Case No: 2014-1279

Neutral Citation Number: [2015] EWHC 1346 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2015

Before:

MR JUSTICE ANDREW SMITH

- - - - - - - - - - - - - - - - - -

Between :

Alfred Uwe Maass	**Claimant**
- and -	
1. Musion Events Limited	
2. Ian Christopher O'Connell	
3. William James Rock	**Defendants**

- -

Mr. Alexander Goold
(instructed by **Bracher Rawlins LLP**) for the **Claimant**

Mr. Thomas Graham
(instructed by **DWFM Beckman**) for the **First and Second Defendants**

Mr. Mark Deem
(of **Cooley (UK) LLP)** for the **Third Defendant**

Hearing date: 6 May 2015

- -

Judgment

Mr Justice Andrew Smith:

1. These proceedings arise from unfortunate confusion in the conduct of a London Court of International Arbitration ("LCIA") reference, and about the meaning and effect of an award made by the arbitrator, Mr Peter Thorp, which was dated 25 September 2014 and called "Final Award on Contractual Interpretation" (the "September award").

2. The subject matter of the underlying dispute is not important to what I have to decide, but I introduce it briefly. Mr Andrew Cromby, a partner in Bracher Rawlins LLP, the solicitors of the claimant, Mr Alfred Maass, described it in his witness statement as being about the proper interpretation of licences of intellectual property. I can convey the nature of the intellectual property by setting out this paragraph of the statement:

> "The intellectual property in question consists of two principal patents, referred to as 'Pepper's Ghost 1' and 'Pepper's Ghost 2' that are the subject of various registrations around the world. As their name suggests, they are based on the Victorian stage illusion known as 'Pepper's Ghost' and involve methods for the projection of life-size 3D video images on a large scale. These are capable of seeming to appear on a stage and with which real people are able to appear to interact. Its applications are various, from entertainment to commercial product launches to politics. There is a valuable market for its exploitation world-wide."

3. The agreement from which the dispute arises, which has been referred to as the "Eyeliner Agreement", is in writing, dated 25 June 2007 and said to be "Heads of Agreement, Reorganisation of Eyeliner business". I can describe it further by setting out this paragraph of the first witness statement of Mr Sharokh Koussari, a partner in DWFM Beckman, the solicitors of the first and second defendants, Musion Events Ltd ("MEL") and Mr O'Connell:

> "The Eyeliner Agreement of 25 June 2007 … is a bespoke commercial agreement between a number of related parties engaged in what is broadly speaking a rather involved form of business partnership (not using that expression in a technical sense). The Eyeliner Agreement is an exercise in the division of territories, income and intellectual property rights between business partners who had chosen to engage in business together but not to do so through a single corporate vehicle. The parties were instead engaged in business through different corporate vehicles, with different share ownerships, in different territories internationally, but making use of the same intellectual property rights (in particular patents) and using a key stock item (a polymer foil) which was subject to an

> exclusivity agreement with a third party manufacturer. The Eyeliner Agreement provides inter alia for the division of territories and income between the various parties and for the licensing of intellectual property rights between them. It is thus a commercial agreement which includes, inter alia, a number of licences of intellectual property licences [sic]."

4. In 2013 Mr Maass purported to terminate the Eyeliner Agreement by accepting its repudiatory breach. There is a dispute as to whether the agreement was effectively so terminated.

5. When the Eyeliner Agreement was made, its parties were (i) Musion Systems Ltd; (ii) "Eventworks" (an entity apparently associated with Mr Maass; (iii) Mr Maass; (iv) Mr Ian O'Connell, the second defendant in these proceedings; and (v) Mr James Rock, the third defendant. Mr O'Connell signed it in his own name and also above the words "Ratified for and on behalf of [MEL]", and both signatures are dated "25-06-07". MEL were not incorporated until 16 April 2008: the Eyeliner Agreement referred to an intention of Mr O'Connell and Mr Rock to incorporate a new company of that name, and they agreed to do so within three months. It was envisaged that MEL would then confirm or ratify the Eyeliner Agreement, but Mr Maass claims that MEL have produced no evidence of having done so. It was also envisaged that side agreements were to be made after MEL was incorporated but Mr Maass claims that none was. There is thus an issue whether MEL ever became party to Eyeliner Agreement and an arbitration agreement that it included, and about whether, if they did not, Mr Maass is nevertheless prevented by estoppel from disputing that they were parties to it.

6. The arbitration agreement in the Eyeliner Agreement was at paragraph 10.2. It was agreed that, unless settled by mediation, a dispute should "be referred to and finally resolved by arbitration under the LCIA Rules from time to time in force", that there should be one arbitrator, who should be "appointed by the LCIA without reference to the relevant parties to the dispute", and that the seat of the arbitration should be London. I should set out paragraphs 10.2(e), 10.2(g) and (in part) 10.2(h):

> "(e) The arbitral proceedings shall be concluded within 3 months of the receipt by the LCIA registrar of the written request for arbitration, subject to the power of the arbitrator to extend this and other deadlines in the proceedings if, at his sole discretion, he considers it reasonable to do so".
>
> "(g) To the extent permitted by law, the parties waive any right of recourse to national courts in order to challenge or appeal against any arbitral award".
>
> (h) If a dispute arises under this Agreement or the Existing Agreements or any other agreement between the parties (which for the purposes of this clause, is deemed to

include MEL and (MIP), then the arbitrator may consolidate those disputes in accordance with this clause 10.2."

