Civil Appeal No. 2 of 2024

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS
CASE NUMBER 2023: No. 162

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL IAN KAWALEY

- -

Between:

AFINITI, LTD.

Appellant

- and -

MUHAMMAD ZIAULLAH KHAN CHISHTI

Respondent

Mr Adam Zellick KC of Counsel and Mr Ben Adamson of Conyers Dill and Pearman Limited for the Appellant
Mr Alex Potts KC of Counsel and Mr Richard Horseman of Wakefield Quin Limited on behalf of the Respondent

Hearing date(s): 6-7 June 2024
Draft Judgment circulated: 21 August 2024
Date of Judgment: 16 September 2024

- -

INDEX

Indemnification deed-entitlement of former director to advancement of expenses-whether foreign arbitration award gives rise to issue estoppel, res judicata or abuse of process-admissibility of evidence-formal requirements for reliance on foreign arbitration award-right of appellant to amend grounds of appeal without leave-jurisdiction to admit further evidence on appeal-Bermuda International Conciliation and Arbitration Act section 41 (a), (b)- Court of Appeal Act, section 8 (2)- Rules of the Court of Appeal for Bermuda, Order 2 rule 2 (8)

APPROVED JUDGMENT

KAWALEY JA:

Background

1. The Appellant appeals by Notice of Appeal dated 23 January 2024 and Supplementary Notice of Appeal dated 9 February 2024 against the 19 December 2023 Ruling of Mrs Justice Shade Subair Williams (the "Judge") in Supreme Court Case No. 162 of 2023 (the "Action"). The Respondent relies upon a Cross-Appeal Notice dated 7 February 2024.

2. The Action was commenced by the Respondent by an Originating Summons dated 19 May 2023, which was amended on 25 May 2023 (the "AOS"). He sought declarations that the Appellant was obliged to advance litigation expenses to the amount of USD45 million, under a Deed of Indemnity between the parties dated 1 January 2020 (the "Deed of Indemnity") in respect of:

    (a) *Afiniti, Ltd. et al-v- Chishti et al,* proceedings commenced in the United States District Court for the District of Columbia (the "Trade Secrets Proceedings");

    (b) *Chishti et al-v- Spottiswoode* and *Chishti-v-Spottiswoode,* proceedings commenced in the United States District Court for the District of Columbia (the "Spottiswoode Proceedings");

    (c) *TRG-I-v- Chishti* and *TRG-I-v- Chishti* (on appeal) (the "TRG Proceedings"); and

(d) *Chishti-v- Jameel et al*, proceedings commenced in United States District Court for the Southern District of New York (the "Respondent's New York Proceeding").

3. The Respondent swore four Affidavits in support of the AOS on 17 May, 8 June, 13 July and 16 August 2023 ("Chishti 1", "Chishti 2", "Chishti 3" and "Chishti 4", respectively). The Appellant filed affidavits sworn by its Chief Legal Officer Samuel Logan on 18 July and 19 September 2023 ("Logan 1" and "Logan 2", respectively). A Consent Order for Directions was granted by the Judge on 15 June 2023 and contemplated a 1-day substantive hearing. However, the Respondent issued two interlocutory Summonses which were issued returnable for 20 September 2023 and were heard on that date (with Supplemental Submissions being filed on 9 October 2023):

(a) a Summons for Interim Relief dated 1 September 2023 primarily seeking a mandatory inunction that the Appellant pay $1 million to the Respondent as an advancement of expenses for the instant proceedings; and

(b) a Summons dated 18 September 2023 primarily seeking to strike-out portions of the Appellant's Written Submissions referring to the sole arbitrator's award dated 29 April 2019 in *Spottiswoode-v-Chishti* (the "Award") on the grounds that, *inter alia*, the Award was inadmissible and/or had not been formally placed before the Court. (After this Summons was filed on 19 September 2023, the Appellant filed Logan 2 which exhibited both the Award and an even dated determination by Delroy Duncan KC as Independent Counsel under the Deed of Indemnity that the Trade Secrets Proceedings are not Indemnifiable Proceedings (the "IC Determination").

4. However, the Judge in her Ruling described the following three matters which she was ultimately required to decide following the 20 September 2023 hearing:

"*3.There are now three interlocutory applications which are to be decided by this Court:*

(i) Firstly, I am seized of the Plaintiff's 1 September 2023 summons application for an interim mandatory injunction ordering the Company to pay the Plaintiff US$1,000,000.00 in the form of an advancement on the expenses of these trial proceedings. This application may be referred to as the 'interim relief application.' (This application has not yet been argued before me.)

