Case No: BL-2023-BRS-000019

Neutral Citation Number: [2023] EWHC 1959 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

2 Redcliff Street
Redcliffe
Bristol, BS1 6GR

Date: 23rd June 2023
Start Time: **11:36** Finish Time: **12:31**

Before:

HIS HONOUR JUDGE PAUL MATTHEWS

- -

Between:

JOLYON THOMAS ROY LIMBRICK

Claimant

- and -

THOMAS STEPHEN ROY LIMBRICK

Defendant

- -

- -

MR E PETERS KC appeared for the **Claimant**
MR M GALTREY appeared for the **Defendant**

- -

JUDGMENT
(As approved)

- -

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Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE PAUL MATTHEWS :

1. This is my judgment on an application made on 3rd May 2023 by the defendant in this matter, seeking to set aside an order of Master Brightwell which was made on 28th April 2023. That application is supported by a witness statement made by the defendant's solicitor, Mr Russ, dated 5th May 2023.

2. The application arises in the context of litigation which I will describe briefly. The disputes have arisen about a property called Home Farm in Sherbourne, in Gloucestershire. This property has been occupied by the Limbrick family since about the 1950s, although the events with which I am concerned are much more recent. The Limbrick family all have the same surname, so I shall use their given names for clarity, although without any disrespect.

3. The grandmother is a lady called Margaret, generally known as Peggy. She had three children: William, generally called Bill, who was the oldest; Roy, who is the current defendant, who married Sybil and has two children, Jolyon, who is the current claimant, and his sister Philippa; and then a third child, a daughter called Jean. Only the claimant and the defendant are really concerned with the events of this dispute now, although William (or Bill) was previously concerned in a dispute.

4. In 1975, the then freeholder of the property granted a tenancy from year to year to Peggy. This was an agricultural holding, protected by the Agricultural Holdings Act 1948 and now the 1986 Act. That legislation permits there to be two statutory successions to the tenancy.

5. In 2006 Peggy decided to retire from the partnership which had been formed to farm the property between herself, Bill and Roy. She nominated Roy, the defendant, as her successor on the basis that Roy had a son, Jolyon, the claimant, who in due time

would be interested in becoming the second successor. The then freeholder -- it had changed in the meantime -- agreed to that, and so the first succession took place, and Roy succeeded Peggy. A new tenancy agreement was granted on 26th June 2006, again of a tenancy for one year and then from year to year, to Roy. Clause 27 of that tenancy agreement contained an arbitration provision which I will need to return to.

6. At that time, unfortunately, Roy and his brother Bill were in dispute, and the partnership that formerly subsisted between them was dissolved. In 2008 a new partnership was formed between Roy and his son Jolyon, the claimant, and it was recorded that the tenancy of the farm was an asset of the partnership.

7. In 2019 the defendant was looking to retire, approaching or having attained the age of 70 years, so he served a statutory retirement notice. The claimant, his son, applied to the First Tier Tribunal for an order for the second succession. The freeholder, the National Trust, agreed to this, and a consent order was filed with the First Tier Tribunal.

8. It was not, however, until 17th March 2021 that the First Tier Tribunal actually made the consent order. In the meantime, unfortunately, relations between the claimant and the defendant had broken down. In January 2021 the defendant served an expulsion notice on the claimant to expel him from the partnership. He also applied on 28th January 2021 to join the application before the First Tier Tribunal, to which he had not previously been a party, and to contend that he was entitled to withdraw his retirement notice and to oppose the claimant's application for the second succession.

9. As I said, the First Tier Tribunal had made the direction by consent in March, I think in ignorance of the fact that this dispute had sprung up and that the application had

been made by the defendant to join in. The consent direction was subsequently set aside by the Tribunal and the defendant was joined to those proceedings.

10. So that was the first set of proceedings between the parties, the "succession proceedings".

11. On 23rd April 2021 the defendant applied to the Chartered Institute of Arbitrators for the appointment of an arbitrator for an arbitration between him and his son as to the validity of the expulsion notice which had been served. In May or June, it is not quite clear which, a Mr Nigel Puddicombe, a solicitor, was appointed to deal with that arbitration. I can refer to this simply as the "expulsion arbitration", although other matters were involved as well.