("MIP" referred to another intended company that was not then incorporated.)

7. It is convenient next to refer to the relevant articles of the LCIA Rules:

i) Article 1.1 provides that "any party wishing to commence an arbitration under these Rules … shall send to the Registrar of the LCIA Court ("the Registrar") a written request for arbitration ("the Request"), containing or accompanied by [specified details]". Article 2 provides that within 30 days of the service of the request on him, the Respondent shall send the Registrar a written response to the Request ("the Response") containing specified details.

ii) Article 4.7 provides that:

> "The Arbitral Tribunal may at any time extend (even where the period of time has expired) or abridge any period of time prescribed under these Rules or under the Arbitration Agreement for the conduct of the arbitration, including any notice or communication to be served by one party on any other party".

iii) Article 5 concerns the appointment of the tribunal, and I set out article 5.4:

> "The LCIA Court shall appoint the Arbitral Tribunal as soon as practicable after receipt by the Registrar of the Response or after the expiry of 30 days following service of the Request upon the Respondent if no Response is received by the Registrar (or such lesser period fixed by the LCIA Court). The LCIA Court may proceed with the formation of the Arbitral Tribunal notwithstanding that the Request is incomplete or the Response is missing, late or incomplete. …".

iv) Article 23 provides that the Arbitral Tribunal "shall have the power to rule on its own jurisdiction".

v) Article 26 is about awards. Article 26.7 provides that, "The Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal". Article 26.9 provides as follows:

> "All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or

recourse to any state court or other judicial authority, insofar as such waiver may be validly made."

vi) Article 27 is about the correction of awards and additional awards, and I set out articles 27.1 and 27.2:

> "27.1 Within 30 days of receipt of any award, or such lesser period as may be agreed in writing by the parties, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature. If the Arbitral Tribunal considers the request to be justified, it shall make the corrections within 30 days of receipt of the request. Any correction shall take the form of separate memorandum dated and signed by the Arbitral Tribunal …; and such memorandum shall become part of the award for all purposes.
>
> 27.2 The Arbitral Tribunal may likewise correct any error of the nature describe in Article 27.1 on its own initiative within 30 days of the date of the award, to the same effect."

vii) Article 28 is about arbitration and legal costs, and article 28.3 provides as follows:

> "The Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing."

viii) Article 29 precludes the parties from appealing decisions of the LCIA court to the extent permitted by the law of the seat of the arbitration. Thus, by article 29, and article 26.9, the parties to the arbitration agreement excluded any right of appeal under section 69 of the Arbitration Act, 1996, as indeed they did by the provision of paragraph 10.2 (g) of the arbitration agreement that I have set out.

8. On 19 August 2013 MEL and Mr O'Connell made a written request (the "Request") to the LCIA that a dispute with Mr Maass be referred to arbitration under its rules. As I understand it, they did not seek a reference of the question whether the Eyeliner Agreement was duly terminated but whether, assuming it to have been, licences that had been granted under it nevertheless remained in force and effect. Mr Rock was party to the reference, although the dispute was then really between, on the one hand, the claimants in the reference and, on the other hand, Mr Maass. By the end of the proceedings leading to the Award, Mr Rock's position had (as it was put in the September award) "evolved" from attendance "if only to assist the Tribunal" to being "fully supportive of the Claimants' request for declaratory relief". Eventworks was

not a party to the original reference and a later application by MEL and Mr O'Connell that Eventworks be joined in it was refused.

9. On 19 October 2013 Mr Thorp was appointed by the Court of the LCIA as the sole arbitrator. On 16 December 2013 MEL and Mr O'Connell served their statement of case. On 7 February 2013 Mr Maass served a defence and counterclaim: there is no evidence that was drawn to my attention that he had served an earlier response to the Request, and it was not suggested at the hearing before me that he had done so. On the same date Mr Rock also served his response.

10. Mr Maass included in his pleading a challenge to whether MEL were party to the arbitration agreement, and so to the "substantive jurisdiction of tribunal". It was in a section of the pleading (paras 34 to 57) that was under the heading "Has the Eyeliner Agreement conferred rights on MEL that it may enforce by reference to arbitration?". There were a number of sub-headings, that - I think - sufficiently indicate what was pleaded for present purposes: "Not a contracting party"; "Not capable of ratification by O'Connell on signing"; "What should have happened"; "No evidence of confirmation or ratification by MEL"; "No evidence of any side agreement by MEL"; "Contracts (Rights of Third Parties) Act 1999 excluded"; "Objection to Substantive jurisdiction of tribunal"; "No evidence of assignment to MEL"; "No claim/no loss"; "No unconditional acquisition of rights" (in which it is pleaded that Mr O'Connell and Mr Rock were entitled to assign rights granted by Mr Mass under the Eyeliner Agreement only within three months of the agreement and a reasonable time thereafter). I need set out only paragraph 46, which is in the part of the pleading headed "Contracts (Rights of Third Parties) Act 1999 excluded", and paragraph 47, the pleading under the heading about objection to the tribunal's substantive jurisdiction:

> "46. Mr. Maass further submits that the procedure followed for the appointment of an arbitrator was not in accordance with the agreement of the parties to it and/or the arbitrator has no jurisdiction to determine MEL's claim".
>
> "47. Whether pursuant to Section 31(1) of the Arbitration Act 1996 or Article 23 of the LCIA Rules, Mr. Maass objects that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings and his Statement of Defence and Counterclaim is made without prejudice to this primary contention".