(ii) *By way of a further summons application dated 15 September 2023, the Plaintiff objects to any and all of the references made by the*

Defendant to the prior findings of a sole Arbitrator in his award in a private arbitration proceeding, namely Spottiswoode v Chishti and Satmat Inc d/b/a Afiniti, Case No. 01-17-007-403 (the 'Award') in which the Plaintiff was found to have committed sexual assault. Admissibility objections were also made in respect of findings made by an Independent Counsel as to the Plaintiff's entitlement to an advancement on his legal expenses. I will refer to this application as the 'strike-out application'.

(iii) *The third application before this Court is for a Confidentiality Order excluding members of the public and the media from access and reporting on these proceedings. This is the 'confidentiality application."*"

5. The Judge summarised her conclusions at the end of her Ruling as follows:

"*91. On the Plaintiff's strike-out application I have found:*

(i) There is no issue estoppel. However, the Award may be admitted as evidence of relevant facts stated under oath. The judicial portions of the Award are inadmissible.

(ii) The [IC] Determination is inadmissible opinion evidence.

(iii) Any statements made by Mr. Logan as to the alleged sexual assault shall be excluded on the grounds that they are inadmissible hearsay evidence.

92. I have also refused the Plaintiff's application for a Confidentiality Order."

6. It is against this background that the grounds of appeal fall to be considered.

The Appeal

7. The Appellant appeals against the Judge's decision that the IC Determination is inadmissible on the following principal ground. The IC Determination is a highly relevant and contractually binding determination that, unless and until set aside, the Respondent is not entitled to indemnification in relation to the Trade Secrets Proceedings. It was not merely opinion evidence.

8. The Appellant appeals against the finding that the Award's conclusions were inadmissible on the following principal ground. The Award created an issue estoppel

as between the parties as co-respondents in the arbitration proceedings. The case of *Sweetman-v- Nathan* [2003] EWCA 1115 either did not apply or was incorrectly applied by the Judge. Further, it would be an abuse of process for the Respondent to be able to re-litigate the issues which were determined by the Award.

The Cross-Appeal

9. The Respondent cross-appeals in respect of the Judge's failure to rule that Logan 2 should have been struck-out altogether and invites the Court of Appeal to either:

    (a) determine the merits of the AOS itself; or

    (b) remit the matter to the Supreme Court for expedited determination.

10. The central ground of the Cross-Appeal is that the filing of Logan 2 on the eve of the hearing without prior notice or Court approval was abusive and prejudicial. In oral argument, the Respondent narrowed the scope of substantive relief it sought from this Court to, in effect, such minimum sum (in the region of $1 million) as the Court considered it appropriate for the Respondent to receive in light of the delay in what was supposed to be a summary process under the Deed.

The factual matrix in outline

The Deed

11. The Appellant submits that under the Deed of Indemnification dated 1 January 2020 between it and the Respondent (the "Deed"), the IC Determination is conclusive as to whether or not a proceeding is indemnifiable until it is set aside. It follows that no advancement of expenses can be claimed. Those portions of the Deed relevant to this argument are set out below.

12. Section 2 of the Deed provides as follows:

> "*2. Advancement of Expenses. Except as limited by Section 10, to the fullest extent permitted under Bermuda law, all Expenses incurred by Indemnitee in defending against any Indemnifiable Proceeding described in Section 3 or 4 in advance of the final disposition of such Indemnifiable Proceeding shall be paid by the Company at the request of the Indemnitee. Such request shall be made pursuant to Article 3 of Appendix A hereto (the 'Procedural Appendix'). In addition, Indemnitee's entitlement to advancement of Expenses shall include those Expenses incurred in connection with any Indemnifiable Proceeding by Indemnitee seeking an adjudication pursuant to Article 5 of the Procedural Appendix (including the enforcement of this provision), subject to the*

> *undertaking of the Indemnitee to reimburse such amounts if so required pursuant to Article 3 of the Procedural Appendix.*"

13. The right to an advancement of expenses under Section 2 is limited by Section 10 of the Deed. This provides that "*no indemnification or advancement of Expenses shall be paid hereunder*":

