purposes of sections 67(4) and 68(4) and hence could not be appealed if the Commercial Court had refused permission.
28. The lead judgment was given by Males LJ (with whom I and Falk LJ agreed). At [32]-[33], Males LJ referred to the relevant passages in his earlier judgment in NIOC, and concluded, at [36]-[41],

“36. In my judgment only the first instance court can give leave to appeal from a decision either to order or not to order security under section 70(7)...

37. I accept that the starting point, as a matter of statutory interpretation, is that in the absence of clear words or necessary implication there should be no restriction on whatever right of appeal a party has under the general law (see Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586, 590E-F, although the issue in that case was whether a right of appeal had been excluded altogether; that is different from the present issue, as there is no doubt that the first instance court has jurisdiction to grant leave to appeal to this court). However, in my view the position is clear.

38. I consider that the reasoning in NIOC applies here. Section 70 is ancillary or supplementary to an application under sections 67, 68 or 69, and has no application independent of those sections. That is spelled out by subsection (1), which states that the provisions of the section apply to an application or appeal under section 67, 68 or 69. It is also made clear by the heading of the section (“Challenge or appeal: supplementary provisions”). The terms of the section fully justify that heading.

39. Deciding whether to order security is part of the process of determining a challenge under section 67, 68 or 69. Such a

decision only needs to be made if the award creditor makes an application for security, but it is equally true that a decision under section 73 whether a right of challenge to an award has been lost will only need to be made if the award creditor argues that it has been.

40. Indeed, the terms of section 70(7) provide expressly that one outcome of an application for security is an order that if security is not provided, the challenge under section 67 or section 68, or the appeal under section 69, will be dismissed. That will be the typical sanction when security is ordered. It is the order which the applicant sought in this case. A decision dismissing the challenge to the award, albeit contingent on security not being provided as ordered, is a paradigm case of a decision under section 67, 68 or 69.

41. This view is confirmed by the structure of the Act, with section 70 located in the group of sections which deal with the powers of the court in relation to an award, and by the policy considerations which I described in NIOC.”

Does this Court have jurisdiction to hear an appeal?

29. Applying the approach set out by Males LJ in NIOC and repeated in Diag Human, I accept that the starting point is that absent clear words, or necessary implication, there should be no restriction on any right of appeal that a party has under the general law.
30. I also accept that the question of whether an appeal against the Judge’s decision on the currency of the Costs Order falls within section 68(4) is a matter of statutory interpretation. This requires the court to identify the meaning of the words used in section 68(4) in context, having regard to the purpose and scheme of the Arbitration Act: see e.g. R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28 (“PACCAR”) at [40] et seq.
31. Applying that approach, there are a number of factors that point to a conclusion that the restriction in section 68(4) is not meant to apply to the Judge’s decision to make the Costs Order in sterling.
32. First, as explained in NIOC at [60], the policy underlying section 67(4) and section 68(4) is to limit the potential for appeals to cause delay and expense in the resolution of disputes that have been referred to arbitration.
33. The policy of avoiding unnecessary delay and expense in arbitrations is clearly stated in section 1 of the Arbitration Act, which provides,

“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...”

