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Case No: 2007 Folio 1374

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 15/04/2008

Before :

MR JUSTICE WALKER

- -

Between :

ROYAL & SUNALLIANCE INSURANCE PLC **Claimant**

- and -

(1) BAE SYSTEMS (OPERATIONS) LTD **Defendants**
(2) SYSTEMS 2001 ASSET TRUST FUNDING LTD
(3) BAE SYSTEMS INSURANCE (ISLE OF MAN) LTD

- -
- -

Mr Iain Milligan QC and Mr David Foxton QC (instructed by Ellum LLP) for the **claimant**
Mr Michael Crane QC, Mr James Cutress and Mr Matthew Gearing (instructed by Allen & Overy LLP) for the **first and second defendants**

Hearing date: 22 February 2008

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Judgment

Mr Justice Walker :

Introduction

1. A First Partial Award ("the Award") has been made in arbitral proceedings between the claimant ("Royal & Sun"), three companies in the BAE group, and other parties. The three companies in the BAE group are the first defendant ("BAE Operations"), the second defendant ("Systems 2001") and the third defendant ("BAE Insurance"). I shall refer to the first and second defendants as "the BAE Operational Companies".

2. BAE Insurance is the BAE group's captive insurer. It underwrote a financial risk insurance policy ("the FRIP") under which it insured the BAE Operational Companies. The Award describes the FRIP as "a highly complex piece of financial engineering." Clause 5.4 of the FRIP contained a "pay now argue later" provision. It obliged BAE Insurance to pay an amount certified in a Year of Account Certificate ("YAC").

3. The total cover provided by the FRIP was $3.771 billion. BAE Insurance reinsured its liabilities with a group of reinsurers ("the Reinsurers") on terms which were essentially back-to–back with the FRIP, including clause 5.4. Royal & Sun was one of

the Reinsurers. It underwrote a first layer of reinsurance which attached when relevant losses totalled $377 million.

4. On 22 October 1998 the BAE Operational Companies, BAE Insurance and the Reinsurers entered into a Reinsurers Common Terms Agreement ("the RCTA") and a Disputes Resolution Agreement ("the DRA"). Pursuant to the DRA various disputes involving the BAE Operational Companies, BAE Insurance and the Reinsurers have been referred to arbitration under the Rules of the London Court of International Arbitration ("LCIA"). Among them is the dispute which gave rise to the Award.

5. The Award was made under s 47 of the Arbitration Act 1996 ("the 1996 Act"). It concerned an application by BAE Insurance for payment by Royal & Sun of a sum of $91.416 million under a revised YAC served on 19 June 2007. The arbitrators rejected objections to the YAC and determined in the Award that this sum was payable with interest.

6. The question which now arises is whether leave of the court to appeal against the Award is required under s 69(2)(b) of the 1996 Act. Both sides agree that this is a pure question of construction. It requires consideration of the 1996 Act, the LCIA rules, and the DRA.

The 1996 Act: challenges and appeals

7. Under the 1996 Act an award may be subject to challenge or appeal. Challenges on grounds of lack of jurisdiction or serious irregularity are dealt with in s 67 and s 68 respectively. Provision is made in s 69 for an appeal on a question of law. Each of ss 67, 68 and 69 contains restrictions, and each also refers to restrictions found in s 70. There are supplementary provisions in ss 71, 72 and 73 which I need not set out here. So far as material, ss 67-70 state:

> **Challenging the Award: substantive jurisdiction**
>
> 67. – (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-
>
> > (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
> >
> > (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> …

Challenging the Award – serious irregularity

68. – (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70 (2) and (3).

…

Appeal on point of law

69 – (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except –

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied –

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award –

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

…

> **Challenge or appeal: supplementary provisions**
>
> 70. – (1**)** The following provisions apply to an application or appeal under section 67, 68 or 69.
>
> (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted –
>
> (a) any available arbitral process of appeal or review, and
>
> (b) any available recourse under section 57 (correction of award or additional award).
>
> (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.
>
> **…**

8. A person who read s 69(1) in isolation might think that, subject only to contrary agreement by the parties, this subsection conferred on a party to arbitral proceedings a general right to appeal to the court on a question of law arising out of an award in those proceedings, such right being exercisable on notice to other parties and the tribunal. However s 69(1) is not to be read in isolation. It is clear from the first sentence of s 69(2) that leave of the court is required unless the appeal is brought "with the agreement of all the other parties to the proceedings." It is also clear from the second sentence of s 69(2) that under s 70(2) and (3) alternative remedies must be exhausted and time limits must be observed.