> "*(c) except with respect to an Indemnifiable Proceeding pursuant to Section 8 above or Article 5 of the Procedural Appendix, in connection with a Proceeding, or part thereof (including claims and counterclaims, initiated by an Indemnitee, unless such Proceeding (or part thereof) initiated by Indemnitee was authorized by the Board*". [Emphasis added]

14. Section 8 deals with expenses incurred in relation to enforcement of the Deed; Article 5 of the Procedural Appendix obliges the Indemnitee to promptly notify the Company that an Indemnifiable Proceeding has been commenced against the Indemnitee. It seems clear from section 10 that, as a general rule, the Indemnitee may not claim an advancement of expenses in relation to proceedings he may have initiated "*unless such Proceeding…was authorized by the Board*".

15. The Procedural Appendix firstly provides that the Indemnitee must request the Company to provide indemnification (Article 1 (a)). That request must be determined by the Board within 45 days (Article 1 (b)). If the Board refuses it, the Indemnitee may renew the request to Independent Counsel, who must determine it within 45 days of their identity being agreed (Article 1 (c)). The latter clause concludes as follows:

> "…*Any determination of Independent Counsel under this Article 1 (c) shall be the final determination of entitlement to indemnification under this Article 1, subject to Article 4 of this Procedural Appendix.*"

16. Separate provision is made for seeking an advancement of expenses by Article 2:

> "*Request for Company to Provide Advancement of Expenses. To receive advancement of Expenses under this Agreement, Indemnitee shall submit a written request to the Secretary of the Company. Such request shall reasonably evidence the Expenses incurred by Indemnitee and shall include or be accompanied by an undertaking, by or on behalf of Indemnitee, to reimburse such amounts to the Company if it is determined in a final and non-appealable judgment of a court of competent jurisdiction that Indemnitee is not entitled to*

> *be indemnified against such Expenses by the Company or otherwise. Indemnitee's undertaking to reimburse any such amounts shall not be required to be secured and shall be interest free, subject to Section 10 of this Agreement. Each payment of Expenses by the Company shall be made within 10 calendar days after the receipt by the Company of a valid written request for advancement of Expenses.*"

17. Article 2 seems to envisage that Expenses will be dealt with before the right to indemnification is finally determined. Viewed practically, this appears to be essential to make the idea of an advancement of expenses workable as regards claims within the scope of the Deed which might ultimately be found to be refundable by virtue of findings of fraud or dishonesty against the Indemnitee at the end of the Indemnifiable Proceedings (as to which, see the exception referred to a paragraph [22] below). The same logic does not apply to questions as to whether an expenses claim falls within the scope of the Deed at all. This question would logically be capable of determination at the outset, and it would be odd for parties to agree that an advancement must be made on request without any analysis at all as to whether it falls within the ambit of the Deed.

18. Article 4 of the procedural Appendix most pertinently provides:

> "*Effect of Determination Whether to Indemnify or to Advance Expenses. In the event that a determination is made that the Indemnitee is not entitled to indemnification by the Company hereunder…Indemnitee shall be entitled to seek final adjudication in a court of competent jurisdiction of entitlement to such indemnification…The determination in any such judicial Proceeding shall be made de novo and Indemnitee shall not be prejudiced by reason of a determination (if so made) pursuant to Articles 1 or 3 of this Procedural Appendix that Indemnitee is not entitled to indemnification…*"

19. These provisions appear to support the following conclusions as to the status of the IC Determination. Firstly it seems to be clearly admissible as the first and potentially final contractually agreed mechanism for determining whether a proceeding is indemnifiable or not. Secondly, it is only final and binding to the extent that (a) the determination is that the proceeding is indemnifiable, or (b) where the finding that a proceedings is not indemnifiable is not challenged by the Indemnitee through an application to the Supreme Court. And, thirdly, the procedural scheme appears to envisage (a) any claim under the Deed beginning with a claim for indemnification being made and (b) that any claim for expenses will follow, rather than precede, the indemnity claim being made.

20. What proceedings are indemnifiable appears to have two elements to it. Firstly, whether the proceedings fall within the scope of the Deed, something that is capable of

determination from the outset after the claim for indemnification is initially made by the Indemnitee to the Company. And secondly, whether the Indemnitee is restricted from relying on the Deed by reason of the fraud or dishonesty of the Indemnitee, something which is only capable of determination at the end of the relevant proceeding.