11. On 17 March 2014 MEL and Mr O'Connell served a reply and defence to counterclaim, pleading in answer to the challenge to jurisdiction that MEL had become party to the Eyeliner Agreement and the arbitration agreement by reason of one or more of the following: ratification, waiver, variation, novation, and estoppel by convention. The pleading also contended that licences granted to Mr O'Connell and

Mr Rock had been transferred by way of an equitable assignment to MEL or that they were held for MEL's benefit, and MEL was "entitled to pursue the claim as the legal and/or beneficial owner of [them]". The questions so introduced into the reference have been labelled the "Status Issues", and I adopt that convenient label.

12. On 24 April 2014 Mr Thorp conducted a management hearing by telephone. On 11 April 2014 he had sent an email to the parties stating that he "would like to discuss and obtain confirmation on the agreed scope of this arbitration, as a number of the other issues raised (for example, the possibility of further and/or amended pleadings, requests for information and documents) will depend on how that fundamental issue is decided". At the telephone hearing, MEL and Mr O'Connell submitted that the arbitrator should first decide the dispute about interpretation of the Eyeliner Agreement, that is to say, whether licences granted under it would have survived its termination by election following a repudiatory breach. Mr Maass opposed this proposal, and argued for prior determination of the Status Issues.

13. On 30 April 2014 Mr Thorp published an award, which he called "Award on jurisdiction, scope of arbitration and various procedural matters" (the "April award"). He described the purpose of the conference on 23 April 2014 as follows (at para 3 of the April award):

> "The primary purpose of the conference was to discuss and confirm the scope of the Claimants' claim and therefore of this arbitration (or at least the present phase of this arbitration), as well as the legal and factual issues that needed to be taken into consideration by the Arbitrator in deciding the Claimant's claim".

14. However, at section (b) of the April award, which was headed "The Arbitrator's Jurisdiction", Mr Thorp referred to Mr Maass' pleaded objection to his substantive jurisdiction. At paragraph 16 and 17 it was said that Mr Maass had not explained how the arbitrator's appointment was defective, and continued "The Arbitrator is therefore satisfied that he has been properly appointed and that he has substantive jurisdiction to hear and decide the Claimants' claim in this arbitration". Accordingly, Mr Thorp stated at paragraph 42 of the April award inter alia that he had "jurisdiction to decide on the Claimants' claim".

15. The parties had not expected Mr Thorp to determine his jurisdiction after the telephone hearing on 23 April 2014. After all, he had not received evidence or heard argument on the Status Issues. All parties agreed that Mr Thorp should withdraw this determination and consented to him correcting his award accordingly. As a result Mr Thorp issued a memorandum of correction on 22 May 2014. It stated

> "Given the agreement of [MEL and Mr O'Connell] and [Mr Rock] to [Mr Maass'] request, the Arbitrator is prepared, by this Memorandum, to amend his findings in the Award with respect to the validity of his appointment and his substantive

> jurisdiction. In particular, the Arbitrator confirms that his findings in this regard were preliminary and without prejudice to the right of [Mr Maass] to make further submissions in this regard, and for the other Parties to respond, based on a timetable to be set out below. The issues of appointment and substantive jurisdiction will then be argued at the final hearing of this matter and decided by the Arbitrator as part of his final award after that hearing."

This apparently satisfied the parties, although to my mind it is questionable whether an arbitrator should make even "preliminary" findings (whatever they might be) in these circumstances.

16. In the memorandum of correction Mr Thorp also gave procedural directions: that Mr Maass make any "further submissions with respect to the validity of the Arbitrator's appointment or his substantive jurisdiction by 13 June 2014", and that MEL, Mr O'Connell and Mr Rock might make any submissions in response by 20 June 2014; and that "The questions of the validity of the Arbitrator's appointment and his substantive jurisdiction will be argued by the Parties as part of the hearing of this matter scheduled for 1 to 3 July 2014 in London, and decided definitely by the Arbitrator in his final award to be issued following that hearing".

17. On 13 June 2014 Mr Maass served his submissions on jurisdiction. I shall set out paragraphs 17 to 20 from them;

> "No other agreement
>
> 17. There is no other agreement [sc no agreement other than the Eyeliner Agreement] between MEL and Messrs O'Connell, Rock and Maass to resolve disputes under or in connection with the Eyeliner Agreement by arbitration.
>
> Alternative submission
>
> 18. If, in the alternative, issues of subsequent ratification, variation, waiver, novation estoppel by convention or equitable assignment are now thought to be relevant to the question of jurisdiction,
>
> (1) it serves to show why Mr. Maass was right to submit that the question of how MEL came to be a party to the Eyeliner Agreement and hence a party to the arbitration agreement within it, was an essential matter to have determined prior to any question of declaratory relief; and,
>
> (2) Mr. Maass would wish to,

(a) advance a case in response to all of those issues as set out in his draft rejoinder dated 23 April 2014;

(b) adduce evidence in support of his contentions as set out in that document.

Effect on the arbitrator's appointment/jurisdiction

19. MEL a legal person not a party to the arbitration agreement within the Eyeliner Agreement has purported to operate it, made a reference to arbitration and obtain the appointment of an arbitrator. It has done so contrary to Mr. Maass' agreement. The fact that MEL might have been able to do so if the terms of the Eyeliner Agreement had been performed so as to make it a party to the arbitration agreement, or even that Mr. Maass would not have been able to object in such circumstances, is irrelevant. The fact of the matter is that those terms were not performed and MEL did not become a party. Mr. Maass submits that the arbitrator's appointment is invalid and that its invalidity means, necessarily, that he lacks substantive jurisdiction.