34. The application of that policy to appeals was confirmed by Waller LJ in Sumukan v Commonwealth Secretariat [2007] EWCA Civ 243, [2007] 3 All ER 342 at [15],
- “15. ... It was the intention of those drafting the 1996 Act to limit appeals to the Court of Appeal to avoid the delay and expense that such appeals can cause. Indeed the wording of the original Bill was altered to make the position absolutely clear (see the Departmental Advisory Committee Supplementary Report on the Arbitration Act 1996 (January 1997), p. 10 (para 27)). Furthermore the philosophy is reflected in section 1(a) of the 1996 Act which provides that “the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense”...”
35. In the specific context of challenges to an arbitral award, it is relatively easy to see how permitting an appeal to be heard against the substantive decision on a challenge under section 67 or section 68 might cause undue delay or expense in the ultimate resolution of the underlying dispute between the parties. Permitting an appeal against a dismissal of such a challenge would leave open the possibility that the appeal might succeed and the court might make orders setting aside an award and/or remitting the underlying dispute to the tribunal for reconsideration in whole or in part. Alternatively, if the appeal was against a successful challenge, until the appeal was determined the parties would be unable to take steps to remedy the deficiencies identified by the first instance judge and would be unable to progress the existing arbitration or, if appropriate, commence a new arbitration to resolve the underlying dispute.
36. It is much more difficult to see how an appeal against one aspect of a final costs order following a challenge under section 67 or section 68 could have a similar disruptive effect upon the resolution of a dispute that has been referred to arbitration. It is true that permitting a costs appeal will inevitably require the expenditure of further resources, and the outcome will have financial consequences for the parties, but it is difficult to see how the decision on such a limited matter could cause any uncertainty in the arbitral process itself.
37. That is readily apparent in the instant case. In his section 68 Judgment, the Judge had determined to set aside the Awards. He had also refused permission to appeal. It is thus clear that the Awards have ceased to have any effect, and nothing in an appeal against the currency in which the Costs Order was made could have any impact upon the status of the Awards. Nor could an appeal against the currency of the Costs Order have any legal bearing upon the steps that the parties might now consider taking to resolve any outstanding disputes between them (whether subject to an arbitration agreement or otherwise). The only impact that an appeal on costs could have upon the parties is a purely financial one.
38. Second, and focussing on the normal meaning of the words “under this section”, unlike the decision in NIOC (which was whether a right of challenge under section 67 had been lost by reason of section 73) or the decision in Diag Human (which was whether to order security under section 70(7) for a challenge under sections 67 and 68), the decision that the Costs Order should be made in sterling was not a decision made under or even by reference to any provisions of the Arbitration Act at all.

39. The Judge’s decision on the currency of the Costs Order was expressly made under and by reference to the entirely separate and free-standing regime created by section 51 of the Senior Courts Act 1981 (“section 51 SCA”) and CPR Part 44.2(1). Section 51 SCA provides, in material part,

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in ... (b) the High Court ... shall be in the discretion of the court.

...

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.”

Similarly, CPR Part 44.2(1) provides,

“The court has discretion as to

- (a) whether costs are payable by one party to another;
- (b) the amount of those costs; and
- (c) when they are to be paid.”

40. It is not a great linguistic stretch to hold (as the Courts did in NIOC and Diag Human) that a decision made by reference to a specific provision of the Arbitration Act, which only has effect for the purposes of sections 67 and 68, should be regarded as a decision “under” those sections for the purposes of sections 67(4) and 68(4). It is, however, not a normal use of language to describe a decision made under an entirely separate and free-standing jurisdictional regime as being a decision made “under” sections 67 or 68. That was the straightforward basis upon which the Court in Manchester City held that a decision made by reference to common law principles on the publication of judgments was not taken “under” sections 67 or 68 for the purposes of sections 67(4) or 68(4).

41. Third, and also in contrast to the situations in NIOC or Diag Human, it is not easy to see how a decision on a final costs order following determination of a challenge under section 68 could be regarded as being “part of the process” of reaching a decision on a section 68 application or as being “within the compass” of a challenge under section 68.

42. In NIOC, the determination under section 73 of whether the applicant had lost its right to bring its challenge under section 67 was clearly a necessary first step in the process for determining the challenge under section 67. A decision that the right had been lost would have resulted in the section 67 application being dismissed. A decision that the test set out in section 73 was not satisfied meant that the court had to proceed to consider the substance of the section 67 application.

43. Likewise, in Diag Human, the putative appellant sought an order that the respondent’s application under sections 67 and 68 should be dismissed unless the money payable under the arbitral award was paid into court. Once such an application had been made, the question of whether security should be provided had to be resolved before the court could proceed to determine the substantive application under sections 67 and 68.