9. As regards s 69(2)(b), the requirement for leave – if it applies – involves a severe restriction on the ability of a party to appeal on a point of law. The four cumulative requirements in s 69(3)(a) to (d) must be met before leave can be granted. The Departmental Advisory Committee Report which preceded the 1996 Act explains the reasons for this in paragraphs 286 to 289. In large part the purpose of s 69(3) is to express limits put on the right of appeal under the Arbitration Act 1979 ("the 1979 Act"). Those limits had been identified by the House of Lords in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] A.C. 724, but had not been evident from the words of the 1979 Act themselves. The Departmental Advisory Committee considered it desirable that limits on the right of appeal should be expressed in the legislation.

10. The ability of parties to contract out of the requirements in ss 67 to 70 is governed by s 4 of the 1996 Act. This provides:

> Mandatory and Non-Mandatory Provisions
>
> 4 - (1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.
>
> (2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements

> by agreement but provide rules which apply in the absence of such agreement.
>
> (3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.
>
> …

11. Schedule 1 lists ss 67 and 68 as mandatory provisions, but not s 69. It lists s 70 as a mandatory provision, but only so far as relating to challenges to the award under ss 67 and 68. This suggests that, in relation to appeals under s 69, by s 4(2) the parties are permitted to make their own arrangements by agreement, with particular provisions of s 69 and s 70(2) and (3) applying only in the absence of such agreement. However there may be scope for argument as to the full extent of the parties' ability to make their own arrangements. It is not necessary for me to decide precisely how far this ability extends, and I shall not attempt to do so.

The LCIA rules

12. Article 26 of the LCIA rules provides:

> … the parties… waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, in so far as such waiver may be validly made.

13. It is common ground that in arbitral proceedings governed by the LCIA rules alone the waiver in article 26 would be effective to exclude the right of appeal conferred by s 69 of the 1996 Act: see the opening words of s 69(1).

The DRA

14. The first main section of the DRA is headed "Interpretation". It defines "Dispute" in terms which include the issues giving rise to the Award.

15. The second main section of the DRA is headed "Dispute Resolution". It comprises clauses 2 to 11 of the DRA. Clauses 2 and 3 provide for amicable settlement and optional mediation. Clause 4 is headed "arbitration". Clause 4.1 provides preconditions to arbitration which are immaterial for present purposes. The remainder of clause 4 is as follows:

> 4.2 Any party submitting a Dispute to arbitration shall serve on every other party to this Agreement a copy of the notice by which the arbitration is commenced, which must state (a) the subject-matter of the Dispute and (b) the relief sought, in sufficient detail to enable the recipients to comprehend the nature of the Dispute. Any party receiving such notice shall within 15 Business Days of receipt of such notice, notify the party submitting the Dispute to arbitration whether or not it wishes to (a) take part in the appointment of the arbitral tribunal and determination of the procedure and/or (b) make

representations in the arbitration. No steps shall be taken to appoint the arbitral tribunal until such period has elapsed. These parties who notify their intention to take part in the appointment and determination and/or make representations shall be known as the *Appointors.*

4.3 Except where the Appointors reach agreement in writing that the Dispute should be referred to fast track arbitration in accordance with the procedures set out in clause 6, any Dispute which is not resolved pursuant to clause 2 or 3 shall be referred to and resolved by arbitration under the Rules of the London Court of International Arbitration (*LCIA*), which Rules are deemed, subject to the provisions of Clause 5, to be incorporated by reference into this Agreement.

4.4 In relation to any arbitration pursuant to this clause, the arbitrator(s) shall be appointed by agreement of the Appointors or, in default of agreement, by the President of the LCIA on the application of any Appointor. Unless the Appointors agree otherwise, the tribunal shall consist of three arbitrators, all of whom shall be legally qualified practitioners with at least 15 years post-qualification experience.