Does it matter that Mr. O'Connell alone could have made reference/obtained the appointment?

20. In a word 'no', the fact is that he did not do so."

18. On 17 June 2014 MEL and Mr O'Connell wrote to Mr Thorp that, having read Mr Maass' submissions, they accepted that "it is impossible to resolve the issues of jurisdiction, as now clarified and presented by [Mr Maass] without simultaneously considering all of the "status" issues … That itself is not possible within the confines of the hearing listed for 1st -3rd July …. In the circumstances, now that [Mr Maass'] approach to the jurisdiction issue is clear, [MEL and Mr O'Connell] invite the Arbitrator to direct that the final determination of the issue of jurisdiction shall be addressed not at the hearing on 1st July but at a further hearing required to resolved the "status" issues". By email of 18 June 2014 Mr Thorp declined the invitation: he observed that "the status and role of MEL have always clearly been central to the jurisdictional arguments" of Mr Maass, and he did not consider it an unreasonable burden on MEL and Mr O'Connell to address them. However, they renewed their invitation in a telephone hearing on 23 June 2014, and Mr Thorp was persuaded: he decided (to set out his email to the parties after the hearing):

"1. The scope of the hearing scheduled for 1 to 3 July 2014 will be confined to the consideration of [MEL's and Mr O'Connell's] request for declaratory relief, and in particular a

> declaration as to whether the grant of the "perpetual irrevocable" licences referred to in clauses 2.4(b)(ii), 2.4(d)(i) and (ii) and/or clause 2.4(f) of the Eyeliner Agreement survive the purported termination of the Eyeliner Agreement by [Mr Maass], … that agreement has been duly terminated.
>
> 2. The question of the Arbitrator's jurisdiction, which had already been determined by the Arbitrator in his Award dated 30 April 2014, including "status issues" in relation to MEL will not be argued or determined at next week's hearing. As advised by the Arbitrator in his Memorandum dated 22 May 2014, the findings in his Award in this regard are of a preliminary nature only, and will be determined definitively, if necessary, at a later stage.
>
> 3. Accordingly, [MEL and Mr O'Connell] and [Mr Rock] are no longer required, at this stage, to submit response submissions on jurisdiction and the status of MEL in response to [Mr Maass'] Submissions or Jurisdiction dated 13 June 2014."

To my mind this email does nothing to clarify the standing of the "preliminary findings" about jurisdiction, not least because of the statement that they had been "determined", albeit not "definitely". However, it does make clear that there was to be no further consideration of the issues about jurisdiction at the hearing scheduled for 1 to 3 July 2014.

19. That hearing, therefore, was about the proper interpretation of the Eyeliner Agreement. After it, pending the award, the parties made written submissions on costs. MEL and Mr O'Connell and, as I interpret his submissions, Mr Rock submitted that the Arbitrator had jurisdiction to determine whether the legal costs of one party should be paid by another under article 28 of the LCIA rules. Mr Maass submitted that, if he was successful about the issues of interpretation, orders for his costs should be made both against MEL and Mr O'Connell and against Mr Rook. His submissions about the position if he was unsuccessful were these:

> "8. Mr Maass always objected to the issue of the proper interpretation of [the relevant clauses of the Eyeliner Agreement] preceding the determination of (i) the arbitrator's jurisdiction; (ii) MEL's status as a party to the proceedings; …. He maintains that objection. It has caused and is continuing to cause problems in this arbitration, as the determination of the costs of this preliminary issue continues to demonstrate.
>
> "9. The issue of the arbitrator's jurisdiction in this arbitration has yet to be determined, whether as to both [MEL and Mr O'Connell] or MEL alone. If, subsequently, that issue is

determined in Mr. Maass' favour, Mr. Maass submits that it would have been quite wrong to have ordered him to pay for the costs of the legal representation of a party or parties who,

(1) had no ability to invoke the arbitration agreement (or at least not to do so as they did); but

(2) persuaded the arbitrator to first determine a preliminary issue prior to determining the issue of jurisdiction – in truth the way the claim was framed it was a *fait accompli* and these proceedings have been little more than the Claimants obtaining, unilaterally, a preliminary issue; and

(3) for that issue to be determined in their favour; only,

(4) for it to turn out that the arbitrator had no jurisdiction at all.

10. Similarly, Mr. Maass submits that it would be quite wrong to have ordered him to pay the costs of a party, MEL, whose status as a party to the has yet to be determined."

As for the costs of the arbitration, Mr Maass submitted:

"…that the costs of the arbitration to be ordered under Article 28.2 of the Rules should follow the decision the arbitrator reaches on the costs of the parties' legal representation on the same basis as submitted above."

20. On 25 September 2014, Mr Thorp issued the September award, which was called "Final Award on Contractual Interpretation". At the risk of oversimplification, he determined the issue of interpretation in favour of MEL and Mr O'Connell. The dispositive paragraph (paragraph 265) of the September award was the following:

"Based on the foregoing:

(1) The Arbitrator confirms that he has jurisdiction to hear and decide the issue of contractual interpretation submitted by [MEL and Mr O'Connell] in this arbitration, as well as [Mr Maass'] counterclaim, and all associated costs claims.

