Case No: CL-2016-000801

Neutral Citation Number: [2018] EWHC 209 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2018

Before:

THE HON. MR. JUSTICE PICKEN

- -

Between:

(1) PROGAS ENERGY LIMITED
(2) PROGAS HOLDING LIMITED
(3) SHEFFIELD ENGINEERING COMPANY LIMITED

Claimants

- and -

THE ISLAMIC REPUBLIC OF PAKISTAN

Defendant

- -
- -

Professor Dan Sarooshi (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
David Foxton QC and Iain Quirk (instructed by **Allen & Overy LLP**) for the **Defendant**

Hearing date: 25 January 2018

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Judgment

THE HON. MR. JUSTICE PICKEN:

Introduction

1. This is an application, first, for security for costs pursuant to section 70(6) of the Arbitration Act 1996 relating to the proceedings which the Claimants have brought before this Court under section 68 of the 1996 Act, and, secondly, for an order under section 70(7) of the same Act that the Claimants should pay into Court or otherwise secure the monies awarded in favour of the Defendant by the arbitrators whose awards (the 'Awards') are the subject of the section 68 challenge.

2. The first of these applications seeks an order that security for costs be provided in the sum of £482,029.19, the estimated costs which the Defendant expects to incur in dealing with the section 68 application. The second application concerns the costs which were awarded to the Defendant by the arbitrators in the underlying Award, namely US$141,549.00, €236,616.86 and £7,769,974.59. The application relates also to interest incurred in relation to those costs. That interest continues to accrue.

Background

3. The Claimants are three companies incorporated in Mauritius. The First Claimant ('Progas Energy') wholly owned the Third Claimant ('Sheffield Engineering') which, in turn, owned 23.75% of the shares in Progas Pakistan Limited ('PPL'), an energy company incorporated in Pakistan which built and operated an import terminal for liquefied petroleum gas (or LPG) at Port Qasim in Karachi, Pakistan. Progas Energy additionally owned 61.8% of the shares in the Second Claimant ('Progas Holding') which, in turn, had a 44.99% shareholding in PPL. Between them, therefore, the Claimants own the majority of the shares in that company.

4. Mr Ali Allawi was the chairman of PPL and an investor, through the Claimants, in PPL. A British citizen, he was formerly a minister in the Iraqi transitional government.

5. PPL imported LPG for sale into Pakistan. Its business, however, suffered, the Claimants say owing to the Defendant's wrongful conduct as further explained below, and as a result PPL defaulted on repayment of various loans. PPL's lenders having taken various action to recover what they were owed, PPL's assets were put up for auction by the High Court of Sindh in Karachi, the terminal operated by PPL being sold to SSGC LPG Ltd ('SSGC'), a subsidiary of Sui Southern Gas Company Limited (a company majority-owned by the Defendant).

6. The Claimants' position being that PPL's plight was the result of various measures taken by the Defendant, including specifically measures concerning the pricing of LPG in Pakistan, claims were brought by the Claimants against the Defendant in an arbitration (conducted under the UNCITRAL Rules) pursuant to the Mauritius-Pakistan Bilateral Investment Treaty. It was this arbitration which led to an award being issued by the Tribunal consisting of Yves Fortier QC, Judge Charles Brower and Christopher Thomas QC on 30 August 2016 (although later corrected on 7 November 2016).

7. In addition to the arbitration commenced by the Claimants, Mr Allawi also commenced an arbitration against the Defendant pursuant to a different treaty, namely the UK-Pakistan Bilateral Investment Treaty. The hearing of that arbitration took place at the same time before the same arbitrators as the arbitration commenced by the Claimants.

8. The Claimants' claims against the Defendant alleged expropriation in breach of the fair and equitable treatment obligations contained in the Mauritius-Pakistan Bilateral Investment Treaty. They also included alleged violation of similar obligations contained in the Denmark-Pakistan Bilateral Investment Treaty (together with full protection and security and non-discrimination provisions contained in that treaty) which the Claimants argued could be imported into the Mauritius-Pakistan Bilateral Investment Treaty in reliance on a most-favoured nation clause in the treaty.

9. The Tribunal decided in the Award dated 30 August 2016 (as well as in the Award relating to the arbitration commenced by Mr Allawi issued on the same day) as follows:

   (1) in respect of jurisdiction, that the Tribunal had jurisdiction to determine the Claimants' expropriation claims in full and that it was not necessary to determine whether jurisdiction also existed in relation to the other claims brought by the Claimants in view of what the Tribunal went on to decide concerning the merits of those claims;

   (2) in respect of attribution, there being a dispute about whether certain acts could be attributed to the Defendant, that this was an issue which did not need to be determined in the light of the Tribunal's rejection of the Claimants' case on causation;

   (3) as to causation, that this had not been established by the Claimants, even assuming that there had been the violations which the Claimants alleged; and

   (4) that there had been no expropriation leading to the failure of PPL since that failure was principally caused by erroneous assumptions which should be made in PPL's business plan rather than any market disruption caused by the Defendant, the Tribunal going on to hold that the Defendant had also not interfered in the auction process which saw PPL being sold.

10. As to (4) in particular, the Claimants alleged that the Defendant had orchestrated the sale to SSGC. The Tribunal held, however, that the assets were actually taken at the initiative of its banking syndicate (PPL having defaulted on its loans), not the Defendant, and that this is what led to the demise of PPL's business. The Tribunal summarised the position as follows:

    "In the end, PPL's objective to serve the untapped consumer segment failed for many reasons, but principally for what turned out to be the erroneous assumptions of its business plan. These other factors which the Tribunal has reviewed caused the company's demise rather than the generalized allegations of market disruption by the Government, as pleaded by the Claimants. Thus, not only have the Claimants failed to prove proximate cause of damage in relation to the alleged breaches, they have failed

to comprehensively address the other causal factors that account for the company's failure."

11. In the circumstances, the Claimants' claims were dismissed and costs were awarded in the Defendant's favour. Those costs, after a correction brought about by the revised Award issued on 7 November 2016, were in the amounts which I have previously identified. The Tribunal also awarded interest payable on those costs, hence the present application relating also to such interest.

12. Subsequent to the first of the Tribunal's Awards and prior to the corrective Award, the Claimants applied to the Tribunal on 27 September 2016 under UNCITRAL Rule 39, taking the position that the Tribunal had failed to rule on the Claimants' allegations of breach other than in relation to the expropriation case which they had advanced. The Tribunal rejected that application on 15 November 2016, so declining to issue an additional award. The Tribunal did so on the basis that, as the Tribunal explained, the Claimants' case on causation having failed, it was not right to suggest that any claims had been left undecided.

13. Following this, on 23 November 2016, Allen and Overy LLP, on behalf of the Defendant, sought payment of the sums awarded to the Defendant by way of costs. There was no response to the request for payment and, indeed, the costs (and interest on those costs) remain unpaid to this day.

14. A month after Allen & Overy LLP had made their demand for payment of the costs, the Claimants commenced the present section 68 proceedings. Specifically, that application, which was made on 20 December 2016 and served on the Defendant by the Foreign & Commonwealth Office on 2 May 2017, is based on section 68(2)(d) (*"failure by the Tribunal to deal with all the issues that were put to it"*). It is the Defendant's position that there is no merit in this application since it was not incumbent upon the Tribunal to address every issue and certainly not an issue which, on the Tribunal's findings concerning causation, did not need to be determined.

15. The present application follows a previous application by the Defendant, made on 27 July 2017, seeking an order for summary dismissal of the Claimants' section 68 proceedings on the basis that they have no real prospect of success. That application was dismissed by Phillips J on 18 October 2017.

16. It is worth mentioning also the position of Mr Allawi. He, too, has commenced proceedings under section 68, but substantially out of time and only after an order was obtained from this Court for enforcement of the Award made by the Tribunal as far as he is concerned. That order was made on 2 August 2017 and was served on Mr Allawi two weeks later. It is clear that his section 68 application was made in response to that order having been obtained by the Defendant.