44. In contrast, the Judge’s decision to make the final Costs Order in sterling had no effect whatever on the question of whether he needed to go on to consider the section 68 challenge. Neither was the application for costs made as a precondition to the hearing of the section 68 challenge. As I have indicated, by the time the Judge came to make the Costs Order, he had already determined the section 68 application by handing down his section 68 Judgment, and he had decided to set aside the Awards. The decision to make the Costs Order, and to do so in sterling, was entirely consequential upon that prior determination under section 68. It was also a decision made exercising the court’s powers under section 51 SCA as I have explained at [39] above.
45. Fourth, I would reject the submission by Nigeria that it would be absurd or illogical if the decision on the currency of the Costs Order did not fall within section 68(4), given that it is common ground that the substantive decision on the section 68 challenge was caught by section 68(4).
46. I accept that the courts will not interpret a statute so as to produce an absurd result unless clearly constrained to do so by the words used (PACCAR at [43]). However, the submission that it is absurd for there to be a restriction on appeals against the substantive decision but not on appeals against a consequential costs order views the matter through the prism of conventional civil litigation, rather than through the relevant lens of the policy of the Arbitration Act to which I have referred above. The submission also fails to distinguish that the court’s power to make orders in respect of costs is derived from section 51 SCA. Once it is appreciated that the purpose of the restriction on appeals in section 68(4) is to prevent delay and expense in the resolution of the underlying dispute by arbitration, it can be seen that it is not illogical, still less absurd, to conclude that there should be a restriction on substantive appeals that have the capacity to disrupt that arbitral process, but no restriction on costs appeals that do not. That conclusion is reinforced by the consideration that a right of appeal given by the general law should not be removed except by clear words or necessary implication.
47. I would also reject Nigeria’s arguments based upon the suggestions made by Males LJ and Sir Geoffrey Vos MR in argument in the Manchester City case, to which reference was made by Sir Julian Flaux C in his judgment in that case at [39] (see above). I preface my consideration of those suggestions by noting that Sir Julian Flaux C made it crystal clear in his judgment at [40] that it was not necessary to determine whether those suggestions were correct, and hence they did not form any part of the decision or reasoning in the case.
48. As reported, Males LJ posited in argument that a case management decision as to how a section 68 challenge should be dealt with might be caught by section 68(4). I can well see that permitting an appeal against a decision, for example, as to the level of disclosure required, or the evidence which should be given at the hearing of a challenge under section 67 or section 68, could easily have the capacity to cause delay and expense in the determination of that substantive challenge, and hence to the resolution of the underlying arbitral process itself. That would not be in accord with the policy of the Arbitration Act, and so it is understandable why such a decision might be regarded as “part of the process” under section 67 or 68, notwithstanding that the strict jurisdictional basis for such a decision would be the court’s case management powers under the Civil Procedure Rules (as authorised by section 1 of the Civil Procedure Act 1997).

49. In Manchester City, Sir Geoffrey Vos MR was also reported as having suggested in argument that a “consequential decision” on a section 68 application, “for example as to costs”, would also be caught by the limitation in section 68(4). For the reasons I have set out, if that comment was directed at a consequential costs order made after the determination of the substantive challenge under section 68, I would respectfully disagree. I would also think it most unlikely that a costs order made in the normal course of events at an interlocutory stage in an application under section 68 would be caught by section 68(4). It would be unusual for such an order to have any impact upon the progress of the substantive application, not least because the court could use its discretion in setting the terms of such an order (for example by not ordering immediate detailed assessment) to ensure that there was no such disruption.
50. In any event, as in Manchester City, it is not necessary to reach a concluded view on all such possibilities in order to determine whether this Court has jurisdiction to hear an appeal against the Costs Order in the instant case. In my view, and for the reasons that I have given, I consider that there is such jurisdiction notwithstanding the terms of section 68(4).

Giving reasons for the refusal of permission to appeal

51. Before turning to consider whether to grant permission to appeal and, if so, to the merits of the appeal, I would observe that in the same way as the Judge was quite right to reserve his judgment on the question of permission to appeal his substantive decision under section 68 because of the effect of section 68(4), it would have been desirable if the parties had alerted him to the possibility that section 68(4) might also have applied to his decision on the currency of the Costs Order before he gave his decision refusing permission to appeal that decision.
52. That is because if a decision to refuse permission to appeal will be the last word and there is no possibility of a further application for permission to appeal, it is desirable that a judge should give sufficient reasons so that it can be seen that he has properly considered all of the arguments and so that the parties know why no further appeal is possible: see (albeit in the context of a final refusal of permission to appeal by the Court of Appeal) Municipio de Mariana v BHP Group plc [2021] EWCA Civ 1156 at [55]-[56] and the authorities referred to therein.
53. If such a process is adopted in future cases, there will be no justification for a disappointed party following the alternative course taken by P&ID in this case of mounting a collateral challenge to the Judge’s refusal of permission to appeal on the basis that he did not give adequate (or indeed any) reasons. As it is, however, because I consider that section 68(4) does not apply in the instant case, it is unnecessary to go on to consider that alternative contention further.