16. Clause 5 is headed "Provisions applicable to all arbitrations." It states, so far as material:

5. The following provisions shall apply to all arbitrations pursuant to this Agreement.

i) The seat of the arbitration shall be London.

ii) The language of the arbitration shall be English.

iii) Any party to the Dispute may appeal to the court on a question of law arising out of an award made in the arbitral proceedings. An award shall be enforceable unless the court orders a stay of execution in respect thereof. Subject to the provisions of clause 10.1(b)(ii) of the Reinsurers Common Terms Agreement, the parties to the Dispute shall fully comply with the terms of the award pending the outcome of any such appeal.

iv) The tribunal shall adopt procedures suitable to the Dispute, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the Dispute.

v) The arbitral tribunal shall act impartially. Prior to entering on an arbitration, each arbitrator shall sign a declaration setting out any potential conflicts of interest or stating that he has none.

vi) All correspondence from and to the arbitral tribunal shall be copied at the time of sending to the other parties to the Dispute.

> The arbitral tribunal shall not discuss any aspect of the arbitration with any party to the Dispute without giving the other parties thereto a reasonable opportunity to be present, whether in person or by telephone conference.
>
> vii) The parties to the Dispute shall cooperate with the arbitral tribunal in resolving the Dispute and for that purpose shall provide it with all information and documentation as it may reasonably require.
>
> viii) The arbitral tribunal shall have full power in its award to order specific performance and/or other injunctive relief.
>
> ix) The costs of the arbitration shall normally be awarded on the principle that costs follow the event.
>
> …

17. Reference was made in clause 4.3, quoted above, to the possibility that agreement would be reached that a Dispute should be referred to fast track arbitration in accordance with the procedures set out in clause 6. The opening words of clause 6 are as follows:

> Fast track arbitration
>
> 6. Where the parties to a Dispute have reached agreement in writing that it shall be referred to and finally resolved by fast track arbitration the following provisions shall apply in addition to those in clause 5 …

18. The remainder of clause 6 contains provisions for the appointment of a sole arbitrator, for written submissions, for the arbitrator to hold one or more hearings if considered necessary, for an award within a time limit, and for other procedural matters.

19. Clause 7 makes provision for the parties to agree on a pool of arbitrators. Clause 8 says that nothing in the DRA prevents any party seeking interim relief in any court. Clause 9 makes provision for joinder of disputes. By clause 10 all parties, subject to the terms of the DRA, irrevocably submit to the non-exclusive jurisdiction of the English courts. Clause 11 makes provision for agents for service of process and any other documents in proceedings in England or any other proceedings in connection with the DRA.

20. The final section of the DRA is headed "Governing law". It consists of clause 13, which states that the DRA shall be governed by and construed in accordance with English law.

The issue and the arguments

21. Section 69(2) identifies two requirements for an appeal without leave of the court. First, by the express words of s 69(2)(a), there must be an "agreement of all the other parties to the proceedings." There is no dispute that the DRA meets this requirement.

Second, s 69(2) makes a requirement as to content: the appeal must "be brought … with [that] agreement."

22. The parties disagree on whether this second requirement is met by the first sentence of clause 5(iii) of the DRA. I shall refer to this sentence as "the crucial sentence". It reads:

> Any party to the Dispute may appeal to the court on a question of law arising out of an award made in the arbitral proceedings.

23. Mr Ian Milligan QC, who appeared with Mr David Foxton QC for Royal & Sun, submitted that s 69(2) refers to an agreement that there may be "an appeal … under this section", which in turn is – in the words of s 69(1) – an appeal "on a question of law arising out of an award made in the proceedings" conferred on a "party to the proceedings". For convenience I shall refer to an appeal which meets the express requirements of s 69(1) as an "appeal on law". Mr Milligan noted that what is described in the crucial sentence is a right to appeal "on a question of law arising out of an award made in the arbitral proceedings" conferred on a "party to the Dispute". The difference in wording between s 69(1) and the crucial sentence, contended Mr Milligan, is immaterial.

24. Mr Michael Crane QC, who appeared with Mr James Cutress and Mr Matthew Gearing for the BAE Operational Companies, did not dispute this proposition. Indeed, consistently with the argument that I describe below, he contended that the crucial sentence deliberately tracked the wording of s 69(1).