17. So much for the procedural history, in particular the history relating to the Claimants (as opposed to Mr Allawi). Before coming on to deal with the Defendant's applications, I shall say something briefly about the funding of the Claimants' claims. Specifically, it emerged during the course of the hearings before the Tribunal that the Claimants were in receipt of funding for the purposes of the arbitration proceedings from a subsidiary of the well-known litigation funder, Burford Capital Ltd ('Burford'). That subsidiary is Pensacola Investments Ltd ('Pensacola'). It is the case

that Pensacola is also funding the Claimants' section 68 challenge, albeit that that funding does not apparently extend to cover any adverse costs order - at least not as a matter of contract as between Pensacola and the Claimants. This is a topic to which I shall return shortly.

The security for costs application under section 70(6) of the 1996 Act

18. Coming on, then, to the security for costs application, section 70(6) of the 1996 Act provides as follows:

"The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal is dismissed if the order is not complied with."

19. The relevant principle which governs the decision by a Court whether to order security for costs is whether it is just to do so in accordance with the overriding objective of CPR Part 1. That was what Sir Anthony Clarke MR (as he then was) explained in ***Republic of Kazakhstan v Istil Group Inc*** [2005] EWCA Civ 1468 at [31] and is the approach which was also adopted by Eder J in ***Konkola Copper Mines Plc v U&M Mining Zambia Ltd*** [2014] 2 Lloyd's Rep 507 at [24]. In particular, as Professor Sarooshi pointed out, CPR 1.1(2) stipulates that:

"Dealing with a case justly and at proportionate cost includes, so far as is practicable - (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate - (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly".

20. For his part, Mr Foxton, uncontroversially as I understood it, described the key question as being whether the party bringing the challenge under section 68 has sufficient assets and whether those assets are available to meet any order for costs. That is how the matter was put by Longmore J (as he then was) in ***Azov Shipping Co v Baltic Shipping Co (No. 2)*** [1999] 2 Lloyd's Rep 39 at page 41 in a passage relied on also by Professor Sarooshi:

"It seems to me … cases will be rare in which a Court or indeed an arbitrator would think it right to order security for costs if an applicant for relief has sufficient assets to meet any order for costs and if those assets are available for satisfaction of any such order for costs."

21. Mr Foxton also relied upon ***X v Y*** [2013] 2 Lloyd's Rep 230, a decision in which at [15] Teare J followed the guidance given by Longmore J and described the question, therefore, as being *"whether X has assets which are available for the purposes of execution"*. In ***Konkola*** Eder J adopted this same approach. Professor Sarooshi, indeed, himself placed heavy reliance on this formulation of the relevant question, emphasising Teare J's use of the word *"available"* when submitting, as I shall come on to explain, that in the present case, in view of the stance adopted by Burford in response to the security for costs application, the Court should treat the Claimants as having assets which are available to them and, as such, decline to order security for costs.

22. ***X v Y*** was a case in which, as Teare J went on to explain at [17], the claimant company was a substantial concern in India with considerable assets in Australia which had *"plainly set its mind against honouring any of the awards made against it, including the orders for costs made against it"*. He went on:

> *"The substantial sums due under the now unappealable third award remain unpaid. That award was issued over a year ago. The costs payable by X pursuant to the second award, issued about 18 months ago, also remain unpaid. Had X any intention to pay the sums awarded against it under those awards they would have been paid some time ago. In those circumstances it is to be expected that X will seek to resist any attempts to enforce the awards which have been issued against it. Moreover, since the major asset relied upon by X is a shareholding in a subsidiary company there must be doubt as to whether such asset is liquid, that is, readily realisable. Whilst X could probably be made to pay in the end, it probably could not be made to pay with any high degree of promptness … . There is no witness statement on behalf of X expressing either a willingness to pay such costs as may be ordered against it or explaining how such a liability could readily be enforced by Y."*

He then concluded at [18]:

> *"In those circumstances I have reached the conclusion that there is a real risk that the assets of X are not readily available for the satisfaction of any order for costs which may be made by the court against X. It follows, in my judgment, that the expense of complying with an order for security for costs is an expense which is necessary to ensure the fair resolution of the dispute between X and Y regarding the former's challenges to the fourth award. In the absence of security there is a very real risk that any costs order made in favour of Y would not be enforced without considerable delay and further expense. I have therefore concluded that X should provide security for Y's costs resisting X's challenges to the award. … ."*

23. Professor Sarooshi submitted that, in the present case, it would be unjust for the Court to require security for costs for any one of the following three reasons: (i) it is not fair, he suggested, that the Defendant by its unlawful acts should be able to cause the Claimants' impecuniosity and then seek to rely on this impecuniosity to seek security for costs; (ii) security should not be granted, he went on to argue, where, because of the Claimants' impecuniosity, it would operate to stifle section 68 proceedings which otherwise have real prospects of success; and (iii) the grant of security would, in any event, be an entirely unnecessary expense in view of the stance which Burford has adopted in response to the application. I shall deal with each of these points in turn.

24. As to the first of Professor Sarooshi's arguments, this hinged on his submission that it was only *"through a series of unlawful acts by the Government of Pakistan"* that the Claimants *"had their investment and property unlawfully expropriated"*. In this respect, Professor Sarooshi emphasised these passages in the sixth witness statement of Mr John Rhie, the partner at Quinn Emanuel Urquhart & Sullivan UK LLP instructed by the Claimants:

> *"11. … prior to Pakistan's wrongful acts, the Claimants owned a substantial LPG facility in Pakistan, with a value in the hundreds of millions of dollars. Pakistan has unlawfully taken ownership of that facility and is now operating it and diverting its revenues away from the Claimants. Thus, because of that illegal*

conversion, the Claimants today only possess a valuable chose in action. The Claimants do not possess liquid assets.

12. The Claimants' lack of assets is a direct consequence of Pakistan's wrongful destruction of the economic value of the Claimants' substantial investment in the Port Qasim project. As the Claimants extensively argued in the arbitration, it was Pakistan's unlawful measures that caused the Claimants' significant losses, undermined their profitable business, and eventually led to the destruction of their investment. Indeed the Claimants' claim in the arbitration against Pakistan for its unlawful acts was in the range of c. US$472 million to US$537 million, depending on the pre-award interest applied.

13. Moreover, the Pakistani Ministry of Petroleum subsequently acquired unlawfully the Progas companies' assets and their LPG terminal. Pakistan continues to this day to own and operate the LPG terminal receiving a significant profit.

…

15. It is precisely because of the unlawful actions by the Government of Pakistan that the Claimants no longer possess very significant assets which are generating substantial revenues. This position would have been rectified if the Tribunal had not committed a serious irregularity in breach of section 68(2)(d) of the Arbitration Act 1996, and in these circumstances the Claimants strongly maintain that no security should have to be granted. It cannot be the case that Pakistan can seize the Claimants' assets and pocket their cash flow, and then come seeking security for costs in an effort to stop the Claimants from seeking redress."

25. There is, however, an insuperable difficulty with Professor Sarooshi's reliance upon this evidence and, indeed, with the first of the reasons which he suggested should mean that no order for security for costs is made. This is that, unless and until the Awards are disturbed on the application which the Claimants make under section 68, the Awards stand and the Tribunal's rejection of the case advanced in the arbitration (a case echoed in Mr Rhie's sixth witness statement) means that it is simply not open to the Claimants at this stage to go behind that rejection. I am clear that, in the circumstances, Mr Foxton must be right when he submitted that it is not open to the Claimants to seek to go behind the Awards. Even if that were not the position, however, still the problem as far as the Claimants are concerned is that the Court is in no position to assume in their favour that they are right in what they have to say about the cause of their present financial predicament being the actions of the Defendant. If any assumption falls to be made, it is that the Tribunal's rejection of the Claimants' case was justified, and so that that case is not well-founded, but, even if that assumption is not made, I struggle to see why the opposite assumption (in favour of the Claimants) should be made. I do not suggest that it should be assumed that the Defendant's case in response to the Claimants' allegations is to be preferred to that of the Claimants. The Defendant, however, does not invite the Court to make any assumption in its favour. The only assumption which the Court is invited to make is an assumption which is favourable to the Claimants and upon which reliance is placed in resisting the Defendant's application for security for costs.