(2) the Arbitrator makes a declaration in the following terms:

"In the event that the Eyeliner Agreement has been duly terminated for repudiatory breach in relation to any of the breaches claimed by [Mr Maass] … the perpetual, irrevocable licences granted under clause 2.4(b)(ii), clause 2.4(d)(i), clause

2.4(d)(ii) and clause 2.4(f) of the Eyeliner Agreement continue in full force and effect notwithstanding any such termination, provided in each case that there has been no breach of the said licence itself".

(3) the Arbitrator orders [Mr Maass] to pay [MEL and Mr O'Connell] their legal costs of £76,231.82.

(4) the Arbitrator orders [Mr Maass] to pay [Mr Rock] his legal costs of £55,469.78.

(5) the Arbitrator orders that the costs of the arbitration to the date of this award shall be borne 80% by [Mr Maass], 10% by [MEL and Mr O'Connell] jointly and 10% by [Mr Rock].

(6) The Arbitrator dismisses [Mr Maass'] counterclaim".

21. The September Award included a section on "Jurisdiction of the Arbitrator". In it Mr Thorp referred to article 23.1 of the LCIA rules under which a tribunal has power to rule on its own jurisdiction. He referred to Mr Maass's objections to his jurisdiction, the April award and the Memorandum of Correction, including the directions about further submissions. He then referred to the submissions made by Mr Maass on 13 June 2014, and continued:

> "Having considered the various Parties' submissions on the jurisdiction issue and his powers under Article 23 of the LCIA Rules, the Arbitrator is satisfied, and hereby reconfirms, that he has been properly appointed and has substantive jurisdiction, pursuant to clause 10.2 of the Eyeliner Agreement, to hear and determine [MEL's and Mr O'Connell's] request for a declaration on the narrow point of contractual interpretation raised by [MEL and Mr O'Connell] in this arbitration, as well as [Mr Maass'] counterclaim and all associated costs claims.".

22. Mr Maass brought these proceedings on 21 October 2014 against MEL, Mr O'Connell and Mr Rock, apparently without giving prior notice to the defendants. In his claim form Mr Maass challenged "the arbitrator's decision in [the September award] that he had been properly appointed and had substantive jurisdiction" and his decision that Mr Maass pay "the Defendant's legal costs" and 80% of the costs of the arbitration and sought orders under sections 67 and 68 of the Arbitration Act, 1996. Although the claim form refers to the "Defendant's" legal costs, it seems that Mr Maass intended to challenge the award of costs to all the defendants, and no point has been taken before me about the use of the word "Defendant's" (singular).

23. Mr Cromby served a witness statement dated 21 October 2014 in support of the claims. The core of Mr Maass' complaint is that Mr Thorp should not have determined that he had jurisdiction in the September award because he had not received evidence or submissions. In other words, essentially their complaint is that

in the September award he repeated the error made in the April award and which he had corrected. Their main complaint about costs it that Mr Thorp should not have made an order that they pay the claimants' costs unless and until he had determined the issue about his jurisdiction.

24. In his first witness statement in these proceedings dated 24 November 2014 Mr Koussari said that MEL and Mr O'Connell's position was that Mr Thorp had not "made a final determination as to his jurisdiction" in the September award, that, if he had, he should not have done so, and that they were content for Mr Thorp to correct the September award in that regard. However, as to costs, their position was that Mr Thorp was entitled to make the order that he did. In a witness statement dated 27 November 2014, Mr Mark Deem, a partner in Edwards, Wildman Palmer (UK) LLP who then acted for Mr Rock, adopted a broadly similar position.

25. There were further exchanges between the parties and Mr Thorp, in which Mr Maass is said (in Mr Graham's words, to have "compounded matters by refusing to cooperate with a proposed memorandum of correction to ensure that the correct interpretation [of the September award] was formally documented". In an email to the parties of 24 February 2015 Mr Thorp said that the relevant parts of the September award "should … be understood just to be a restatement, at the time of the Award, of my earlier finding … of my preliminary findings on jurisdiction". He offered, if the relevant parts were thought confusing, to issue a memorandum of correction "to confirm that the decision on jurisdiction contained therein was preliminary only". He did not refer to the order about costs. Both Mr Koussari and Mr Deem wished to accept Mr Thorp's offer, and sought Mr Maass' consent to Mr Thorp taking this course. In response, Bracher Rawlins LLP recognised that the question of jurisdiction might be dealt consensually, but sought clarification about costs.

26. Initially Mr Thorp's position, stated in an email of 19 March 2015, was this: he observed that MEL and Mr O'Connell did not agree with the proposal that "the memorandum of correction also clarify that the award of costs made in the Award are equally preliminary in nature and in any event should not be enforced until after determination of the issue of jurisdiction", but that he was "prepared to concede to [Mr Maass'] request and include that clarification in the Memorandum". However, after further representations had been made, Mr Thorp changed his mind, and on 23 March 2015 he wrote to the parties that "Having considered carefully all the Parties' submissions on [the issue of costs], and consulted with the LCIA, I have concluded that the awards of costs in the Award were in fact intended to be final and are therefore immediately enforceable on their terms". He enclosed a proposed "Memorandum of Correction and Clarification" which he had drafted. In the draft Mr Thorp referred to article 27 of the LCIA rules and section 57 of the Arbitration Act 1996 (which provides for corrections "so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award", subject to an application being made within 28 days of the award and the correction being made within 28 days of the application, or, where the tribunal acts of its own initiative, to the corrections being made within 28 days of the award,