21. The Deed requires a claim for indemnification to be made, much like an insurance policy would require an insured to give notice of a claim. It seems nonsensical to suggest that this claim does not have to be made at the start of the process, before an advancement of expenses claim is made. It seems logical to conclude that the parties contemplated that whether or not a claim is *prima facie* indemnifiable should be determined at the soonest possible juncture after the commencement of the relevant proceedings, before (rather than after) an advancement of expenses claim has been made.

22. As for the scope of proceedings potentially engaged by the Deed, Sections 3 (a) and 4 (a) ("Eligibility") refer in substantially similar terms to proceedings:

> "*…by reason of the fact that Indemnitee is or was an Officer of the Company; or by reason of anything done or not done (or allegedly done or not done) by Indemnitee in any such capacity, whether or not Indemnitee is actually serving in such capacity*…"

23. The relevant indemnity rights are enforceable to "*the fullest extent permitted by Bermuda law against all judgments, fines, amounts paid in settlement and Expenses incurred by Indemnitee in connection with a Proceeding described in Section 3 (a)/Section 4 (a)if Indemnitee acted in good faith and in a manner Indemnitee reasonably believed to be in or not opposed to the best interests of the Company; provided, however, that no such indemnification shall be made in respect of any such Proceeding as to which such person shall have been found, in a final and non-appealable judgment of a court of competent jurisdiction, to be liable for fraud or dishonesty in the performance of such Indemnitee's duty to the Company, unless and only to the extent that a court of competent jurisdiction shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, Indemnitee is fairly and reasonably entitled to indemnification for such judgments, fines, amounts paid in settlement and Expenses as such court shall deem proper.*" (Section 3(b). Section 4(b) makes broadly similar provisions in abbreviated terms). On the face of it, whether these limitation provisions apply will not be capable of determination until the proceedings otherwise falling within the scope of the Deed have been finally determined.

24. Accordingly, as a matter of preliminary analysis, the Appellant's submission that it must be entitled to evaluate whether the proceedings to which an advancement of expenses claim related were indemnifiable appeared valid as regards assessing if the proceedings fell within the scope of the section. The Respondent's submission that the Deed appeared to contemplate an advance before it was finally determined whether or not the proceedings were indemnifiable appeared correct, but only in relation to a determination of whether the fraud or dishonesty exclusion applied. Otherwise, as also noted above at [13], there appears to be no right to an indemnification or advancement, with respect to proceedings initiated by an Indemnitee, unless such Proceeding (or part thereof) was authorised by the Board.

The Arbitration Award

25. In *Tatiana Spottiswoode-v- Zia Chishti and Satmat Inc. d/b/a Afiniti*, Case No. 01-17-007-4093, Sole Arbitrator Ronald G. Birch delivered an Award of the American Arbitration Association Employment Arbitration Tribunal on 29 April 2019 in favour of Ms Spottiswoode against the Respondent and Afiniti Inc (the "Award"). The Respondent was found liable for constructively terminating the complainant's employment by reason of persistent sexual harassment and one serious incident of assault and battery. Afiniti was found vicariously liable for the Respondent's action, both having elected to make common cause in the arbitration. Compensation in the principal amounts of approximately $4.5 million and $1 million, respectively, was ordered to be paid by each respondent (Award, Section XV, paragraphs 1-2).

26. Sections 40-41 of the Bermuda International Conciliation and Arbitration Act 1993 ("BICA") impose the same requirements to both enforcement and reliance upon a foreign arbitration award, which include the production of originals or "*duly certified copies of*" both the relevant award and the arbitration agreement (section 41 (a), (b)). Both before the Supreme Court and this Court, it was complained that the Appellant had failed to comply with sub-paragraph (a) or (b) of section 41.

27. The version of the Award placed before the Court exhibited to Logan 2 appeared on its face to be a copy of the original. It was said to be a version already in the public domain, with minor redactions applied to the original document. Mr Logan implicitly averred that it was a true copy of the original although this was not stated in explicit terms. Although no doubt was cast on the authenticity of the document, it was submitted that the Appellant had failed to comply with the statutory requirements for reliance on the Award. This complaint seemed highly technical, however no version of the arbitration agreement which formed the basis for the Award had been placed before the Court.