25. The foundation for the argument advanced for the BAE Operational Companies lay in one particular factor. This was that, unless there were some agreement to the contrary, article 27 of the LCIA rules involved a waiver of the right of appeal on law conferred by s 69(1). That meant that by incorporating the LCIA rules the right under s 69 would be excluded unless the parties took steps to override this aspect of the LCIA rules. The BAE Operational Companies submitted that the court should draw an inference in this regard. The inference was expressed in different ways. In the BAE Operational Companies' skeleton argument reference was made to exclusion of the right of appeal being the result of the LCIA rules, and it was submitted that the crucial sentence was inserted "to avert this result in the usual case." Earlier, however, it was said that the crucial sentence "reinstates in terms a statutory right of appeal which would otherwise have been excluded … [but] deliberately does not go on to remove the various constraints to which that right is subject, including the requirement to exhaust any available arbitral process of review under s 70(2) and the requirement for leave of the court under s 69(2)(b)." In oral argument Mr Crane put the matter this way: there was an inference that the crucial sentence was equivalent in scope to, and coextensive with, the right which but for that sentence would have been excluded. The theme which underlay these various ways of putting the inference was that although the crucial sentence carried no limitation on its face, it had a limited purpose and the court should not give it an effect going beyond that limited purpose. Consistently with that limited purpose the crucial sentence tracked the wording of s 69(1) alone.

26. The points made for and against such an inference are analysed below under the following headings:

(1) What does s 69(2)(a) require?

(2) What the crucial sentence purports to do

(3) Tracking the words of s 69(1)

(4) The role of clause 5

(5) Drafting techniques not used in the DRA

(6) The DRA and other features of English law

(7) Clause 10(1)(b)(ii) of the RCTA

(8) Redundancy

(9) Similar provisions in other agreements

(1) What does s 69(2)(a) require?

27. In considering what s 69(2)(a) requires, Royal & Sun submitted that the policy of the 1996 Act involved no predisposition to restrict the ability of the parties to make an agreement for an appeal on law without leave. The BAE Operational Companies, by contrast, while acknowledging that an agreement for the purposes of s 69(2)(a) would be effective, nevertheless submitted that such an agreement must be shown in the clearest terms. It was said that no equivalent to s 69 existed in the laws of other sophisticated arbitration jurisdictions, that it was a controversial proposition, and that it was plainly intended that only exceptional cases should be capable of passing through the leave requirements, which themselves imposed a higher threshold than had previously been the case. In oral argument Mr Crane disclaimed any contention that the 1996 Act embodied a policy antagonistic to agreements for appeal on law without leave. However, while such agreements were not outlawed, he submitted that "an agreement to dispense with leave" ought to be expressed "in the clearest terms." It was said that this conclusion followed from a recognition of the constraints in s 69 and the need for finality.

28. I reject the submissions of the BAE Companies in this regard, for I do not consider that the conclusion flows from either or both of the premises.

29. I start with the ordinary meaning of the words used in s 69(2). Those words say that if the case is one where there is an agreement of the kind specified in s 69(2)(a), that is an agreement by all parties to the arbitral proceedings that an appeal on law may be brought, then there is no need to seek leave of the court in order to bring an appeal. If the case is one which lacks such an agreement, then there will be a need to seek leave of the court. Whether or not there is an agreement of the kind specified in s 69(2)(a), there will be requirements to exhaust alternative remedies and comply with time limits under s 70(2) and (3). I do not find it necessary to decide whether the parties can contract out of these latter requirements. In my view, on any ordinary reading of the language, s 69(2) makes it clear that there will be no need for leave of the court if

there is an agreement by all parties to the arbitral proceedings that an appeal on law may be brought. It is not a question of contracting out of the need for leave. The approach taken in s 69 is to introduce a requirement for leave only in those cases where the parties have not positively agreed that there may be an appeal on law.

30. Nothing in the 1996 Act leads me to think that in s 69 there is an intention to make a requirement that there be a specific agreement to dispense with leave, nor that such agreement as is contemplated by s 69(2) must be "expressed in the clearest terms." There are indeed constraints in s 69, but I see no reason why the court should do anything other than apply ordinary principles of construction in determining whether those constraints are engaged. True it is that if those constraints are engaged then this will tend towards finality. Finality is often regarded as a good thing. However parties to an arbitration may take the view that as regards questions of law finality should come from the court rather than from the arbitral tribunal.