12. Subsequently, the First Tier Tribunal stayed the succession application to it, pending the resolution of these other disputes. So by this stage there were two sets of proceedings in existence, although one of them before the First Tier Tribunal had been now stayed.

13. On 15th June 2022 the claimant started a *third* set of proceedings – the present proceedings – in the High Court in London, by issuing a claim form seeking a number of heads of relief. These included the dissolution of the partnership between him and the defendant, the winding up of the partnership affairs, and ordering accounts and enquiries. These were already heads of relief claimed in the expulsion arbitration.

14. In addition, and importantly, however, the claimant also sought a declaration that he was entitled to an equity arising by way of proprietary estoppel in relation to the partnership and sought orders to satisfy the equity found. I interpose simply to say that the defendant challenged this extra relief being sought on the basis that it should

have been claimed in the arbitration and it was not now possible to ask for it on *Henderson v Henderson* grounds. Of course, I do not need to say any more about that today.

15. In July 2022 the defendant, relying on the arbitration clause in the tenancy agreement, applied to stay the claim under Section 9 of the Arbitration Act 1996. On 5th October 2022 Deputy Master Hansen, after a contested hearing in which counsel were involved on both sides, found in favour of the defendant and stayed the proceedings under Section 9 of the Arbitration Act.

16. On 15th September 2022 the claimant issued an application to remove Mr Puddicombe as the arbitrator in the expulsion arbitration for apparent bias. This was dealt with by Deputy Master Marsh on 16th December 2022, when he held that the application failed. Not unnaturally, between September and December 2022 Mr Puddicombe, out of an abundance of caution, did nothing further in the arbitration in case, of course, he was removed.

17. So, by the beginning of 2023, the expulsion arbitration was now free to proceed. The present claim was stayed in the High Court and the succession application was stayed in the First Tier Tribunal. But nothing expressly dealt with the proprietary estoppel claim which the claimant wished to raise. It was not included in the expulsion arbitration, although the defendant proposed that it should be.

18. Instead, however, what the claimant suggested was that there should be a further arbitration reference, and proposed as arbitrator the recently retired judge, Sir Paul Morgan. The defendant declined his nomination, preferring to put forward Mr Puddicombe to carry on the second reference. The claimant then applied to the Chartered Institute of Arbitrators for a new arbitrator to be appointed, on the basis that

the parties could not agree. In January 2023 the Chartered Institute nominated Mr Jonathan Karas KC. On the material before me the defendant was concerned that Mr Karas would be too expensive. It is a fact that his hourly rate was twice as much as Mr Puddicombe's and nearly twice as much as Sir Paul Morgan's would have been.

19. So, following that appointment by the Chartered Institute, there was some negotiation between the parties. At first, that negotiation was without prejudice, but then, in March 2023, it became open correspondence. I will have to come back to that. However, on 16th April 2023 Mr Karas KC resigned his appointment. That was followed, just over a week later, by an application on 25th April 2023 by the claimant to lift the stay and for amendments to be permitted to the particulars of claim. That application was supported by a witness statement of the claimant's solicitor, Peter Williams, also dated 25th April 2023.

20. Three days later, on 28th April 2023, Master Brightwell made an order on the papers, lifting the stay and permitting the amendments to the particulars of claim, but also transferring the whole litigation to Bristol. That was also something that the claimant had asked for. However, as I say, this was done on the papers. There was no argument put forward on the defendant's part, nor even any evidence from him. Moreover, and what is less than ideal, no reasons were given by Master Brightwell for having made his order. It may be that the Master was convinced by the arguments put forward by Mr Williams in his witness statement, that the stay should be lifted, or perhaps the Master thought that the parties had actually agreed to lift the stay. Perhaps the Master simply thought that, whatever happened to this litigation, it should be in Bristol, rather than in London, on the basis that the property was within the remit of

the district registry of the High Court in Bristol. The short point is that we do not know why the Master did this.

21. Of course, because it was made without hearing the parties, the order contained the usual rubric allowing either party to apply to set aside or vary. That invitation was taken up by the defendant on 3rd May 2023, when an application was issued seeking to set aside the order of Master Brightwell. That application was supported by a witness statement from the defendant's solicitor, Mr Tim Russ.