28. After the hearing, the Appellant was requested by the Court on 12 June 2024 to file an Affidavit (a) explicitly confirming that the previously exhibited copy of the Award was a true copy of the original and (b) exhibiting a true copy of the arbitration agreement. On 19 June 2024, Ben Adamson, a Director of Conyers Dill and Pearman, swore and filed an Affidavit (a) explicitly confirming that the previously exhibited copy of the Award was, redactions apart, a true copy of the original and (b) exhibiting a true copy of the arbitration agreement. I was satisfied that this cured the only procedural irregularities which had previously been raised as objections to the Appellant relying upon the Award.

29. Bizarrely, it seemed to me, the Respondent filed 'draft Reply Submissions' on 21 June 2024 raising further procedural (and wholly non-substantial) objections to the Adamson Affidavit, namely (1) the lawyer was an inappropriate deponent, (2) the evidence constituted "fresh evidence" and the *Ladd-v- Marshall*[1] requirements had not been met, (3) the rule against hearsay had been breached and (4) the requirements for due certification under section 41 of BICA had not in the circumstances been met. On 24 June 2024, the Appellant filed Supplementary Submissions contesting these further objections, most pertinently pointing out that no doubts had been raised about the authenticity of the exhibited version of the Award. Those submissions attached the decision of District Judge Amy Jackson dated 19 June 2024 dismissing the Respondent's 14 June 2024 application to restrain the Appellant's subsidiary, Afiniti Inc, from authenticating the Award in breach of the Protective Order made by the District of Columbia Court. At page 6 of that decision, Judge Jackson aptly noted: "*Plaintiff cannot seriously contend that the authenticity of the publicly available document is in dispute…*".

30. I summarily reject the Respondent's objections in relation to the Adamson Affidavit and the propriety of this Court relying upon it for the following reasons:

    (a) Mr Adamson is clearly an appropriate deponent to make formal averments about documents (one of which is now a public document) the authenticity of which is not in dispute;

    (b) no authority was cited for the novel proposition that the *Ladd-v-Marshall* principles apply to further formal evidence confirming the substance of evidence which is no different on appeal than it was at trial;

    (c) Mr Adamson avers that the copies of the Award and arbitration agreement are true copies of the originals "*to the best of my knowledge, information and belief (and that of the Company)*" (paragraph 7). It is true he accepts that this is informed in part by his "instructions". However, the Affidavit

[1] [1954] 1 WLR 1489; [1954] 3 All E.R. 745.

was clearly sworn in the context of interlocutory proceedings before this Court. The Respondent's hope that the Judge would have granted final relief at the relevant hearing cannot transform the character of the proceedings before this Court or below from interlocutory into final. Order 41 rule 5(2) of the Rules of the Supreme Court 1985 accordingly applies. The Supreme Court Rules apply because section 8 (2) of the Court of Appeal Act 1964 provides that the "*powers of the Court of Appeal to admit additional evidence shall correspond to the power of the Supreme Court to admit fresh evidence in the exercise of its appellate jurisdiction in a civil or criminal cause, as the case may be*". And the Civil Appeals Act 1971 section 14 provides in relation to the Supreme Court's jurisdiction to admit "*further evidence*":

> "*(5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition*"*;*

(d) Section 41 of BICA is designed to facilitate, not impede, the enforcement of Convention awards, particularly when the authenticity of the exhibited copies is not in dispute. Even an implicit averment that the exhibited copies are true copies of the original arbitration documents has been held in such circumstances to be a sufficient certification: see e.g. *Lombard-Knight-v-Rainbow Pictures Inc.* [2014] EWCA Civ 356 at paragraphs 32-33 (per Tomlinson LJ, Ryder LJ and Christopher Clarke LJ concurring).

The Judge's relevant findings: the IC Determination

31. The Judgment records the following findings in relation to the IC Determination:

> "*36. in my judgment, the wording of Article 1(c), as read with Article 4, is plain and gives way only to a literal interpretation. The Determination is final in terms of the internal two-tier procedure involving the Board and Independent Counsel. However, Article 4 makes it perfectly clear that this Court has jurisdiction to adjudicate the Plaintiff's claim anew once the 'final determination of entitlement' procedure has come to an end. So, for the avoidance of doubt, the Determination cannot give rise to an issue estoppel.*