26. Mr Foxton took me during the course of the hearing to certain passages in the Award which he suggested demonstrated that there is no merit in the Claimants' complaint (made in the underlying section 68 proceedings) that the Tribunal failed to deal with arguments raised by the Claimants. Specifically, he highlighted how the Tribunal drew attention to the Claimants' expert evidence not addressing particular causation issues, despite apparently this having been pointed out well in advance of the hearing. Mr Foxton highlighted, indeed, how it has not been suggested by the Claimants in the section 68 challenge that the Tribunal overlooked expert evidence on such issues. It is unnecessary, however, for me to form any particular view about these matters at this stage. They will be addressed at the substantive hearing of the section 68 application. What matters for present purposes is that, in my view, it would be inappropriate to assume that the Claimants will succeed at that hearing.

27. As to the second of the reasons which Professor Sarooshi advanced in opposition to the application for security for costs, the suggestion that to award security would stifle the Claimants' section 68 application, reliance was placed for these purposes on a case dating from before the 1996 Act, namely ***Keary Developments Ltd v Tarmac Construction Ltd*** [1995] 3 All ER 534, in which Peter Gibson LJ had this to say at [3]:

"The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity … But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company … ."

28. Professor Sarooshi submitted that in the present case the Court should not allow the Claimants' impecuniosity to be used by the Defendant as a means of stifling the section 68 proceedings. In this context, Professor Sarooshi referred again to the Claimants' case on the underlying merits, the case rejected by the Tribunal, that their difficulties were brought about by the Defendant, and furthermore suggested that the section 68 proceedings were likely to succeed. As he put it, since the section 68 proceedings have *"a degree of cogency"*, the Court should be very slow to grant the security sought. He relied for these purposes on what Peter Gibson LJ went on to say at [4]:

"In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure … ."

29. Professor Sarooshi highlighted in this regard the fact that, in dismissing the Defendant's application to have the section 68 proceedings struck out, Phillips J had

necessarily concluded that those proceedings have real prospects of success. I see no merit in this submission, however, given that, on no view, can it be considered that the section 68 proceedings (or, for that matter, the underlying case which was run before, and rejected by, the Tribunal) has *"a high degree of probability of success"*. Certainly, the fact that Phillips J declined to strike the section 68 proceedings out, applying a somewhat modest test as to the merits of the proceedings, cannot conceivably assist the Claimants.

30. I recognise, however, that Professor Sarooshi's resort to the merits was but an aspect of his overarching submission that to require the Claimants to provide security for costs in this case would result in a stifling of the section 68 proceedings (and so their ability, if successful in those proceedings, to re-run the case which was rejected by the Tribunal before a differently constituted panel of arbitrators). The problem, however, as far as Professor Sarooshi's stifling submission is concerned, is that the Claimants have funding for the section 68 proceedings. Accordingly, there is no question of the application being stifled. Although I shall come on in a moment to deal with what Burford has said about meeting any adverse costs order, specifically whether this is a freestanding answer to the security for costs application, the fact that the Claimants have funding to advance the section 68 proceedings puts beyond doubt that this is not a stifling case. Indeed, during the course of the hearing, I asked Professor Sarooshi whether, were a security for costs order to be made, this would mean that the section 68 proceedings would not proceed. His answer, having taken instructions and with representatives from the funders in court, was that that was not the case. In other words, the section 68 proceedings will continue regardless of whether security for costs is ordered or not. In the light of the answer which he gave to the question I posed, Professor Sarooshi sensibly recognised that the second of the reasons advanced by him as to why security for costs ought not to be ordered (the stifling reason) was not viable.

31. This brings me to the third of the reasons put forward by Professor Sarooshi, namely that Burford has sent letters (initially on 15 December 2017 addressed *"to whom it may concern"*, and on the eve of the hearing before me in an identical letter addressed to me as the judge hearing the application) stating as follows:

> *"… Pensacola … has provided financing for the Claimants to pursue the Proceedings but has not contracted to accept any responsibility for the Claimants' adverse costs.*
>
> *Notwithstanding the above, on behalf of Burford Capital Ltd I am authorised to hereby confirm that, should the Court make a future adverse costs order against the Claimants in the Proceedings for the costs of these Proceedings, Burford Capital Ltd will ensure that Pensacola will pay these costs to the Defendant (should the Claimants not do so) up to a maximum amount of £482,029.19.*
>
> *… this arrangement is entirely without prejudice to the Claimants' position in the Proceedings that, in the circumstances, an order that the Claimants pay security for costs is not appropriate."*

32. Professor Sarooshi's submission was that this means that there are *"available assets"* for the purposes of meeting any adverse costs order made against the Claimants in the event that their section 68 challenge were to fail. Professor Sarooshi in this context

relied upon this further passage in ***Azov***, following on from the passage which I have quoted earlier, where Longmore J stated:

"In this case it is therefore relevant for me to enquire whether Azov have assets which are available for the satisfaction of any judgment as to costs. If Azov does have such assets, then I would not be inclined to make any order for security; whereas, if it does not have such assets or if such assets are not readily available to satisfy any court order, I would be inclined to make an order for security."

33. As I have previously mentioned, Professor Sarooshi also prayed in aid ***X v Y*** and Teare J's description of the question as being *"whether X has assets which are available for the purposes of execution"*. It was Professor Sarooshi's submission that, applying this approach, there is no basis for the grant of security for costs in view of Burford's letters dated 15 December 2017 and 24 January 2018 stating, as Professor Sarooshi put it, *"in terms that it would ensure payment of any future adverse costs order made against the Claimants as part of these s. 68 proceedings up to the maximum amount of £482,029.19"*.

34. Specifically, Professor Sarooshi submitted that, in such circumstances, since the Court is able to make an adverse costs order directly against a non-party (such as Burford) by virtue of section 51 of the Senior Courts Act 1981, the Court should approach the present case on the basis that there are assets which are *"available"* to the Claimants which mean that an order for security for costs would not be appropriate. It does not matter, Professor Sarooshi observed, that there is no obligation (whether owed to the Claimants under their funding arrangements with Burford or to the Defendant under the letters to which I have referred) on the part of Burford to meet the Defendant's costs as there is no need for the Claimants to point to any such obligation. It is sufficient, he argued, that there is ability on the Defendant's part to seek an order against Burford under section 51 of the 1981 Act. Professor Sarooshi submitted, indeed, that, were Burford not to comply with its undertaking, which, he suggested, *"is difficult to imagine given its size and reputation"*, the Defendant would just need *"to return to this Court for a simple order compelling it to do so"*. His position was that making an application under section 51 is not a long or costly process and, accordingly, that there is nothing objectionable about the Defendant having to make such an application rather than obtain an order for security for costs in advance of the Court's determination of the Claimants' section 68 proceedings.

35. I cannot accept that Professor Sarooshi was right when he made these various submissions. On the contrary, it seems to me that he must be wrong as a matter of principle. I say this for a number of reasons. First, it is common ground that the letters from Burford do not constitute a contractual commitment to anybody (whether the Claimants or the Defendant) to meet any adverse costs order awarded in the Defendant's favour. It follows that the letters are not legally enforceable by the Defendant (or the Claimants for that matter) and I do not, therefore, see how Professor Sarooshi can have been right when he suggested that the Defendant could obtain a *"simple order"* from the Court requiring Burford to pay in accordance with the terms of the letters. Nor, I observe, do the Burford letters take the form of undertakings to the Court to meet the Defendant's costs. Even if they were, and Professor Sarooshi did not suggest that this was the case, that would not entitle the Defendant to an order requiring Burford to pay its costs. The remedy for breach of an undertaking to the Court is committal, and that is not the same thing as obtaining payment of one's costs.

36. Secondly, it is impossible to see how Professor Sarooshi can be right that the Burford letters mean that the Claimants have *"available"* to them assets which mean that no order for security for costs is necessary or appropriate. Since Burford is under no contractual (or other) obligation to the Claimants to do what Burford says it would do in the letters, namely meet any costs order in favour of the Defendant, it simply makes no sense to regard the letters as somehow making *"available"* to the Claimants assets which would make a security for costs order unnecessary or inappropriate. There is nothing *"available"* to the Claimants, and still less can it be said that the Claimants have assets in any relevant sense. As I have explained, Professor Sarooshi in this regard placed heavy reliance upon what Teare J had to say in ***X v Y*** at [15], specifically his formulation of the relevant question is being *"whether X has assets which are available for the purposes of execution"*. In so doing, he emphasised the word *"available"*. However, as I pointed out to him during the course of his submissions, the other word which matters for present purposes is the word *"has"* since, unless a claimant can point to assets to which it has an entitlement, the question of availability in the abstract hardly matters. This point is illustrated by the fact that in ***Azov***, in a passage upon which Professor Sarooshi sought to rely, Longmore J went on to discount 69 vessels which, it turned out, were not owned by the claimant but by the State of Ukraine, plainly considering that in such circumstances the vessels could not be considered as relevant assets when deciding whether or not to order security for costs against the claimant.