22. I turn therefore to consider what the position was in law at that stage. There was an order made by Deputy Master Hansen on 5th October, after a contested hearing, imposing a stay under Section 9 of the Arbitration Act 1996. It is important to notice that that order has never been appealed, and so it stands. Then on 28th April 2023 there was the order of Master Brightwell, sitting in a coordinate jurisdiction, made on the papers from the claimant without a hearing and without any evidence or submissions from the defendant but, as I say, with the usual proviso that the parties can apply to set aside.

23. So the question I ask myself first is what power does a court of coordinate jurisdiction, as Master Brightwell was exercising, have to reverse the order already made by Deputy Master Hansen? This was not argued in any detail at the hearing but it seems to me obvious that it is the usual power under CPR Rule 3.1(7), that is, the power to make an order includes a power to revoke it or vary it. But this is not an appeal jurisdiction, as the courts have many times said, so the question is when should it be exercised? There are a number of authorities dealing with this.

24. Perhaps the most well-known is the decision of the Court of Appeal called *Tibbles v SIG plc* [2012] 1 WLR 2591. It has been followed and applied in a number of other

cases, including another recent decision of the Court of Appeal in *Allsop v Banner Jones* [2021] EWCA Civ 7. The burden of the judgments is to the effect that, first of all, it normally does not apply to allow the Court to reverse a *final* order, except in exceptional cases such as fraud. Secondly, as to *interim* orders of the Court, it usually applies only where *either* there was a misstatement of the facts leading to the making of the original order, so that the order was made on a false basis, *or* there has been a material change of circumstances since the first order was made. It is this latter limb which is, by far and away, the most commonly applied of those reasons for making an order under rule 3.1(7).

25. Unfortunately, as I say, we have no explanation by the Master as to why he made that order, but, of course, it is clear that any party may apply to vary it or set it aside. So I ask myself what is the test that I should apply in considering whether or not to set aside the order of Master Brightwell?

26. In my judgment, what I need to do is to take the matter back to the original application before Master Brightwell and deal with it again. I ask myself, who had the burden of proof? The claimant sought to lift the stay which had been imposed by a Court of coordinate jurisdiction and therefore, in my judgment, the claimant had the burden of proof to show that the jurisdiction in Rule 3.1(7), or some other similar jurisdiction, was satisfied. The Court is now running through this exercise again, so once again the claimant has the burden of proof.

27. The arbitration clause in the partnership agreement (clause 27) is headed Dispute Resolution, and provides relevantly as follows:

> "All disputes which shall arise between the partners to include, where appropriate, a partner as personal representative, whether during or after the determination of the partnership and whether in relation to the

> interpretation of this deed, or to any act or omission of any party to the dispute, or to any act which shall be done by the parties in dispute or any of them, or in relation to any other matter whatsoever attaching to this partnership, save as otherwise provided for in this deed, shall be determined as follows."

28. Then the clause goes on to provide, first, for a negotiated resolution and, second, for arbitration by an arbitrator to be agreed by the parties or nominated by the Chartered Institute of Arbitrators.

29. Next I turn to Section 9 of the Arbitration Act 1996. This is headed Stay of Legal Proceedings. The relevant provisions in it for our purposes are (1) and (4). Sub-s (1) says:

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

30. Then sub-s (4) provides:

> "On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

31. I note that those provisions are derived from Section 1 of the Arbitration Act 1975. In particular, the phrase 'satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed' has been taken verbatim from Section 1 of the 1975 Act. That means, of course, that authorities on those words in the 1975 Act are also authorities on Section 1 of the 1996 Act. That is important, because there are one or two authorities on the 1975 Act to which I shall refer.

32. Now, in the present case, the claimant accepts that there is no binding agreement between the parties to lift the stay. But he does say that there is an agreement in

principle for the estoppel claim to be dealt with in the High Court claim, rather than by way of arbitration. The claimant, in this respect, relies on an exchange of letters in open correspondence between Mr Williams on behalf of the claimant and Mr Russ on behalf of the defendant, their respective solicitors, in March 2023, dealing with the four sets of proceedings. These were, first of all, the expulsion arbitration (which is referred to as the "Puddicombe arbitration"), secondly the application to the First Tier Tribunal for the second succession to the tenancy, thirdly, the estoppel arbitration (which is referred to as 'The Karas Arbitration' in the letters), and fourthly, these High Court proceedings.