all these time limits being subject to the parties' agreement to extend them). He stated that Mr Maass' requests were made outside the periods specified under the LCIA rules and section 57, but stated that under the LCIA rules "the Arbitrator may at any time extend any period of time prescribed by the Rules" and that the parties might agreement to extend a period specified under section 57. He also said that "the types of clarification requested by [Mr Maass] could fall within the meaning of "correction" or "clarification" as understood by Article 27 or Section 57 of the Act", and that given the agreement of other parties to Mr Maass' "request with respect to clarification of the question of jurisdiction, the Arbitrator is prepared, by this Memorandum, to amend and clarify his findings in the Award with respect to jurisdiction". The proposed changes were by way of additions to the effect that the findings were "of a preliminary nature only" and "the issue of the Arbitrator's jurisdiction will be determined, if necessary, following further submissions from the Parties and a further hearing". As for costs, the draft memorandum stated that "Given that the costs awarded in the Award excluded specifically those costs related to arguing the "status issues" and therefore matters relevant to his jurisdiction, the Arbitrator is not minded to revisit, reverse or stay his awards in the Award as to costs. These awards as to costs will therefore remain unchanged and will be immediately enforceable on their terms".

27. Mr Maass resisted the proposed memorandum, and it has not been issued. I shall return briefly to Mr Thorp's proposal, but it is convenient here to make two observations, neither of which was controversial as between the parties before me:

i) First, although the draft memorandum referred to Mr Maass requesting corrections, albeit outside the stipulated periods, Mr Maass did not make such a request. Mr Thorp might have had in mind Mr Maass' response to his offer on 24 February 2015 to issue a memorandum of correction: he referred to the parties, including Mr Maass, responding that they would "support such a proposal", but to my mind Mr Maass' response was more qualified than this suggests, and in any case this would not amount to a request for a memorandum of correction. Or it might be that Mr Thorp had in mind that the proposed result could be achieved if Mr Maass did agree to make such a request, and his proposal was that he should issue the memorandum if Mr Maass did so.

ii) Secondly, Mr Thorp supposed that he had powers under section 57 of the 1996 Act to correct the September award. Section 57(1) provides that "The parties are free to agree on the powers of the tribunal to correct an award or to make an additional award", and section 57(2) provides that the other provisions of section 57 apply "If and to the extent there is no such agreement". As Mr Alexander Goold, who represented Mr Maass, observed, here the parties to the arbitration agreement have made an agreement for the correction of awards and making additional awards by agreeing to the reference being in accordance with LCIA rules, which include article 27. Mr Graham said that he was unable to argue to the contrary, and Mr Deem did not do so. I accept Mr Goold's point: Mr Thorp was in error in thinking that section 57 applied.

28. Mr Goold explained the nature of Mr Maass' challenge to Mr Thorp's jurisdiction. It has two limbs, but both are based on his contention that MEL was not party to the Eyeliner Agreement, and so not party to the arbitration agreement in it: hence the heading to this section of the Defence and Counterclaim. One limb is a simple submission that therefore Mr Thorp had no jurisdiction to make an order in favour of MEL. But Mr Goold also submitted that, if MEL were not party to the arbitration agreement, this vitiates Mr Thorp's appointment and therefore his jurisdiction in its entirety. Mr Thorp was appointed pursuant to the Request made to the LCIA on 19 August 2013, and the Court of the LCIA therefore appointed him as the Arbitral Tribunal under article 5.4 when no Response was received. However, it is said, since the request was made by MEL as well as Mr O'Connell, no valid request was made to the LCIA and therefore the LCIA Court had no power to make an appointment.

29. Mr Graham contended that the challenge the appointment had not been so advanced before the hearing, and that previously it had been only to Mr Thorp's jurisdiction in relation to claims by MEL. He referred to the pleading at paragraph 46, which refers to the arbitrator having "no jurisdiction to determine MEL's claim": see paragraph 10 above. However, that is a plea under the heading of "Contracts (Rights of Third Parties) Act 1999 excluded" and was directed to refer any argument that the 1999 Act would allow MEL to invoke the arbitration agreement. I accept, as I think did Mr Goold, that paragraph 46 should strictly have referred to the arbitration's jurisdiction more generally, but I cannot accept that the paragraph can reasonably be read as defining the limits of the jurisdictional challenge.

30. I agree that the argument was not previously fully developed, but to my mind the jurisdictional challenge was always wider than Mr Graham argued. Paragraph 47 pleads a challenge in general terms to the whole of Mr Thorp's substantive jurisdiction, and paragraph 20 of Mr Maass' submission on jurisdiction removed any uncertainty about this. His position was reiterated in his submission on costs.

31. I next consider the meaning of the September award, and in particular whether it is to be understood to make a determination about jurisdiction, and if so what determination. This is, of course, a question of what the September award means as a matter of its objective interpretation, and not what Mr Thorp intended subjectively to decide or convey in it. The parties' submissions are these:

    i) Mr Goold submitted that in the September award Mr Thorp determined that he had jurisdiction over the matters in dispute in the reference, thereby rejecting the challenge to his jurisdiction.

    ii) Mr Deem submitted that in the September award Mr Thorp determined that he had jurisdiction to determine the questions of interpretation of the Eyeliner Agreement which were the subject of that award, but he made no further findings about whether he had jurisdiction over other issues in the reference.

    iii) Mr Graham submitted that Mr Thorp did not determine the challenge to his jurisdiction in the September award.