37. Thirdly, I bear in mind in this regard that the purpose of the security for costs jurisdiction is clear: it is to enable a defendant to recover costs subsequently awarded to it without delay or other difficulty. This is the point made by Popplewell J in ***Monde Petroleum SA v WesternZagros Ltd*** [2015] EWHC 67 (Comm), [2015] 1 CLC 49 at [61], as follows:

> *"It is conventional to order security to be given either by payment into Court or by the provision of a guarantee from a first class London bank. That practice recognises that the security should be in a form which enables the defendant to recover a costs award made in its favour at the trial from funds which are readily available, such that there is little risk of delay or default in enforcement. Although security may be ordered in an alternative form, that form should be such as to fulfil the same function, so as to allow simple and swift enforcement of a costs order from a creditworthy source. In practice any such alternative form of security must be such as can properly be regarded in these respects as at least equal to, if not better than, security by payment into Court or provision of a first class London bank guarantee. … ."*

I am quite clear that it is no answer for a claimant facing an application for security for costs to point to an ability on the part of the defendant to make a different application (under section 51) against a different party (a funder - in this case, Burford). The more so, in circumstances where that other application can only be made at a later stage, specifically after the outcome of the underlying proceedings (in the present case, section 68 proceedings) is known and, necessarily in the circumstances, after a costs order has been made (and, in all probability, not complied with by the party making the arbitration challenge). If it were the position that a claimant could resist the making of a security for costs order at an interlocutory stage on that basis, that would be a most surprising position. I repeat that the purpose of a security for costs order is to give a defendant protection against the risks of an adverse

costs order not being satisfied by the claimant. That protection is required, as recognised by the security for costs regime, much earlier during the course of proceedings than Professor Sarooshi's approach contemplates.

38. It is worth noting in this regard that the CPR contains a provision enabling a defendant to *"seek an order"* for security for costs *"against someone other than the claimant"*. This is CPR 25.14, which gives the Court a discretion to make such an order if *"(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and (b) one or more of the conditions in paragraph (2) applies"*. Paragraph (2)(b) describes one of those conditions as being that *"the person … has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings"*, before going on to require also that the person *"is a person against whom a costs order may be made"*. As Mr Foxton pointed out, were the Defendant in the present case to have made an application under CPR 25.14 against either Pensacola or Burford, it is likely that the Defendant would have been met with the objection that the condition contained in paragraph (2)(b) is not met given that the present proceedings are proceedings under section 68 of the 1996 Act and, as such, this is not a case where the Claimants can be regarded as seeking *"any money or property… in the proceedings"*. Although, if successful in the section 68 challenge, the Claimants (and so those funding them) will seek a financial recovery before different arbitrators, it is questionable whether this changes the position as far as CPR 25.14(2)(b) is concerned. It follows that this is not, therefore, a case where it would be open to the Defendant to seek an order for security for costs in advance of making an application under section 51 against Burford or Pensacola, and, in fairness, Professor Sarooshi did not suggest otherwise.

39. Fourthly, although the point really flows on from the last, I agree with Mr Foxton that the section 51 jurisdiction is not functionally equivalent to the security for costs jurisdiction since the former anticipates the *future* exercise of the Court's discretion whereas the latter requires the Court to exercise its discretion *now*. This is significant not merely as a matter of theory but also as a matter of practice. I cannot accept that it is appropriate that a Defendant should have to take part in proceedings which the claimant has brought, and thereby incur costs (substantial costs in the present case), without knowing whether it is going to be in a position to recover the costs which the defence of those proceedings will entail. Professor Sarooshi was, at most, able to point to the existence of the section 51 jurisdiction and to suggest (whilst not apparently seeking to commit Burford) that, in all likelihood, an order would be made against Burford requiring it to pay the Defendant's costs. There is, however, no certainty that the Court would, on a subsequent section 51 application by the Defendant, require Burford to do any such thing. It would be a matter for the Court at that stage to decide what to do.

40. Although Professor Sarooshi referred me to a number of authorities dealing with section 51, unsurprisingly none of them would justify a conclusion that an order under that provision would inevitably be made against Burford. I was taken, for example, to ***Deutsche Bank AG v Sebastian Holdings Inc and another*** [2016] EWCA Civ 23, [2016] 4 WLR 17, in which, having reviewed the authorities, Moore-Bick LJ stated as follows at [21]:

"These principles have been applied in a number of subsequent cases, but it is unnecessary to consider them in detail because they all turn to a greater or lesser degree on their own facts. When an order for costs is sought against a third party, the critical factor in each case is the nature and degree of his connection with the proceedings, since that will ultimately determine whether it is appropriate to adopt a summary procedure of the kind envisaged in the authorities, … ."

Similarly, in ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others*** [2004] UKPC 39, [2004] 1 WLR 2807 Lord Brown identified at [25] one of the relevant principles as far as the operation of section 51 is concerned as being this:

"Where … the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation, a concept repeatedly invoked throughout the jurisprudence … ."

41. As I say, in neither of these cases (and it is right to say that, as will appear, Mr Foxton himself relied on ***Dymocks*** in support of his application under section 70(7)), was it decided that an order should automatically result from an application being made under section 51. It follows that it would be wrong to treat the ability to apply under section 51 as being a suitable alternative to obtaining an order for security for costs at an interlocutory stage.

42. Fifthly, if anything, the fact that a funder in Burford's position is a putative party to proceedings, in the sense that it would likely be made an additional defendant were a section 51 application to be made by the Defendant, seems to me to make it all the more appropriate that an order for security for costs should be made. An order for security for costs would, in the circumstances, appropriately recognise the reality which, as Professor Sarooshi acknowledged in the present case, is that the funder is enabling the Claimants to pursue the proceedings by providing the Claimants with the necessary funding.

43. Finally, although (again) this point is related to the last, it seems to me, in any event, that, if Burford is willing to meet an adverse costs order, as stated in the two letters to which I have referred, then there is no reason why Burford cannot provide security for costs or, more accurately, put the Claimants in a position where they can furnish the Defendant with security. Put differently, when exercising my discretion in dealing with the Defendant's security for costs application, I am in no doubt that to require the Claimants (no doubt with funding supplied by Burford) to provide security for costs is the right course, and that to deprive the Defendant of the order which it seeks on the basis that it would be open to the Defendant to ask the Court at a later date (after it has incurred its costs) to make an order under section 51 (and so to take the chance that the Court might at that stage decline to make such an order) would be quite wrong.

44. I might add that I am not swayed from this conclusion by Professor Sarooshi's suggestion that it would be an *"unnecessary expense"* to require Burford to do more than it has already done. In this context, reference was made to the costs involved in Burford having to provide security, although, of course, the order sought by the

Defendant is an order requiring the *Claimants* (not Burford) to do this. There is, however, nothing in this objection. Burford is in the business of providing litigation finance and, as such, ought not to find it overly difficult to furnish the Claimants with the necessary security to enable them, in turn, to comply with an order for security for costs made against the Claimants. Furthermore, it should be borne in mind that the section 68 proceedings are to be heard in relatively short order, a hearing having been fixed for two days at some point in April this year. The period of time over which Burford (and the Claimants) will have to provide the security is, therefore, somewhat limited.

45. This leaves the matter of quantum. Although no point was taken in Mr Rhie's witness statement in response to the application for security for costs, Professor Sarooshi suggested that the Defendant's projected legal fees of £482,029.19 for the section 68 hearing, a two-day hearing, were *"wholly exorbitant"*. On any view, the fees are significant. I am not persuaded, however, that, in the context of a substantial commercial case such as this, they are so far out of kilter as to merit the description afforded to them by Professor Sarooshi. Furthermore, it is to be noted that, until his skeleton argument was submitted, the Claimants took no issue with the amount of security sought. It would have been open to them to have done so, and I expect that they would have done so had it really been thought that the quantum was excessive. I bear in mind also that, in their letters dated 15 December 2017 and 24 January 2018, Burford did not take issue with quantum albeit that it is right to point out that the letters referred to costs being paid up to a maximum of the amount sought. There is, in addition, the point that the Claimants have not provided the Court with details of what their legal costs will be in relation to the section 68 proceedings. As a result, I am reluctant to assume that the costs will be at a wholly different level. That said, as Mr Foxton acknowledged, it is open to the Court to trim the level of security sought, if only to take account of the likelihood that on an assessment, whether detailed or summary, not all the costs will be recovered. I consider that, in the circumstances, an appropriate figure would be £400,000.