33. If we look first at the letter of Mr Williams to Mr Russ, this is dated 15th March 2023. The first few paragraphs are simply dealing with the fact that the correspondence was originally without prejudice, and that earlier there were without prejudice communications. But it goes on to say this in the fourth paragraph:

> "We will set out in this letter our client's more detailed proposal as to the way forward, building on comments already made. That is as follows."

Then there are four sections of the letter, headed 'Puddicombe Arbitration', 'First Tier Tribunal Proceedings', 'Estoppel Arbitration', and 'High Court Proceedings'.

34. In the second numbered paragraph, under Puddicombe Arbitration, it says this:

> "Our client proposes that first our respective clients should invite Mr Puddicombe to perfect his resignation which was previously offered"

And then there are a number of things that proceed from that.

35. Under the next part of the letter, First Tier Tribunal Proceedings, numbered paragraph 14, Mr Williams says:

> "We suggest that the sensible way to deal with the Tribunal proceedings is to agree that they should continue to be stayed but subject to either of the parties being entitled to make an application to the Tribunal on not less than 21 days with notice."

Then some further things are said about that.

36. Under Estoppel Arbitration, in paragraph 21, Mr Williams says:

> "Accordingly, we suggest that Mr Karas should be invited to confirm that he will not take up the appointment"

And then he says something about responsibility for fees.

37. Lastly, under High Court Proceedings, Mr Williams says in paragraph 23:

> "The matters in dispute in the estoppel arbitration replicate the High Court proceedings and should return to be determined in the High Court in accordance with the proceedings that were commenced in June last year on our client's behalf"

He goes on to deal with some other matters and then says in paragraph 28:

> "We will need to agree the terms of an order to lift the stay. When we agree terms following this letter, we will prepare such an order"

I think that there the word 'we' means different things in different parts of the paragraph. 'We' in the first place and in the first part of the second sentence means both sides, but 'we' in the second part of the second sentence means Ebery Williams, rather than both parties.

38. Then there is a letter in reply, some two days later, dated 17th March 2023, which uses again the headings for the four different sets of proceedings, except that the estoppel arbitration is referred to as "the Karas arbitration". Under "Puddicombe arbitration", Mr Russ says this:

> "It is not necessary for us to agree or disagree as to whether or not the arbitration has run its course. We agree that the appropriate method for resolution of this matter should be Court proceedings, subject [to]

> be enabled to agree a basis and a way forward but in the absence of agreement, do insist that there should be only one dispute resolution mechanism agreed between our respective clients to deal with the various disputes between them. We agree that Mr Puddicombe should be invited to resign on the basis that he retains his fees"

and then it goes on.

39. The next paragraph is:

> "We agree that indemnity should be offered, but only if he requires it."

40. Next there is this:

> "We agree that the award made as to the ability of the parties to expel and counter-expel should continue to bind the parties."

That is a reference to the fact that, in the expulsion arbitration, Mr Puddicombe had found that the parties did not have the power to expel each other. That paragraph goes on to say:

> "We do not agree, however for the record, that Mr Puddicombe did not have authority to make the interim measures award or that the CIR rules were not incorporated into his retainer."

41. Then under "First Tier Tribunal proceedings", there is a discussion of some points that have already happened. It goes on:

> "We are not prepared to agreed that a term to the effect that either of the parties are entitled to make an application to the Tribunal on not less than 21 days' written notice being part of that order. The Tribunal has a general jurisdiction to revisit its previous orders if an application is made but we are not willing to agree to expressly include a term to that effect."

42. Under "Karas Arbitration", it says this:

> "It is not necessary to respond to most of your points. The key is that as long as you agree to all the terms set out in this letter, we agree that Mr Karas KC be asked to agree that he will not take up the appointment."