32. I reject Mr Deem's submission. I can see no rational basis on which it might have been argued that Mr Thorp's appointment was valid to decide issues of interpretation but not other issues in the reference, or that MEL was entitled to an award on issues of interpretation but not other issues. Nothing in the September award suggests that Mr Thorp was deciding the challenge to jurisdiction in a piecemeal fashion, it would have been odd to do so and there is no indication that he intended to do so. Indeed, he purported to dispose of the counterclaim.

33. Mr Graham pointed out that in the September award Mr Thorp had recited his email of 23 June 2014, and argued that, reading the award "in full and in context, rather than superficially or selectively", Mr Thorp can only be understood to be confirming his "preliminary" finding about jurisdiction. The courts are not attracted to pedantic criticism of arbitration awards, and try to discern a tribunal's true intention even if it is inexactly expressed. Nevertheless, to my mind Mr Graham seeks to give the September award an interpretation that simply distorts its natural meaning, and I cannot accept his submission: even if the section headed "Jurisdiction of the Arbitrator" could bear this meaning, Mr Thorp cannot be understood to be repeating in the dispositive paragraph his "preliminary" finding made in the April award. On any view such preliminary observations would not have been presented as part of the "decision", which is what paragraph 265 is about. Moreover it is a decision in an award that Mr Thorp described as "final". As Rix J said in Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd (The "Smaro"), [1999] 1 Lloyd's LR 225, 247 "If the decision disposes of everything within the reference, it could be made the subject of a final award, but if it disposes of only part of the reference, it would be made the subject of an interim award". An award that was final must have decided the issues about jurisdiction.

34. The debate about the objective interpretation of the award might seem rather arid since there is no dispute between the parties as to what Mr Thorp could properly decide in it. It is certainly common ground between Mr Maass, MEL and Mr O'Connell that he could not properly decide the jurisdiction challenge, and I do not understand Mr Rock to argue otherwise. However, the parties are not agreed about whether Mr Thorp could properly make an award against Mr Maass about costs, and it is convenient to consider that next.

35. Mr Maass' argument is simply that the arbitrator had no power to order that he pay the claimants' costs unless and until it has been determined that MEL is party to the arbitration agreement (and so properly party to the reference). He cited Internaut Shipping GmbH and anor v Fercometal Sarl, [2003] EWCA Civ 812, a case about a charterparty containing an arbitration clause, in which Rix LJ said at paragraph 3, "In principle, of course, only parties to the charterparty and thus the arbitration agreement contained in it can refer a dispute to arbitration, or have arbitration claimed against them". In his witness statement Mr Koussari summarised the arguments of MEL and Mr O'Connell about costs as follows:

> "As regards costs:

a) the Arbitrator was properly entitled to make the award of costs he made;

b) the issues of contractual interpretation which were the subject of the Preliminary Issue were discrete issues on which Mr. Maass lost and which he could and should have conceded;

c) the costs decision made by the Arbitrator accorded with ordinary principles of issue-based costs;

d) Mr. O'Connell and MEL shared the same legal representation and made the same case; Mr. O'Connell, Mr. Maass and Mr. Rock are indisputably party to the arbitration agreement; the Arbitrator had the power to make the costs order he made regardless of the manner in which the Status Issues may ultimately be resolved as regards MEL".

36. The first point is simply a bald statement of MEL's and Mr O'Connell's position. The second and third points support Mr Thorp's decision on the assumption that he had jurisdiction to make an order about costs, and they do not engage with Mr Maass' complaint that he did not. The fourth point, as I understand it, is that it makes no difference that a costs order was made in favour of MEL as well as Mr O'Connell: that Mr Maass would be in the same position, and have to pay the same costs, if the order were only in favour of Mr O'Connell. Mr Goold, who represents Mr Maass, pointed out that, according to the claimants' submissions on costs in the arbitration, "MEL is the paying party on all [the claimants'] costs bills": this is how they explained that they did not claim VAT on them. If this means that MEL were liable to the claimants' solicitors for fees and Mr O'Connell was not, then both under the indemnity principle and the rule in Gundry v Sainsbury, [1910] 1 KB 645 and under article 28 of the LCIA rules, which gives the tribunal power to order that costs "incurred" by one party be paid by the other, the costs of the claimants' representation could be recovered only as MEL's costs and not as Mr O'Connell's costs: this would answer Mr Koussari's fourth point. However, during the hearing Mr Graham showed me (without objection from Mr Goold or Mr Deem) invoices of Howard Kennedy addressed to MEL and Mr O'Connell. I am not in a position to determine who was liable to pay them under the retainer. But there is a simpler answer to Mr Koussari's fourth point: it does not recognise that Mr Maass challenged Mr Thorp's jurisdiction in its entirety.

37. In view of these conclusions what, if any, order should I make the applications? The parties did not present evidence about the Status Issues, nor did I hear submissions about them. Mr Goold did not contend that, once Mr Maass has established (as he has) that MEL was not originally a party to Eyeliner Agreement and the arbitration agreement, the evidential burden to show that they became party to the arbitration agreement (or that Mr Maass is estopped from disputing that they are) shifted to MEL, that it has not been discharged, and that I should decide the dispute about Mr Thorp's jurisdiction accordingly. It follows that I cannot grant the section

67 application. Mr Goold agreed that Mr Maass' challenge is really under section 68.