46. Accordingly, the Claimants will need to provide security for costs in the sum of £400,000, either by paying that sum into Court or by providing an appropriate bank or other guarantee to the Defendant.

The security application under section 70(7) of the 1996 Act

47. I turn, then, to the Defendant's application under section 70(7) of the 1996 Act. This application, as I have explained, relates to the costs (together with interest on those costs), which the Tribunal ordered the Claimants to pay to the Defendant, the Claimants having failed to make good their claim against the Defendant.

48. Section 70(7) provides:

> *"The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application … and may direct that the application … be dismissed if the order is not complied with."*

49. The relevant principles were not in dispute between Mr Foxton and Professor Sarooshi, at least insofar as what might be described as the classic situation where the sums of money which are sought to be secured by an order under section 70(7) are not

costs liabilities but substantive liabilities and where there is no litigation funder involved. As I shall come on to explain, Mr Foxton submitted that, in the particular circumstances of the present case, the principles applicable to the classic situation have no operation in relation to his primary case. It is convenient to address that primary case later, after first setting out the principles applicable to the classic situation and applying those principles to the facts of the present case and so to Mr Foxton's alternative case that, even on that basis, security under section 70(7) should be ordered.

The classic situation: the Defendant's alternative case

50. In the case of an application under section 67 of the 1996 Act, there are two requirements which will generally need to be met for the exercise of the power under section 70(7), namely whether: (i) the challenge *"is flimsy or otherwise lacks substance"*; and (ii) the challenge in some way prejudices the ability of the defendant to enforce the award or diminishes the claimant's ability to honour the award.

51. The position in relation to section 68 is, however, different in that there is no need to establish the first of these requirements. This was made clear by Teare J in ***X v Y*** at [26], albeit in recording a concession made by counsel, and was not disputed by Professor Sarooshi before me.

52. As to the second requirement (I repeat the only requirement where the underlying application is under section 68), Flaux J (as he then was) had this to say in ***A v B (Arbitration: Security)*** [2011] 1 Lloyd's Rep 363 at [47], [48] and [50]:

> *"47. This point was considered further in the judgment of Mance LJ in Dardana Ltd v Yukos Oil [2002] 2 Lloyd's Rep 326 at 337-8 (paragraph 37) from which it appears that any relevant prejudice would generally be based on a risk of dissipation of assets and the successful party applying for security would need to show such risk in a similar manner to that required for a freezing injunction.*
>
> *48. That the issue of whether security should be ordered under section 70(7) should be related to issues of ease or difficulty of enforcement and diminution of assets is apparent from the Report on the Arbitration Bill of the Departmental Advisory Committee on Arbitration Law ('DAC'), headed by Lord Saville, which commented at paragraph 380 on the clause in the Bill when security was limited to what are now sections 67 and 68 and recommended extending it to what is now section 69, on the basis that the power to order security was:*
>
> *'A tool of great value, since it helps to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may, by design or otherwise, be diminished.'*
>
> *…*
>
> *50. Thus, whilst it would not be advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under section 70(7), it seems to me that as a general principle the Court should not order security unless the applicant can demonstrate that the challenge to the award (whether under section 67 or, indeed, either of the other sections) will*

prejudice its ability to enforce the award. Often this will entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced."

53. Teare J in ***X v Y*** at [32] described the proper approach as being as follows:

"I accept that the jurisdiction conferred on the court by section 70 should not be used a means of assisting a party to enforce an award which has been made in its favour. Ordering payment in by X would certainly assist Y to enforce the fourth award. Such an order can only be justified (following the guidance in the authorities to which I have referred) if the existence of the sections 67 and 68 challenges to the award in some way prejudices the ability of Y to enforce the award or diminishes X's ability to honour the award. If such prejudice or diminution is shown then an order for payment in may be an appropriate means of removing the prejudice to Y's ability to enforce the award or of restoring X's ability to honour the award."

54. More recently, in ***Erdenet Mining Corporation LLC v ICBC Standard Bank PLC*** [2017] EWHC 1090 Sir Jeremy Cooke had this to say at [12]:

"The second limb has been the subject of different forms of expression also. 'Such an order can only be justified … if the existence of the section 67 challenge … in some way prejudices the ability of Y to enforce the award or diminishes X's ability to honour the award'. It has been accepted that simple delay in enforcement does not amount to the prejudicing of the winner's ability to enforce the award so that the exercise of the power given to a court in a country which is party to the New York Convention to adjourn enforcement proceedings (pending the determination of the validity of the arbitration agreement in the court of the seat of arbitration, with the concurrent power to order security to be given) could not in itself constitute what is required under that limb. Whilst the courts have not limited this aspect to the issue of dissipation of assets, that appears to be the only basis upon which any court has so far proceeded. In order to show that the ability to enforce the award has been prejudiced or the ability of the applicant to honour it has been diminished, it is therefore effectively necessary to satisfy a similar requirement to that of a freezing injunction, namely the risk of dissipation of assets between the time of the section 67 application and its final disposal."

55. Professor Sarooshi also highlighted this passage in Teare J's judgment in ***X v Y*** at [34]:

"The conduct of X in refusing to honour the arbitration awards does not attract any sympathy. However, that is not a legitimate reason for ordering that it pay the amount of the fourth award into court. Y has sought to enforce the award in Australia where X has substantial assets. The challenges to the fourth award in this jurisdiction will delay enforcement there but such delay will be brought to an end if and when Y defeats those challenges. An order for payment in is not required to bring that delay to an end. In the meantime Y has the protection of the Australian freezing order. If X persuades the Indian court to add the fourth award to the scope of the injunction already granted by that court, such injunction is unlikely to have any effect on enforcement in Australia because it restrains enforcement 'in India'."

56. Teare J continued at [35]:

"I have therefore come to the conclusion that an order for payment in of the sum adjudged due to Y under the fourth award would be wrong in principle because the challenges to the award do not materially prejudice Y's ability to enforce the award. By contrast the making of an order for payment in would assist Y to enforce the award. Whilst that may be said to be desirable it is not, on the authorities, a good reason for making an order for payment in pursuant to section 70 of the Arbitration Act 1996."

57. Professor Sarooshi similarly stressed this passage in Sir Jeremy Cooke's judgment in ***Erdenet*** at [59]:

"The power under section 70(7) is to be exercised to avoid the successful party being prejudiced in the enforcement of the Award by the challenge to it. It is right to say that they are not designed to put the successful party into a better position than before. It was suggested that all that Standard's evidence amounted to was to show EMC's generally weak financial position and that this would not suffice. If the evidence showed that EMC was not able to pay now, any further deterioration in its financial circumstances would be of no significance. …."

58. ***Erdenet*** was a case which involved a section 67 challenge (as well as a challenge under section 68), and the decision reached was that security under section 70(7) should be provided. In doing so, the Court relied on various matters: the claimant had failed to provide evidence of its financial position, or any evidence to show that an order for security would stifle the claim; there was no realistic prospect of enforcing the award until the challenges in the English court had been resolved; there were no assets in the UK or in a Regulation state against which to enforce; and there were accounting irregularities in the award payee's financial accounts, characterised as *"financial delinquency"*, and *"serious deficiencies in the [award payee's] financial governance and corporate management"*.

59. Sir Jeremy Cooke's reasoning was explained at [61] as follows:

"As Mr David Joseph QC submits, there are serious deficiencies in EMC's financial governance and corporate management. As the reports in Parliament and other evidence before the Court makes plain, there has been significant corruption with at least two changes of management since the departure of Mr Ganzorig. There have been wholesale failures to comply with banking law, the law relating to accounting (the Glass Accounts Law) and company/administrative/constitutional law in relation to the sale of the 49% shareholding. Whilst these matters are the subject of inquiry there is no evidence before the Court that there has been a reform of the management structures or that there will in the future be ethical governance or control. What appears to have happened in the period immediately before and after the issue of the two Awards in the references with which I am concerned is a significant dissipation of assets."