43. Then, after something about fees under Court proceedings, it says:

> "Again, it not appropriate or necessary for us to respond to much of what you say. We suggest that we draft a suitable Court order which lifts the stay, subject to your agreement to the terms of this letter and allows our client to counterclaim and raise any issue in relation to the fact that your client has not raised the estoppel action previously and in the Puddicombe arbitration you may be estopped from now doing so."

44. So that is the substance of the letter. We then have the witness statement of Mr Williams, which was that put forward to Master Brightwell. I think I am right in saying that the exhibit to that witness statement included the letter from Mr Russ to Mr Williams, but did not include the letter from Mr Williams to Mr Russ. So the Master only had one of the two letters. Nevertheless, the witness statement of Mr Williams says this at paragraph 39:

> "Having regard to the overall position which existed in March 2023 and mindful that Mr Russ of Roythornes, acting on behalf of the defendant, had originally before my involvement wanted the dispute to proceed in the High Court. I suggested to Mr Russ that the parties should agree:
>
> 1. The resumption of the High Court proceedings lifting the stay.
>
> 2. Conclude the long negotiated resignation of Mr Puddicombe as the arbitrator in respect of the expulsion arbitration.
>
> 3. Terminate the appointment of Mr Karas KC as the arbitrator in respect of the estoppel arbitration."

45. I then jump over to paragraph 42:

> "As a matter of courtesy, I kept Mr Karas informed of the discussions concerning the proposals referred to in paragraph 39 above. In particular, sub-paragraph 3."

Sub-paragraph 3, of course, was that part of the paragraph that referred to the termination of his appointment. Then:

> "Accordingly, Mr Karas was aware that I was not progressing the formalities concerning his appointment as a consequence of my expectation that the estoppel arbitration would not proceed and that the stay in connection with the High Court proceedings would be lifted. While those discussions were underway, I was not aware of any

> contact made by Mr Russ with Mr Karas seeking to advance the estoppel arbitration. I relied on the fact that Mr Russ and I had reached an agreed basis for proceeding following the discussions that had taken place in good faith to terminate the arbitration process, both the estoppel arbitration and expulsion arbitration, to allow matters to proceed in an orderly fashion in a single set of proceedings before the High Court."

46. Then in paragraph 43, he goes on:

> "On 17th March 2023 on behalf of the defendant, Mr Russ agreed with me the three proposals that I put to him as set out at paragraph 39 above. A copy of [the] letter is at Exhibit PRW/3. The process of negotiating the terms of the resignation agreement relating to Mr Puddicombe and the orders necessary in respect of those proceedings, and the Tribunal proceedings, commenced."

47. So that is what would have been before Master Brightwell. It does seem to me that, rather unfortunately, and without attributing any blame, what Mr Williams says there is not as accurate as it might be. Mr Russ's agreement that he refers to clearly depends on Mr Williams' agreement to the terms of Mr Russ's letter. But there is no indication that I can see in Mr Williams's witness statement or any other document before me that Mr Williams ever agreed to those terms. Therefore, it does not seem to me that any terms of orders were capable of being negotiated. As far as I can see, there was simply no agreement between the parties.

48. Now the claimant's skeleton at paragraphs 31 through to 35 sets out a sequence of events on which the claimant relies to say finally in paragraph 36, that the conduct referred to in the earlier paragraphs amounted to an implicit mutual abandonment of the estoppel arbitration by both parties and such circumstances rendered the arbitration clause inoperative in relation to the estoppel dispute within the scope of Section 9(4) of the 1996 Act.

49. I will come back to the authorities which the claimant relies on, but, if I just summarise the events referred to in paragraphs 31 through to 35, they are these. In

31, there is the defendant's application for the stay under Section 9, which is opposed by the claimant and is resolved by Deputy Master Hansen in October 2022, imposing the stay on the High Court proceedings. Then in 32, there is the fact that the defendant did not immediately seek the appointment of an arbitrator for the estoppel arbitration and it was the claimant that did that, although that was in the same month, October 2022, so not long afterwards. It was not then until 31st January 2023 that the Chartered Institute appointed Mr Karas KC. Neither side had, in fact, asked for Mr Karas to be appointed because the defendant wanted Mr Puddicombe and the claimant wanted Sir Paul Morgan.