31. The clear words of s 69(2) leave no room for the gloss which the BAE Operational Companies seek to put on them. No doubt the matter is dealt with differently in different jurisdictions. Mr Milligan suggested that in some it is dealt with in a similar way to s 69. Nothing turns on this. Nor does anything turn on whether or not s 69 was controversial, or whether or not it raised the threshold for leave. Where the words of the section are clear, and there is no reason to doubt that the words mean what they say, I see no basis to impute a requirement that the agreement contemplated by s 69(2)(a) must be "an agreement to dispense with leave" expressed "in the clearest terms."

32. The BAE Operational Companies nevertheless urge that as a matter of construction the crucial sentence is so limited in purpose as not to fall within s 69(2)(a). The true intention of the parties, they submit, was to confer a right to appeal on law with leave. If that were indeed the true intention of the parties, then I would strive to construe the crucial sentence in a way which would bring about that effect. As s 69 is not listed in Part 1 of Schedule 1 to the 1996 Act, it does not seem to me that s 4 of that Act would impede my doing so. Mr Crane submitted that as a matter of principle the task of the court was to consider whether it should draw an inference as to the intention of the parties from the words they had used in the particular context. This broad principle was not contested by Mr Milligan, and I am content to adopt it. In accordance with that principle I turn to examine the words used in the crucial sentence and the contextual factors which are said to be relevant.

(2) What the crucial sentence purports to do

33. On its face, as pointed out by Mr Milligan in the passage cited earlier, the crucial sentence does exactly what is contemplated by s 69(2)(a). As Mr Crane accepts, it tracks the wording of s 69(1). In the light of my analysis of s 69(2), it seems to me that if the words used in the crucial sentence are given their ordinary meaning, Mr Milligan is right to say that they plainly constitute the agreement contemplated by s 69(2)(a). The question which remains is whether there is good reason to give those words anything other than their ordinary meaning.

(3) Tracking the words of s 69(1)

34. The essential point raised here by the BAE Operational Companies is that the LCIA rules removed the right of appeal conferred by s 69(1). By tracking the words of s 69(1), it is submitted, the crucial sentence went no further than restating and writing back the right that had been conferred by s 69(1). As was pointed out by Mr Milligan, however, the problem with this submission is that s 69(2)(a) tells the parties what to do if they wish to ensure that an appeal on law will be available without leave. They are to make an agreement permitting an appeal to be brought under the section. Tracking the words of s 69(1) does just that. I do not consider that this feature of the crucial sentence assists the BAE Operational Companies.

(4) The role of clause 5

35. Royal & Sun observes that under clause 4.3 of the DRA the incorporation of the LCIA rules is "subject to the provisions of clause 5 …". In other words, clause 5 is not a qualification of the LCIA rules. It is the other way round: the rules may, where not inconsistent, supplement clause 5. Mr Crane suggested that this was a matter of semantics. I do not agree. As noted elsewhere in Royal & Sun's skeleton argument, clause 5 is a free-standing code applicable to arbitrations under the DRA. This is readily apparent from the second and third sentences of clause 5(iii) itself. In another context (see "Redundancy" below) the BAE Operational Companies acknowledge that other parts of clause 5 replicate provisions which are either in the 1996 Act or are in the LCIA rules. I consider that the structure of the DRA is to set out in clause 5 provisions which are applicable to all arbitrations and are thus to be overarching. There is nothing to suggest that the provisions of clause 5 have been designed to counteract any particular feature of the 1996 Act or the LCIA rules. I consider that a reader of the DRA would reasonably be entitled to expect that the provisions in clause 5 were designed to set out in clear terms for the benefit of the parties overarching principles which would apply to all arbitrations. Moreover, a principle which states that a party may appeal on law, and contains no express qualification, would ordinarily be clearly understood as not involving any requirement for leave.

(5) Drafting techniques not used in the DRA

36. The BAE Operational Companies' skeleton argument observed that the DRA and the surrounding contractual documents were drafted for the parties by their respective solicitors. Building on this observation the BAE Operational Companies suggested that those drafting the DRA could have made clear reference to s 69(2)(a), but chose not to do so. This is said to have been "a telling omission." No doubt on the basis that sauce for the goose is sauce for the gander, Mr Milligan submitted that if the intention of the parties had been as limited as the BAE Operational Companies suggest, then one would have expected, rather than the general words of the crucial sentence, an express provision in clause 4.3 stating that the incorporation of the LCIA rules did not extend to any waiver of the right of appeal under s 69(1).