It is clear, therefore, that an important factor in the decision to order security was evidence which pointed towards efforts to dissipate assets immediately before and after publication of the awards in that case.

60. Professor Sarooshi submitted that there is no such evidence as to dissipation in the present case. It was his submission that the Defendant's application in the present case

is designed simply to improve the Defendant's ability to enforce the Award(s) and that this represents an inappropriate use of section 70(7). In short, he submitted that, if security is required to be provided, the Defendant would find itself in a better position than if the section 68 application had not been made by the Claimants, and so that the application should be refused. I agree with Professor Sarooshi about this, whilst emphasising that I am here dealing only with Mr Foxton's alternative case. It seems to me that Professor Sarooshi must be right to characterise the application as he did. Specifically, I see no proper basis for a conclusion that in the present case the Claimants have engaged in dissipation of their assets.

61. Mr Foxton highlighted a number of matters in support of his submission that it would be appropriate to conclude otherwise. First, he submitted that, despite their assertion that they have no liquid assets, the Claimants have chosen to produce no meaningful evidence as to their financial condition, simply saying (through their solicitor, Mr Rhie, in his sixth witness statement) that they have no liquid assets and producing virtually no information concerning their actual financial position. This, Mr Foxton pointed out, is the position despite it having been stated in November last year, when seeking a time extension for service of their evidence in response to the application, that more time was required because: detailed instructions needed to be obtained from the Claimants on the location, nature, liquidity, value and transferability of the assets owned by them; evidence on the enforceability of the Award(s) against the Claimants' assets in Pakistan, where assets were said to exist, was also required; and evidence on Pakistan law and practice relating to the recognition and enforcement of adverse English court judgments against the Claimants' assets in Pakistan was also needed. Mr Foxton suggested that, in the circumstances, it is striking that the Claimants have not put before the Court more extensive evidence about the Claimants' financial position, and that they have instead merely sought to rely upon Mr Rhie's evidence, without elaboration, that the Claimants do not *"possess liquid assets"* except for an alleged "*valuable chose in action"* in the shape of the claims which were rejected by the Tribunal in the Award(s) but which the Claimants seek to resurrect through obtaining the order which they will be asking the Court to make at the section 68 hearing in April. Mr Foxton submitted that, in these circumstances, it would be appropriate for the Court to infer, insofar as the Claimants have failed to provide financial information, that such information, had it been produced, would show that the Claimants' financial position will worsen over the course of these proceedings. Secondly, Mr Foxton submitted that the Court should proceed on the basis, as Sir Jeremy Cooke did in ***Erdenet***, that there is no realistic prospect of enforcing the Award(s) until the section 68 challenge has been determined since, despite seeking an extension of time to obtain evidence on this issue, the Claimants have not produced any evidence justifying a contrary conclusion. Thirdly, Mr Foxton relied upon the fact that, again as in ***Erdenet***, it is not disputed that the Claimants have no assets in the UK (or indeed in a Regulation state) against which to enforce. Fourthly, Mr Foxton submitted that the evidence obtained by the Defendant about PPL, the company which the Claimants say once held their main assets, has shown serious deficiencies in financial and corporate governance, and ongoing breaches of Pakistan company law requirements, increasing the uncertainty as to the nature and location of the Claimants' assets. This includes: a failure (by PPL and Mr Bilgrami, a shareholder in the Claimants and a main witness in the arbitration) to co-operate with requests to appear before the Official Assignee and file a statement of affairs as required under Pakistan company law; an application by the Official Assignee to the High Court of

Sindh for PPL to be dissolved, together with a request to initiate criminal proceedings against PPL's management for its failures to comply with Pakistan company law; and violations of Pakistan company filing requirements, including failing to prepare accounts.

62. In addition, Mr Foxton relied upon the bringing of proceedings in this Court in the name of a defunct party, which has no right to bring them, and in apparent breach of the Claimants' solicitors' warranty of authority, an allegation made by the Defendant in the witness statement in support of the present application which has not been addressed by the Claimants. Specifically, Mr Foxton drew attention to the fact that, according to company searches, Progas Holdings and Sheffield Engineering are Global Business Company ('GBC') Category 1 companies, and as such, their financial statements are not publicly disclosed. Based on the company searches which have been undertaken, Mr Foxton explained, the companies do not appear to engage in any commercial activity or have any substantial assets. For example, the website address listed for Progas Holdings (which is the same as the PPL website address) does not open, and the description of Progas Holdings' Operations and History in the Legalinx search is limited to the Port Qasim project, in which it is no longer involved. As for Progas Energy, this is a GBC Category 2 company and is, therefore, subject to negligible reporting and disclosure requirements. The company is, furthermore, now *"defunct"*, which apparently means as a matter of Mauritian company law, that it has been removed from the companies register and may no longer exist or operate. Mr Foxton went on to explain, based on the evidence which had been put before the Court on the application, that Progas Energy was wholly owned by Progas Holdings (UK) Limited ('Progas Holdings UK'), a UK company incorporated in 2009, Progas Holdings (UK) Limited having acquired Progas Energy in 2010. At the end of 2010, Progas Holdings UK disclosed Progas Energy to be worth £8.5m in Progas Holdings UK's Abbreviated Accounts for the year ended 31 December 2010, although at the end of 2011 Progas Holdings UK had a negative worth of a mere £39,000, a figure which did not change in subsequent years. Furthermore, Mr Foxton explained, Progas Holdings UK last filed financial statements for the period ending December 2013, but these comprised only an abbreviated balance sheet, so making an analysis of its activity and financial position at that time difficult, which disclosed that Progas Energy was its wholly-owned subsidiary and that Progas Holdings UK's investment in Progas Energy was worth a token £1, with a negative worth of £39,000 and with no profit or loss in the year. Moreover, soon after the substantive hearing of the arbitrations in February 2015, the directors of Progas Holdings UK applied in June 2015 to have the company struck off – something which came about in November 2015. Accordingly, Mr Foxton observed, it is not clear who currently owns Progas Energy. He went further in his oral submissions, suggesting that *"ownership of entities has fallen into a black hole"*.

63. Mr Foxton also prayed in aid in this context the fact that the Claimants have failed to satisfy the costs award made 1½ years ago, submitting that this demonstrated that they have no intention of paying the Defendant the sums ordered by the Tribunal, as well as the fact that the section 68 challenge has, Mr Foxton suggested, not been pursued with any particular haste, so indicating that the Claimants' real purpose is to delay enforcement.

64. I see no merit in any of these points, bearing in mind the hurdle, certainly in the classic situation as I have characterised it, which the Defendant needs to surmount if an order is to be made under section 70(7). I remind myself in this context that, as Sir Jeremy Cooke put it in ***Erdenet***, in order to show that the ability to enforce an award has been prejudiced or the ability of the applicant to honour it has been diminished, it is *"effectively necessary to satisfy a similar requirement to that of a freezing injunction, namely the risk of dissipation of assets"* between the time of the section 68 application and its final disposal. Mr Foxton's submissions do not justify such a conclusion.

65. Indeed, it is instructive that, when I asked Mr Foxton during the course of his submissions whether, were the application before the Court not an application under section 70(7) but an application for a freezing order, the evidence which had been assembled by the Defendant would be sufficient to merit the making of a freezing order, his initial response was, in effect, to acknowledge that it would not be sufficient. It is right to point out that by the time that he came to make his submissions in reply Mr Foxton had become more emboldened, submitting that the evidence was *"very much in freezing order territory"*. However, in truth, that is not the position at all since, crucially, there is no evidence demonstrating, or even hinting at, dissipation of assets on the Claimants' part. There is nothing remotely equivalent to the evidence in ***Erdenet*** which enabled Sir Jeremy Cooke to conclude that there had been dissipation *"immediately before and after issue of the two Awards"*. That evidence, it should be noted, involved a sale at about the time of the awards of a 49% shareholding in the claimant company: see [55(8)]. That was solid evidence supporting dissipation which is simply not matched by anything in the present case.