50. In paragraph 33 it is said that the defendant was running out of money to pay his legal costs and that neither party had agreed to Mr Karas' terms. In paragraph 34, Mr Karas warned the parties that he had heard nothing and that he would have to consider his position if he did not. In paragraph 35 Mr Karas resigned his appointment to the parties. I observe that it was only at the end of January that the Chartered Institute appointed or nominated Mr Karas to the appointment, it was only in March that he warned the parties about agreeing to his terms, and it was in April, so just over two months later, that he resigned his appointment.

51. So as I say, those are the events on which the claimant relies in order to say that there was an implicit mutual abandonment of the estoppel arbitration. The claimant relies on a number of authorities, including a passage from the well-known textbook, *Russell on Arbitration*, where, in the 24th edition of 2015, at paragraph 7-031, under sub-paragraph 2, what the learned editors say is:

> "Where the conditions mentioned in the preceding paragraphs are satisfied, the Court must make an order under Section 9 of the Act staying the proceedings, unless either:

> […]
>
> (2) The Court is satisfied that the arbitration agreement is inoperative or incapable of being performed. Examples of where an arbitration agreement will be inoperative include where: (i) it has been repudiated or abandoned, provided that the repudiation or abandonment has been accepted by the other party; (ii) it contains such an inherent contradiction that it cannot be given effect; (iii) a party is precluded by an estoppel from pursuing the arbitration agreements; and (iv) the dispute is not arbitrable. An arbitration agreement may be inoperative even though it has not ceased to have legal effect. An arbitration agreement which provided for the parties to agree upon an arbitrator, failing which the dispute would be resolved by litigation, would become inoperative or incapable of being performed if the parties could not agree upon an arbitrator. An arbitration agreement will also be incapable of performance were, even if the parties were both ready, willing and able to do so, it could not be performed by them. Impecuniosity of the putative claimant will not render the arbitration agreement incapable of being performed, nor will inability of the party seeking the stay to satisfy any subsequent award. The distinction is drawn between a party being incapable of performing the arbitration agreement which does not trigger s. 9(4) and the agreement itself being incapable of performance which does trigger s. 9(4). The arbitration agreement will not be inoperative or incapable of being performed just because reference is made to the rules of a non-existent arbitration institution provided the underlying intention to arbitrate is clear."

52. So that is the passage relied on by the claimant. He also relies on a lengthy paragraph in *Merkin and Flannery on the Arbitration Act 1996*, 6th Edition 2020, which is paragraph 9.17.5. It is a rather lengthy paragraph and so I shall not read it out, but I have read it to myself and I treat it as being incorporated in this judgment.

53. Thirdly, the claimant relies on the decision of Mr Justice Walker in a case called *Hashwani v Jivraj* [2015] EWHC 998 (Comm). Here there was a question whether an arbitration had effectively been abandoned or agreed to be abandoned or agreed to be terminated. What I observe about this is, first of all, that there is nothing in the law here which I need to cite, but that on the facts, it is a very different case indeed. If one looks, for example, at page 61, paragraph 119, it can be seen that, on any view, the circumstances were completely different. There were, as the cross-heading says,

10 years of inactivity in this arbitration. More than that, there were also communications between the parties in which it was agreed that there was nothing further to be done in the arbitration. Frankly, I am not at all surprised that the judge held that the arbitration should not be proceeded with in that case.

54. I turn then to consider what is the test that I must apply for lifting the stay. It seems to me that it is the obverse of the test for granting one. In other words, I simply go back and look at Section 9(4) and ask myself, would I grant a stay in these circumstances? If I would not, then I should lift it. I note that, in a case which was cited to me, but I do not think I had a copy yesterday -- I have since looked at it -- *Paczy v Haendler Natermann* [1981] FSR 250, at page 257, Lord Justice Buckley, with whom Lord Justice Brightman agreed, said that

> "if it could be shown that, owing to events which occurred since the stay was imposed, the arbitration agreement had become incapable of performance, I think the Court would very probably be right in lifting the stay."