Permission to appeal

54. I consider that an appeal against the currency of the Costs Order based upon the analysis of John Kimbell QC in Cathay Pacific has a sufficiently realistic prospect of success to warrant the grant of permission to appeal. Further, as indicated by Males LJ in NIOC at [60], one of the intentions behind the limitation in section 67(4) and equivalent provisions of the Arbitration Act, and the general policy of non-intervention of the courts in the arbitral process (see section 1(c) of the Arbitration Act), is that appeals in

arbitration cases should generally be limited to some important point of principle. To the extent that this represents an additional factor in the decision whether to grant permission to appeal, I also consider that the point on the currency of the Costs Order is of sufficient general importance to meet that requirement.

The substance of the appeal

55. In Cathay Pacific, the solicitors for the successful defendant had accounted for their time and had invoiced their client (a German company), in euros. The deputy judge was asked to assess those costs summarily and to make an order for payment of the resultant amount in euros. The paying party objected that the court could only make an order for payment of costs in sterling. The issue that arises in the instant case was not therefore, the central issue in Cathay Pacific.
56. However, following his conclusion that he did have jurisdiction to award costs in a foreign currency, John Kimbell QC considered whether it was appropriate in his discretion to do so. On that question he referred at [46]-[50] to the indemnity principle in the following terms,

“46. It has been recognised since at least 1860 that costs awarded by the courts are awards of a statutory indemnity:

“Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained”: per Bramwell B in Harold v Smith (1860) 5 H & N 381, 385.

47. This basic principle of indemnity has remained intact. In Brawley v Marczynski (No 2) [2003] 1 WLR 813, para 12, Longmore LJ said: “All cost awards are intended to be compensatory in the sense that the litigant is compensated for the liability he has incurred to his own lawyers.”

48. Given that cost award is intended to be compensatory and in the form of a statutory indemnity, there ought to be no difficulty in principle in the court applying Services Europe Atlantique Sud v Stockholm Rederiaktiebolag (“The Folias”) [1979] AC 685 in this context. The question is: in which currency is it most appropriate to compensate the receiving party for its expenditure on the litigation.

49. This approach has already been adopted in the context of contractual indemnities. In Food Corpn of India v Carras (Hellas) Ltd (“The Dione”) [1980] 2 Lloyd’s Rep 577, a shipowner paid overtime to the stevedores in Buenos Aires. Under the terms of the charterparty, the owner was entitled to a 50% contribution from the charterers. Owners paid 100% of the

costs in Argentinian pesos using US dollars to acquire the pesos to do so. Owners subsequently claimed half of the cost in US dollars (at the rate of conversion prevailing at the time the sum required to buy the pesos to pay the stevedores was remitted to the local agents). The claim in US dollars was upheld. Lloyd J held that for claims for an indemnity (arising under a contract) the principle of The Folias ought to apply. The court should identify the currency in which the loss is actually felt or borne. The claimant's loss was suffered in US dollars and therefore the arbitrators were right to issue an award in that currency.

50. In my judgment, there is no reason why the same approach as was taken in The Dione should not be taken in the context of a statutory indemnity for the award of costs. The fact that the source of the right to the indemnity in the one case is a contract and in the other statute makes no difference. In both cases, it is appropriate to inquire as to the currency which most truly reflects the loss which the claimant has suffered."

On the facts of Cathay Pacific, since it was clear that Lufthansa had been invoiced and had paid its solicitors' costs in euros, John Kimbell QC held that the euro was "the currency which most accurately expresses [its] loss and the currency in which it ought to be compensated."