66. This conclusion addresses the first and fourth of the points raised by Mr Foxton. These are the arguments which are directed to the dissipation issue. Neither the second or third matters raised by Mr Foxton warrants a different conclusion. As to the second point, although Mr Foxton suggested that the fact that there is no realistic prospect of enforcing the Award(s) until the section 68 challenge has been determined is a factor which led Sir Jeremy Cooke in ***Erdenet*** to require that security be furnished, on analysis, I do not consider that he was right about this. It was, indeed, a matter which was listed in the judgment at [55(1)], but it is clear that it was not the reason why Sir Jeremy Cooke decided to make the order which he did. In any event, in circumstances where it does not appear that the Defendant took any enforcement steps prior to the issue of the section 68 proceedings and in circumstances also where the application under section 70(7) was only made relatively late in the day, the hearing of the section 68 challenge taking place in only just over two months' time, it seems to me that this is not a factor which, in and of itself, ought to lead to the making of the order sought.

67. Nor, similarly, does the fact that it is not disputed that the Claimants have no assets in the UK (or indeed in a Regulation state) against which to enforce, in my view, justify the making of an order under section 70(7). Although, again, Mr Foxton suggested that this was a matter relied upon by Sir Jeremy Cooke in ***Erdenet***, that is not how I read the judgment. In any event, the logic of Mr Foxton's submission, if right, would be that in any case where assets are located outside this jurisdiction (or outside a Regulation state), an order under section 70(7) would be appropriate. That, however, simply cannot be right.

68. In conclusion, therefore, applying the principles applicable to the classic situation, I have reached the clear conclusion that security under section 70(7) ought not to be ordered.

Litigation funding: the Defendant's primary case

69. This leaves the Defendant's (and Mr Foxton's) primary case. This case had as its starting point the proposition that the present case appears to be the first occasion when an application under section 70(7) has been made where: (i) the application is brought against a party funded by a professional third party funder who has not paid an adverse costs order by an arbitral tribunal, and is seeking (through the party which it is funding) to seek to re-run the arbitration which that party has lost, in circumstances where there was no ability on the part of the other party to seek an order against the funder in the underlying arbitration; (ii) where the claimant, funded by the same professional funder, comes before the Court only by way of a challenge under section 68, and not also under section 67, so that the first limb of the test applicable to section 67 applications (namely that the challenge *"is flimsy or otherwise lacks substance"*) is inapplicable; and (iii) where the sum in respect of which security is sought is for adverse costs alone, rather than consisting of (or including) a damages award.

70. Mr Foxton explained that none of the authorities dealing with section 70(7) has been concerned with comparable situations and that, therefore, the Court is in what he described as *"uncharted waters"*. ***A v B*** was not such a case. Indeed, Mr Foxton submitted, the fact that the DAC Report described section 70(7) as being a *"tool of great value"* which *"helps to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may, by design or otherwise, be diminished"* (as quoted by Flaux J in ***A v B*** at [48]) is instructive because, as Mr Foxton put it, at the time that the DAC Report was published litigation funding such as that in the present case was *"not even a twinkle in the eye"* of Lord Savile and his DAC colleagues. Even in ***A v B***, however, Mr Foxton went on to observe, the point was clearly made by Flaux J at [50] that *"it would not be advisable or appropriate to lay down hard and fast rules"*. Accordingly, Mr Foxton submitted, even if an order under section 70(7) would not be appropriate applying the principles which have been applied in other cases not involving the aspects listed at (i) to (iii) above and notwithstanding that the Defendant would be put in a better position if an order were made under section 70(7), those aspects give rise to an additional basis on which an order for security should be made under section 70(7) and authorities such as ***A v B***, ***X v Y***, ***Konkola*** and ***Erdenet*** represent no bar to the making of such an order (assuming, as I have decided, that an order is not appropriate applying the principles applicable in the classic situation).

71. As to (i) and (ii), Mr Foxton submitted, in particular, first, that, although details of Pensacola's funding of the claim remain scant, it is a reasonable inference that Pensacola is funding the present challenge because, if successful, it stands to gain a considerable benefit from any later award made (by different arbitrators) in its favour. In truth, there was no issue at the hearing that Pensacola is providing the funding to allow the Claimants to do this; Professor Sarooshi did not suggest the contrary. Secondly, Mr Foxton emphasised that the Claimants contracted with Pensacola on the express basis that there is no cover for adverse costs awarded against it. He submitted that, whilst the Claimants and Pensacola were able to take advantage of this before the

Tribunal given that the Tribunal had no power to award costs against Pensacola or Burford (non-parties to the arbitration), that is not the case before this Court since the Court is able (if it considers it appropriate) to make an order for costs against a third party funder pursuant to section 51 of the 1981 Act.

72. In this regard, Mr Foxton referred, again, to the passage from Lord Brown's judgment in ***Dymocks*** at [25(3)] to which I have previously referred, emphasising the reference to the appropriateness of an order under section 51 where the funder is *"the real party"* to the litigation in the sense that the funder *"not merely funds the proceedings but substantially also controls or at any rate is to benefit from them"* and, as such, is *"not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes"*. Mr Foxton submitted that this essentially pragmatic, and at all events realistic, approach to the role played by litigation funders can be seen in other authorities. This, for example, Mr Foxton suggested, is what led the Court of Appeal in ***Arkin v Borchard Lines*** [2005] EWCA Civ 655, [2005] 1 WLR 3055 to introduce the concept of what has become known as 'the Arkin cap'. In that case, Lord Phillips MR explained the rationale behind this at [38] to [40]:

> *"38. … Somehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.*
>
> *39. If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above.*
>
> *40. The approach that we are about to commend will not be appropriate in the case of a funding agreement that falls foul of the policy considerations that render an agreement champertous. A funder who enters into such an agreement will be likely to render himself liable for the opposing party's costs without limit should the claim fail. The present case has not been shown to fall into that category. Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable. Such funding will leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation."*

73. The same approach was, Mr Foxton submitted, adopted in ***Excalibur Ventures v Keystone*** [2016] EWCA Civ 1144, [2017] 1 WLR 2221), where Tomlinson LJ stated as follows at [27]:

> *"… I particularly agree with and wish to associate myself with the judge's general approach, which is to emphasise that the derivative nature of a commercial funder's*

involvement should ordinarily lead to his being required to contribute to the costs on the basis upon which they have been assessed against those whom he chose to fund. That is not to say that there is an irrebuttable presumption that that will be the outcome, but rather that that is the outcome which will ordinarily, in the nature of things, be just and equitable. … ."

Tomlinson LJ added this at [28]:

"For my part I am sceptical about the argument deployed here by the funders that the imposition of a requirement to pay costs on an indemnity basis will have an adverse impact upon access to justice. I do not myself think that commercial funders are greatly motivated by the need to promote access to justice, and nor do I suggest that they should be. They are, as it seems to me, making an investment and are motivated by largely commercial considerations. Those whose money they invest would no doubt be aggrieved if it were otherwise.… ."

74. Mr Foxton's submission was that these authorities are indicative of a general policy approach that those who fund proceedings ought to be liable, at least up to a certain point, in relation to the costs which are incurred by the opposing party. It is permissible, the authorities show, Mr Foxton suggested, to have regard to the economic realities of who controls and benefits from litigation. That this is the position, Mr Foxton submitted, is further borne out by ***The RBS Rights Issue Litigation*** [2017] EWHC 1217 (Ch), [2017] EWHC 463, in particular the following passage, at [22], from Hildyard J's judgment in that case:

"Commercial litigation funding carried on as a business for profit is likely to be addressed differently than gratuitous support offered on a one-off basis in respect of a particular cause or matter in which the funder seeks to support a party which could not otherwise vindicate its position in a genuine case. In the former case, the policy is likely to be to visit the consequences and costs of a commercial venture on the adventurer. In the latter case, policy may favour facilitating the funding of such claims. The availability (or not) of After the Event insurance cover ('ATE cover') may also affect the approach."