55. So, the question is whether there is anything that has happened since Deputy Master Hansen imposed the stay which would justify the Court in saying that it would not now grant a stay. The defendant makes four points. The first is that the burden of proof is on the claimant. This I think is not controversial. However, the defendant also says that it is enough for the defendant to have an arguable case for the validity or operability of the agreement. He relies on what is stated in *Russell on Arbitration*, at the bottom of page 379. There the learned editors say the burden of proving that any of the grounds in Section 9(4) of the Act has been made out lies on the claimant in the proceedings, i.e. the respondent to the stay application, and, if the defendant/applicant can raise an arguable case in favour of validity, a stay of the proceedings should be granted and the matter left to the arbitrators.

56. *Russell* cites three cases for that proposition. The first is stated to be *Hulme v AA Mutual International Insurance*. As I understand it, the complete name is *Barrington-Hulme v AA Mutual International Insurance*. A report of that case is found at 1996 LRLR, which I think are Lloyd Reinsurance Law Reports, at page 19. The second case is *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, and the third is *Albon v Naza Motor Trading* [2007] EWHC 665 (Ch).

57. In *Downing*, Lord Justice Potter, with whom Lord Justice Keane and Mr Justice Sumner simply agreed, pronounced at paragraph 20 exactly the words which we find in *Russell*. So there is no doubt that that decision is authority for what is stated in *Russell*. But Lord Justice Potter cites the first case, *Barrington-Hulme*, as supporting the proposition that he puts forward. Yet the first case does not actually contain any such succinct statement of principle as Lord Justice Potter put it in the *Downing* case. *Barrington-Hulme* was a complex reinsurance case decided by Mr Justice Clarke, as he then was, later Lord Justice Clarke and then Lord Clarke, a Supreme Court Justice. The proposition of law has to be gathered from different parts of the judgment, because it turns very heavily on its facts, and there is no concise statement of the law. I do not think I need, in the circumstances, to analyse this case any further. Nevertheless, I will say that, having read the case, I think Lord Justice Potter's statement is justified in relation to the facts of that case.

58. I put it that way because it may be that, where the factor relied on to get out of Section 9(4) were some kind of *nullity*, it might be that there was a different way of approaching the matter, perhaps some different test to apply. I do not deal with that question here. I am simply concerned with the facts of our case. And, on those facts,

I am quite satisfied that what *Russell* says is what Lord Justice Potter laid down in the *Downing* case.

59. In the third case, *Albon v Naza Motor Trading*, Mr Justice Lightman does not go into the matter at all. He simply says there is a question as to whether Lord Justice Potter's proposition is justified but it was unnecessary to deal with it then.

60. I am entirely satisfied that, on the facts of this case, the burden is on the claimant to show that events since Deputy Master Hansen's order have rendered the agreement inoperative, for example, because the parties have agreed not to proceed by way of arbitration. In my judgment, it is not enough to show that parties have *arguably* agreed. The Court must be satisfied that the parties have, either expressly or impliedly agreed, in effect, to rescind the arbitration reference that they had entered into. On the facts of this case, I can only say that the correspondence is clear, and I am not so satisfied.

61. The defendant's second point was that it must be the *whole* agreement which is inoperative and not a particular reference. In support of that, he relies on a decision of the Court of Appeal of Northern Ireland, in case called *Trunk Flooring v HSBC* [2015] NICA 68, at paragraph 39. I accept that at the beginning, in first sentence or so of that paragraph, the Court of Appeal actually says more or less that. The relevant passage in paragraph 39 reads as follows:

> "Secondly, it is important to distinguish in the instant case, between determination of the arbitration reference before the ICC and determination of the arbitration agreement itself, clearly the costs issue had led to the former but we find no sense of the latter being invoked by either party. On the contrary, the letter of 4th September 2014 from the ICC expressly envisaged that the same claim could be reintroduced in another arbitration, notwithstanding that the present reference had been withdrawn."

62. Then it continues. I respectfully agree with what is said, as far as it goes. I think that the way in which the Court of Appeal dealt with the matter in that paragraph was important on the facts of that case. However, I also agree with Mr Peters KC when he said during the argument that the parties could agree to terminate a *reference*, without necessarily agreeing to terminate the *agreement*. The only question would be whether they had actually done so. In this case, it seems to me that it does not matter because, on the material before me, I do not consider that there was any agreement even to terminate the *reference*, let alone the whole arbitration *agreement*.