37. I do not derive assistance from points of this kind. There are many different ways in which the objects of the parties can be achieved. It is true that they did not adopt the alternative drafting methods identified by Mr Crane and Mr Milligan. In a case like the present, those who are skilled in drafting legal documents cannot be expected to

have unanimous views as to how to go about their task. I do not think it right to draw any inference from the fact that any one particular drafting method was not adopted.

(6) The DRA and other features of English Law

38. Mr Crane submitted that the DRA did not envisage the removal of any other features of the English law of arbitration. This was said to be highly relevant. I do not agree. The structure of the DRA is, as indicated earlier, to set out in clause 5 the overarching principles which are to govern all arbitrations. One of those overarching principles, if interpreted according to the ordinary use of language, has the consequence that under s 69(2)(a) there is no need to seek leave of the court when bringing an appeal on law. Whether other aspects of the overarching principles, or any other parts of the DRA, involve the removal of a feature of the English law of arbitration is of little assistance in determining whether the words in question have their ordinary meaning.

(7) Clause 10 (1)(b)(ii) of the RCTA

39. The RCTA contains a provision in clause 10.1(b)(ii) entitling the Reinsurers to set off against sums payable by them:

> any amount which is due and payable by the Reinsured pursuant to any final award .... provided such award is not being validly appealed against by the Insured in accordance with the procedures contemplated by the [DRA].

40. It is said by Royal & Sun that this provision shows that the parties envisaged that the DRA provided for an appeal procedure. As Mr Crane pointed out in oral argument, however, all that this provision assumes is that there may be a valid appeal in accordance with the procedures contemplated by the DRA. This offers no assistance on the question whether the appeal envisaged was one which required the leave of the court.

(8) Redundancy

41. Royal & Sun drew attention to the fact that the fast track arbitration for which clause 6 provides is not subject to the LCIA rules at all. Yet an award from a fast track arbitration would also fall within the crucial sentence. What Royal & Sun drew from this was that there was no basis for giving the sentence a different meaning depending on whether the arbitration was fast track or under the LCIA rules. Royal & Sun made similar points arising from the fact that all other provisions of clause 5 applied both to fast track and LCIA arbitrations, and the fact that the provisions of clause 5 extended both to matters not covered by the LCIA rules and matters covered by those rules in different terms. While these are all good reasons for thinking that clause 5 sets out overarching principles applicable to all arbitrations, I do not consider that they assist Royal & Sun any further than this. As Mr Crane observed, to the extent that provisions in clause 5 are identical to those in the LCIA rules, as regards arbitrations which are not fast-track they are redundant or they have the effect that the relevant provision in the LCIA rules is redundant. To the extent that provisions in clause 5 echo provisions of the 1996 Act, they will be redundant as regards both fast-track and non-fast track arbitrations. There is no basis for thinking that those drafting clause 5

were going out of their way to avoid redundancy. Accordingly the mere fact that the crucial sentence is applicable to fast track arbitrations as well as LCIA arbitrations is not of itself inconsistent with the BAE Operational Companies' argument.

(9) Similar expressions in other agreements

42. Royal & Sun pointed out that similar formulae to those in the crucial sentence were found in other contracts which had come before the courts and had been recognised as having the effect of removing the requirement for leave. None of the cases cited, however, involved any judicial determination of the point. It follows that they give me no assistance in my task.

Conclusion

43. In my analysis of the points relied upon by the parties I have found nothing which positively assists the BAE Operational Companies in their contention that the crucial sentence sought only to remove the waiver found in article 26 of the LCIA rules. The ordinary meaning of the words used in the crucial sentence is contrary to that contention. The considerations that I have identified when discussing the role of clause 5 of the DRA point strongly to the words of the crucial sentence being given their ordinary meaning.

44. I reject the BAE Operational Companies' contention that an agreement made under s 69(2)(a) must be "an agreement to dispense with leave" expressed "in the clearest terms." There is no good reason to construe the crucial sentence as anything less than the agreement contemplated by s 69(2)(a), or in any way as departing from the provisions of s 69. In any event, however, for the reasons given above I would hold that the crucial sentence amounts to an agreement "to dispense with leave" expressed "in the clearest terms."

45. It follows that Royal & Sun is correct in its contention that leave is not required in order to bring an appeal under s 69 of the 1996 Act.