> *37. That said, it is to be recognized that up until 19 September 2023 when the Determination was first made available to the Company, the Defendant would have been right to complain that the engagement of the Court process was premature…*
>
> *69. Quite rightly, Mr. Potts KC pointed out that expert opinion evidence on matters of Bermuda law is not admissible. The legal issues on which Mr. Duncan KC opined in the Determination are the very same legal issues with which this Court is now seized i.e. The question of eligibility for indemnification in accordance with the Deed. These are all questions of Bermuda law, which neither require nor allow for expert opinion evidence….*
>
> *72….As for the Determination, it does not qualify as a res judicata because the parties contracted that Mr. Chishti would be entitled to commence these proceedings after the finality of the internal proceedings.*"

32. For these reasons, the Judge concluded: "*The Determination is inadmissible opinion evidence"* (paragraph 91 (ii)). This ruling on inadmissibility was closely connected to the arguably more significant finding that the IC Determination did not give rise to an issue estoppel.

The Judge's relevant findings: the Award

33. The Judge made the following key findings:

> "4*0. As I see it, Mr. Zellick KC is plainly correct in that any relevant application of the 1993 Act would be for the purpose of achieving enforcement. The parties contractually submitted to the arbitration process as a forum for adjudication. So, it follows that the Award, in the absence of any appeal proceedings, is not only final but also binding on the parties privy to the proceedings to the extent that it is not open to them to re-litigate the same issues…]*
>
> *48. In this case, the most cogent evidence supporting the privity of interest asserted by the Defendant is the evidence which comes directly from Mr Chishti. From his affidavit evidence, I accept that directors of the Company actively participated in the arbitration proceedings. This leads me to only one reasonable conclusion; the Defendant was party to the Arbitration via its privy,*

> *Afiniti Inc. That being the case, it follows that the Hollington v Hewthorn[2] rule does not apply to the circumstances of this case.*
>
> *49…Mr. Potts KC argued that even where I find that the Company may be properly regarded as being privy to the Award, the doctrines of res judicata and issue estoppel could only be engaged under the following circumstances: (i) Where there was a conflict of interest between the Defendants in the previous case; (ii) Where it was necessary to decide the conflict in order to give the plaintiff in the previous case the relief claimed; and (iii) Where that conflict between the Defendants was judicially decided…*
>
> *70. As for the call for expert evidence from the Arbitrator on the factual matters determined on the Award, the Defendant is again confronted with insurmountable difficulty in that these are not questions for expert opinion evidence. Whether a sexual assault was committed is simply a factual issue on which only direct evidence or circumstantial evidence could be properly admitted.*
>
> *71. For these reasons, I am bound to reject any proposition that the Award or the Determination falls within the scope of admissible expert opinion evidence.*
>
> *72. In summary, I have thus far found that the Hollington v Hewthorn rule has no application to the facts of this case on the basis that the parties and/or privies were one and the same in both the earlier and the present proceedings. However, I also found that there is no issue estoppel in relation to the Award because it falls short of the Sweetman v Nathan test.*"

34. These findings demonstrate the elaborate array of arguments the Judge was required to unscramble. It was submitted by the Appellant that the Award was enforceable under the BICA, which she accepted. It was submitted that although the parties to the Award were different, the Appellant could rely upon the Award as a privy. She also accepted this submission although the Appellant did not seemingly seek to formally rely upon the Award, making no attempt to comply with the statutory formalities for so doing. It was submitted by the Respondent that the common law requirements for issue estoppel as between co-defendants, a three-pronged test, were in any event not met. The Judge accepted this submission. She rejected the Appellant's final fall-back submission that the Award's factual findings could be regarded as a form of expert evidence.

35. Assuming it was legally correct to rely upon the *Sweetman-v-Nathan* test, at first blush these findings appear to be sound. However, the Appellant correctly asserted that the Judge failed to deal with its alternative argument, that if issue estoppel did not apply, it was an abuse of process for the Respondent to launch a collateral attack on the Award

[2] [1943] 1 KB 587.

by challenging the validity of the findings made against him by the Arbitrator in the Spottiswoode Proceedings.

Merits of the appeal: the admissibility of the IC Determination

36. Ground 1 of the appeal can be dealt with shortly. It states, so far as is material:

> "*Independent counsel determined a question of indemnification, not advancement, under the Deed….*
>
> *2.5 The correct analysis is that the IC Determination was a highly relevant fact , constituting a contractually final and binding determination by a contractually appointed expert that Mr Chishti is not entitled to any indemnification in relation to the Trade Secrets Litigation…The learned Judge was therefore wrong to exclude the IC Determination as mere opinion evidence.*"

37. Ground 1 (and indeed all the Appellant's grounds of appeal) only fall for consideration if the Respondent's Cross-Appeal inviting this Court to find that Logan 2 exhibiting the IC Determination ought to have been struck-out is rejected. In the event I find that this limb of the Cross-Appeal should be dismissed for the reasons set out below.