63. The defendant's third point was that the mere fact that the defendant was impecunious did not render the agreement incapable of being performed. In that respect, the defendant relied on another part of the judgment of Lord Justice Buckley in *Paczy v Haendler Natermann* at page 256, the last paragraph of which I shall just briefly read:

> "In considering that question, I am prepared to assume in the plaintiff's favour that he is incapable of finding the deposit, though I am bound to say that I am not at all satisfied that the evidence establishes that in at all an absolute sense. In my judgment, on the true construction of these words, incapable of being performed, relates to the arbitration agreement under consideration. The incapacity of one party to that agreement to implement its obligations under the agreement does not, in my judgment, render the agreement one which is incapable of performance within the section any more than the inability of a purchaser under a contract for purchase of land to find the purchase price, when the time comes to complete the sale, could be said to render the contract for sale incapable of performance. The agreement only becomes incapable of performance, in my view, if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it. Impecuniosity is not, I think, a circumstance of that kind."

64. I respectfully agree with that but, as I understand it, Mr Peters KC's argument was that impecuniosity was not being relied on to show that the agreement could not be performed. Rather it was being used to show a motive as to why the defendant should

readily agree to end the arbitration reference. However, since I have found no such agreement, it is irrelevant anyway.

65. The fourth point made by the defendant was to ask rhetorically where the agreement to abandon the arbitration had come from. The claimant's response was to rely on the resignation letter of Mr Karas KC, of 16th April 2023, an email to both Mr Limbrick and Mr Williams, where he says this:

> "I have heard from neither of you concerning acceptance of my terms of appointment. On 13th March 2023 I asked that the parties substantively respond by 17th March 2023 and expressly indicated that if neither party accepts my terms and conditions by then, I will proceed to consider whether I should proceed as an arbitrator.
>
> I have received by email letters from Mr Williams dated 15th and 16th March 2023. I have, however, no record of having received any substantive indication from either party that my terms and conditions have been accepted. Further, I have received no indication that other terms and conditions for my appointment are proposed.
>
> Given (a), the length of time since my original appointment by the CIR, (b), the length of time since I provided the parties with my usual terms of appointment together with initial directions, and (c), the absence of any substantive response as indicated above and the lack of compliance with my initial directions, I infer that neither party wishes me to continue as arbitrator. In any event, without the substantive cooperation of at least one of the parties, it is impossible for me to perform my duties under the Arbitration Act 1996.
>
> Accordingly, I consider that I have no option other than to resign my appointment."

66. What I think the claimant relies on in particular is that the statement in the third paragraph, that there has been no substantive response to the original email and no compliance with the initial directions, so that therefore nothing has happened. However, what Mr Karas KC actually says is not that "I infer that neither party wishes to continue the arbitration", but "I infer that neither party wishes me to continue as arbitrator ". Of course, the evidence before me is that the parties were unhappy at the

charge out rate proposed to be applied by Mr Karas KC, this being approximately twice what the other arbitrators proposed to charge.

67. So I think that that is a slender basis for saying that the parties had actually agreed that they wanted to abandon the arbitration. It seems to me far more likely that they simply did not wish to pay the rates which Mr Karas KC wished to charge.

68. So I come back to the point made by Mr Peters KC in his skeleton argument, where he says the conduct referred to between paragraphs 31 and 35 of his skeleton argument amounted to an implicit mutual abandonment of the estoppel arbitration and, in the circumstances, rendered the arbitration clause inoperative. I do not accept that that conduct amounted to anything of the kind. I think it amounted to a disinclination to proceed with the arbitration *with Mr Karas KC as arbitrator* and nothing more.

69. Overall, I am there not satisfied that any of the exceptions in Section 9(4) applies to the circumstances to this case and, therefore, the application to set aside the lifting of the stay, or if you like an application to re-impose the stay, will be granted. I make clear, however, that this is not to disturb the other orders made by Master Brightwell, in particular the transfer of the matter to Bristol and to the amendments of pleadings and so on.