38. The court has power under section 68 to remit an award to the tribunal in whole or in part, to set aside an award in whole or in part and to declare it to be of no effect in whole or in part where there is shown to be a serious irregularity. A serious irregularity is an irregularity of one of nine kinds specified in section 68(2) which the court considers has caused of will cause substantial injustice to the applicant. Mr Graham complained that the claim form does not identify which kind of irregularity is alleged by Mr Maass. I reject that complaint. One of the kinds, specified in sub-section 68(2)(a), is "failure of the tribunal to comply with section 33 (general duty of tribunal)", and the claim form states: "[Mr Maass] has been denied the opportunity to put his case on the issues of the validity of the arbitrator's appointment and his substantive jurisdiction and contrary to the arbitrator's general duty in sections 33(1) and (2) of the Act". The last "and" seems redundant, but the complaint is clearly of an irregularity of the kind stated in section 68(2)(a).

39. Section 33 of the 1996 provides as follows:

> "(1) The tribunal shall-
>
> (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.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it".

It is not disputed that if, as I have concluded, Mr Thorp decided the challenge to the jurisdiction, he did so without giving any notice to the parties, and in particular Mr Maass, that he would not adhere to the procedure stated in the email of 23 June 2014. And it is not disputed – and it could not be disputed – that therefore he was in breach of the duty stated in section 33: for my part, I would regard this breach as fitting more naturally into subsection (1)(a) than (1)(b), but that categorisation is not important.

40. This leads to the question whether this irregularity has caused or will cause Mr Maass substantial injustice. It was suggested that the court cannot consider this requirement of section 68 satisfied because it has not been shown that it would have affected Mr Thorp's decision if Mr Maass had had an opportunity to develop his challenge to the jurisdiction. Mr Maass has not shown on the balance of probabilities that it would have done, but that is not the test. The test adopted by the courts is, in

my judgment, properly stated in Merkin, Arbitration Law, at para 20.8. Having cited the observation of Lord Steyn in Lesotho Highlands Development Authority v Impregilo SpA, [2005] UKHL 43 at para 38 that "The burden is squarely on the applicant, who invokes the exceptional remedy under section 68, to secure (if he can) findings of fact which establish the pre-condition of substantial injustice", Merkin continues:

> "If the result would most likely have been the same despite the irregularity there is no basis for overturning an award. However, in determining whether there has been substantial injustice, the court is not required to attempt to determine for itself exactly what result the arbitrator would have come to but for the alleged irregularity, as this process would in effect amount to a rehearing of the arbitration. Instead, if the court is satisfied that the applicant had not been deprived of his opportunity to present his case properly, and that he would have acted in the same way with or without the alleged irregularity, then the award will be upheld. By contrast, if it is realistically possible that the arbitrator could have reached the opposite conclusion had he acted properly in that the argument was better than hopeless, there is potentially substantial injustice. The accepted test now seems to be that there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable."

This view is justified by the authorities that Merkin cites: Vee Networks v Econet Wireless International Ltd, [2004] EWHC 2909 Comm); BTC Bulk Transport Corp v Glencore International AG, [2006] EWHC 1957 (Comm); ABB AG v Hochtief Airport GmbH, [2006] EWHC 388 (Comm); Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd, [2010] EWHC 442 (Comm); Transition Feeds LLP v Itochu Europe plc, [2013] EWHC 3629 (Comm).

41. It seems clear that, had Mr Maass been given a proper opportunity to do so, he would have presented further submissions, and probably evidence, about the jurisdictional challenge. I also consider that the challenge would have had a sufficient chance of success to establish the pre-condition of substantial injustice: it is realistically possible that Mr Thorp would have accepted Mr Maass' contentions, which I consider reasonably arguable. I do not propose to give extensive reasons for this conclusion because, consistently with the principle of kompetenz-kompetenz enshrined in the 1996 Act, it is for the tribunal first to opine on its jurisdiction after the parties have had a proper opportunity to present their case, and it is not for the court to trample over that ground before the tribunal has dealt with it.

42. I shall therefore only say this: the question whether MEL are entitled to the benefit of an arbitration award depends on whether they can establish their case on one or more

of the Status Issues, the evidential burden being upon them. On the very limited material before me, it appears that Mr Maass has a reasonable argument about this. I recognise that his other argument, that Mr Thorp's very appointment is wholly defective and so invalid, is more ambitious, but Mr Goold does not need to rely on that. In any case, I would, if necessary, conclude that this too is reasonably arguable. Mr Goold was able to support it by reference to J T Mackley & Co Ltd v Gosport Marina Ltd, [2002] EWHC 1315 (TCC), in which HHJ Richard Seymour QC accepted the contention that a so-called "Notice to Refer" was "invalid" because, being an attempt to commence "tripartite arbitration proceedings", it purported to commence an arbitration that was not covered by the arbitration agreement: loc cit at para 38. It might be that this is insufficient support for Mr Goold, but I should not and do not decide that.

43. In these circumstances, should I exercise my discretion under section 68 to grant Mr Maass relief? It was argued that I should not do so because Mr Maass has rejected Mr Thorp's proposals for remedying the position consensually. I do not criticise him for doing so: after 23 March 2015, when Mr Thorp acceded to representations and changed his views about the part of the September award that dealt with costs, his proposals did not meet Mr Maass' proper complaints. In any case, in view of the confused history about the jurisdictional challenge, I can well understand that Mr Maass preferred that it be examined by the court.

44. I therefore conclude that Mr Maass has shown that that the September award is affected by a serious irregularity, and I should exercise my jurisdiction under section 68 to grant relief. I invite further submissions about the terms of the appropriate relief and whether it should go to the whole of the September award or only part (or parts) of it.