75. Mr Foxton drew an analogy, in this context, with the discretion which the Court of Appeal has to impose conditions on the bringing of an appeal, including a condition that prior costs orders be complied with. He gave as an example ***Contract Facilities Ltd v The Estate of Rees*** [2003] EWCA Civ 1105, in which such a condition was imposed in circumstances in which a third party, a Mr Shuck, had funded the action and was funding the appeal. Waller LJ explained the Court of Appeal's rationale at [27] as follows:

"First Mr Shuck had financed the whole of the trial process or been a party to the financing. Second this is a case in which a Section 51 application must stand a considerable prospect of success. Third it is an appeal and that places the case management powers in a very different content. Fourth this is not a case where the respondents are simply seeking to inflate the pool against which they can later execute any judgment. Their position is that when Mr Shuck has financed the trial and is financing the appeal, there is no reason why he should be allowed to conduct that appeal on a heads he wins and a tails they lose basis."

76. Mr Foxton acknowledged that, as he put it, a desire to avoid having to take conventional steps by way of enforcement of an arbitral award would not justify the making of an order under section 70(7). Mr Foxton submitted, however, that, having regard to the policy approach evident from these various authorities, it would be appropriate to make an order for security under section 70(7) in circumstances where Pensacola (backed apparently by Burford) has financed the whole of the arbitration process as part of a commercial venture and with the expectation that, if successful, significant profits would ensue. For this reason, Mr Foxton explained, Pensacola ought to be regarded as *"the real party"* in the sense described by Lord Brown in ***Dymocks*** and, as such, as a party which is now seeking to take advantage of the Court's power to review arbitration awards for its own benefit, whilst at the same time not having to pay the costs of the arbitration which the Tribunal awarded in the Defendant's favour owing to the inability of arbitrators to make the type of order (under section 51) which, had the underlying proceedings been in the Court rather than in arbitration, could have been made. Put shortly, Mr Foxton submitted that the Claimants and Pensacola are avoiding the obligations that arise in funded cases whilst at the same time seeking to take advantage of all the benefits which the existence of the funding provided by Pensacola has brought (and still brings), namely the ability on the part of the Claimants to bring claims which, without funding, could not have been brought.

77. Mr Foxton observed, as regards (iii), that the position is all the more stark in the present case in view of the fact that the Defendant is not seeking security in respect of a damages award or any sum which would provide a 'benefit' to it as a result of the arbitration process which the Claimants seek to impugn, but is instead merely seeking to put itself in the position which it would have been in had the arbitration proceedings brought against it not been brought. Mr Foxton described this as the Defendant, in effect, seeking to make itself whole, anyway to the extent that a costs award can do this, in respect of costs which were spent on defending the arbitration claim – a claim which was brought only with the assistance of the funding provided by Pensacola, a commercial funder. Mr Foxton submitted that, in such circumstances, if the Claimants (and Pensacola) wish to have 'a further go' at realising commercial benefit from the arbitration, then, it is only reasonable that they should first secure the costs which they have to date caused the Defendant to incur. To order security in respect of those costs under section 70(7) would, Mr Foxton suggested, neutralise the effect of the Defendant having to defend the Claimants' failed claims in the arbitration and of having to confront the Claimants' section 68 challenge to the Award(s) resulting from that arbitration.

78. I cannot accept Mr Foxton's various submissions. I consider that the authorities dealing with section 70(7) have identified an approach which should be regarded as applying whether the case involves commercial funding or not. I acknowledge that, as Flaux J put it in ***A v B***, there are no hard and fast rules. However, I struggle to see why, as a matter of principle, there should be any special or different position where third party funders are involved. The power to order security under section 70(7) in the event of an arbitral challenge is necessarily linked to the making of such a challenge. There must, therefore, be something brought about by the challenge which makes an order for the provision of security appropriate. If a respondent is in no worse position, particularly bearing in mind the power to award security for costs under section 70(6), by dint of the fact that there is an arbitral challenge than it would

be were there no such challenge, then, in my view, an order under section 70(7) ought not to be made. In this respect, a party ought not to be permitted to use section 70(7) as a way of avoiding having to take enforcements steps which, were it not for the arbitral challenge before the Court (in this case under section 68), would have to be taken in the usual way. As Teare J put it in ***X v Y*** at [32], *"the jurisdiction conferred on the court by section 70 should not be used a means of assisting a party to enforce an award which has been made in its favour"*. This seems to me to be a principle which is as appropriate in a case where there is litigation funding as in a case where there is not. As Professor Sarooshi put it, section 70(7) ought not to be used as a substitute for the section 66 (*"Enforcement of the award"*) regime. It would be wrong to permit this since to do so, Professor Sarooshi observed, rightly in my view, would mean that section 70(7) was not being used *"to avoid the successful party being prejudiced in the enforcement of the Award by the challenge to it"* (as Sir Jeremy Cooke described the power under section 70(7) in ***Erdenet*** at [59]), but as a means of circumventing section 66. In my view, since, were it not for the section 68 challenge, the Defendant would have no choice but to enforce pursuant to section 66, the fact that the challenge has been made with funding from Pensacola ought not to mean, without more, that security under section 70(7) should be ordered.

79. I see no reason why it should matter that in the section 51 context there are authorities which point to the Court's willingness to require that third party funders should pay costs. The section 51 jurisdiction is expressly concerned with non-party costs orders whereas section 70(7) is not. There is no equivalent to section 51 within the 1996 Act and nor is there an equivalent to CPR 25.14 which would permit costs awards made by arbitrators to be paid by third party funders. Nor, as previously explained, is there an ability on the part of arbitrators to make such orders. In my view, to adopt an approach to section 70(7) which would, in effect, make up for the absence of such equivalents by permitting the Court to require that security in respect of costs awarded by arbitrators made against parties to arbitration proceedings should be provided by dint of the fact that those parties are in receipt of funding from commercial funders, would involve an illegitimate use of the power to be found in section 70(7).

80. Nor, in my view and for the same reason, can it matter that this is a case where what is sought is security in respect of an arbitral award concerned with the costs of the underlying proceedings, as opposed, for example, to a damages award which would provide a 'benefit' tot the party applying under section 70(7). The Claimants are entitled to bring their section 68 challenge and, as such, it seems to me that it would be wrong in principle to introduce into the 1996 Act what would, in effect, amount to preconditions through the operation of section 70(7) which are not to be found in the 1996 Act itself. The more so, since the effect of Mr Foxton's argument would be that, in any case where factors (i), (ii) and (iii) are at play (and probably, in fact, even where only factors (i) and (ii) apply), an order under section 70(7) should be made. This would, in my view, be wrong. The fact that litigation funding was *"not even a twinkle in the eye"* of Lord Savile and his DAC colleagues does not justify adopting the approach urged upon the Court by Mr Foxton since I am clear, as I have explained, that section 70(7) has as its focus something really quite straightforward: the ability to order security in the event of an arbitral challenge when the fact that that challenge has been made makes the provision of security appropriate. In any event, although this is not central to my reasoning, I would observe that, at least as far as a respondent in an arbitration is concerned (which is what the Defendant was in the

underlying arbitration proceedings in the present case), typically it would be open to that party to have sought security for costs in the arbitration itself and that, if such security had been obtained, this ought to mean that (at least in some measure) there would already be costs protection in place without the need for any subsequent order under section 70(7), where the order sought is in respect of the costs which have been awarded to the respondent by the arbitral tribunal.

81. I should add, really only out of completeness in the circumstances, that Mr Foxton went on to observe that there would be little prejudice to the Claimants (or Pensacola) in having to provide the security sought given that what the Defendant seeks, consistent with section 70(7), is an order that money be brought into Court or otherwise secured pending the determination of the section 68 challenge. Mr Foxton submitted that, in such circumstances, if that challenge is successful, then, it would be open to the Claimants to apply for its release. I see nothing in this point, however, since, if Mr Foxton were right, it would be a point which applied in every case given that section 70(7) is in the terms which it is.

82. For these reasons, I am not persuaded that it would be right, whether as a matter of principle or in the exercise of my discretion (or both), to require that security should be furnished by the Claimants on the Defendant's application under section 70(7).

Conclusion

83. In conclusion, therefore:

(1) I order that the Claimants are to provide security for costs in respect of these proceedings in the sum of £400,000, either by paying that sum into Court or by providing an appropriate bank or other guarantee to the Defendant.

(2) I dismiss the Defendant's further application, made under section 70(7) of the 1996 Act, seeking an order that the Claimants should pay into Court or otherwise secure the monies awarded in favour of the Defendant by the arbitrators whose Awards are the subject of the section 68 challenge.

84. I am grateful to all counsel for their assistance in this matter.