57. I consider that the Judge was correct to decline to follow this approach in the instant case.
58. I agree with John Kimbell QC that, as explained by Bramwell B in Harold v Smith, an award of costs is a form of statutory indemnity. However, where I part company with his analysis is that I do not consider that an award of costs should be viewed as an indemnity which is designed to compensate a receiving party against *loss*. Rather, an award of costs is a statutory indemnity against the *liability* that the receiving party has incurred to his own lawyers.
59. That distinction is clearly illustrated by the many cases in which costs have been awarded to a successful party to litigation even though it is also apparent that they have personally suffered no loss because the fees of the lawyers acting for them have been paid by a third party such as a union, an insurer or a litigation funder. Attempts by paying parties to avoid an adverse costs order in these circumstances, on the basis that the receiving party has not actually paid any part of their legal costs, have been consistently rejected. The position was well summarised by Vos J (as he then was) in Popat v Edwin Coe LLP [2013] EWHC 4524 (Ch) at [35] where, after a review of the authorities, he concluded,

"35. The question that the court has to answer in deciding in any particular case, where there is a party claiming to be indemnified with respect of costs is whether that person has paid or become liable to pay the costs. The question of who actually discharges the costs is not the relevant question, as the cases show. In every case that I have cited the costs were actually discharged by some third party, by the insurer, by the

Automobile Association, by the union or by someone else. It matters not that the third party has paid. What matters is whether, as Lord Phillips said [in Thornley v Lang [2004] 1 WLR 378], the party claiming indemnity has “become liable to pay” those costs.”

60. Moreover, when the remarks of Longmore LJ in Brawley v Marczynski (No 2) [2003] 1 WLR 813 (“Brawley”) are considered in their full context, it is apparent that they do not support John Kimbell QC’s thesis that orders for costs are intended to provide compensation for loss in the same way as awards of damages in tort or for breach of contract.
61. In Brawley, the paying party objected that he should not have been ordered to pay costs to be assessed on the indemnity basis to a legally-aided receiving party. Although the paying party accepted that because of the wording of the legal aid regulations, the indemnity principle did not strictly apply, he nonetheless contended that the trial judge should not have ordered costs to be assessed on the indemnity basis. His argument was that the main reason for an award of indemnity costs was to avoid unfairness, because an order for assessment on the standard basis would almost invariably result in the receiving party being out of pocket. He contended that this could not occur with a legally-aided party who would not have to pay anything himself towards his costs, or might only have to make a limited contribution based on his means.
62. It was in that context that Longmore LJ observed, at [12],
- “[12] In fact the rationale for an award of indemnity costs is rather different. Since the introduction of the CPR, indemnity costs have been described as both compensatory and penal; but these concepts are not antitheses. All costs awards are intended to be compensatory in the sense that the litigant is compensated for the liability he has incurred to his own lawyers. The ‘indemnity principle’ ensures that an award of costs (whether on a standard or an indemnity basis) does not enable the litigant to profit from any costs order. But an order for indemnity costs is often intended to operate penally on the losing party in the sense that the court disapproves of that party’s conduct in relation to the litigation.”
63. In context, it is clear that Longmore LJ’s reference to an award of costs being “compensatory” was to distinguish it from an award of costs which was designed to operate “penally” in the sense of expressing the court’s disapproval of the losing party’s conduct. Longmore LJ was not addressing the question of whether the purpose of an award of costs was to provide compensation for loss, and indeed he made it clear that his reference to an award of costs being compensatory was “in the sense that the litigant is compensated *for the liability he has incurred* to his own lawyers” (my emphasis). I therefore do not consider that the remarks of Longmore LJ provide any foundation for the conclusion that when making an award of costs, the court has to conduct an inquiry into the currency which most truly reflects any underlying loss which the receiving party has suffered, as suggested in contract or tort cases such as The Folias and The Dione.

64. I would also observe that in contrast to cases in contract or tort, in which the court hearing the claim will necessarily be aware of the manner in which the claimant claims to have suffered the losses for which it seeks damages, a court deciding whether to award costs will usually have no idea of the arrangements which the receiving party has used to obtain the funds to pay its lawyers. It would also often be entirely inappropriate and disproportionate for the court to embark upon such an inquiry into the business and affairs of the receiving party at the behest of the paying party.
65. In my judgment, therefore, the Judge was right to accept Nigeria's straightforward submission that because Nigeria had been invoiced and had incurred its liability to its solicitors in sterling, and had paid those bills in sterling, the court ought to make its Costs Order in sterling.

Disposal

66. I would therefore grant P&ID permission to appeal, but would dismiss the appeal.

Lord Justice Fraser:

67. I agree.

Sir Julian Flaux, Chancellor of the High Court:

68. I also agree.