38. The Appellant centrally complained that the Judge was wrong to conclude that the IC Determination did not provide a legally binding justification for the refusal of the Expenses application. It was submitted:

> "*65. In short, the IC Determination presently stands. It has not been overturned and therefore it remains at present, as per Article 1 (c), the final determination of entitlement to indemnification. It determines that there is no right to indemnification for the Trade Secrets Litigation and that the Trade Secrets Litigation is not an Indemnifiable Proceeding under the Deed.*
>
> *66. It inexorably follows, that Mr Chishti has no right to advancement under the Trade Secrets Litigation…*"

39. Mr Potts KC argued that the Judge was never properly asked to consider the effect of the IC Determination and this Court should not deal with it either. The right to expenses was in any event entirely without prejudice to whether or not the claim related to a qualifying proceeding, which would not be known until the critical fraud/dishonesty allegations had been finally determined. Since the Supreme Court was required to reconsider the matters addressed by the IC Determination *de novo*, no need to refer to it would arise.

40. As I understood the Respondent's position, it was contended that the Judge was in substance right to decline to admit the IC Determination for the purposes it was relied upon. It was not contended that it was technically correct to rule that it was inadmissible expert evidence as to Bermuda law, as was contended in the Court below in the context of an impromptu attempt to strike-out the late evidence the Appellant had filed.

41. To the extent that the Appellant's complaint is construed, artificially, as merely challenging the ruling on admissibility, Ground 1 succeeds. The IC Determination ought not to have been excluded on the grounds of its being inadmissible opinion evidence. It was factual evidence as to what had occurred in the first stage of the contractually agreed mechanism for determining whether or not a proceeding was indemnifiable under the Deed. Such determinations are potentially either:

(a) final and binding on the Company because the proceedings have been found to be indemnifiable;

(b) final and binding on the Indemnitee because he has not challenged and/or does not intend to challenge the finding that the proceedings are not indemnifiable; or

(c) relevant as part of the background to an extant or prospective application to the Supreme Court by the Indemnitee for a *de novo* determination.

42. It appears the Judge elided the advancement claim which founded the proceedings before her and the indemnification issue which formed the subject of the IC Determination. However there was in practical terms a close connection between the merits of the advancement claim, and the question of whether the underlying proceedings were *prima facie* indemnifiable in the sense that they potentially fell within the scope of the Deed. An advancement claim could not possibly be "valid" if it was made in relation to proceedings which were not potentially indemnifiable at all. I find, consistent with the preliminary views set out above, that the Deed required a claim for indemnification to be made before an expenses claim was made, so that expenses would only be payable in relation to a proceedings which were *prima facie* indemnifiable.

43. The Appellant was correct to contend that it was entitled to satisfy itself that the advancement claim related to proceedings which were at least *prima facie* indemnifiable; the Respondent was correct to insist that expenses ought to be advanced before it was finally determined whether the underlying proceedings were indemnifiable at the end of those proceedings.

44. The only substantive issue before the Judge was whether or not the IC Determination was final and binding notwithstanding the fact that the Indemnitee, the day following the IC Determination being made, had not yet sought a final determination from the Supreme Court. She correctly held that the IC Determination was not final and binding in circumstances where, after it had been issued, the Court had jurisdiction to adjudicate the Plaintiff's claim anew. To the extent that the Appellant contended for the contrary position (Notice of Appeal paragraph 2.5, Skeleton Argument of the Appellant, paragraph 72), Ground 1 of its appeal fails. The Judge also should have rejected the submission that the IC Determination was inadmissible opinion evidence, but her failure to do so had no practical impact on the proceedings at all.

45. The Respondent has now issued separate proceedings with a view to obtaining the Supreme Court's final determination of whether or not the Trade Secrets Proceedings fall within the scope of the Deed. As regards those proceedings, the question of whether they are *prima facie* indemnifiable will have to be determined by the Supreme Court. In my judgment it is impossible to sensibly construe the Deed as entitling the Indemnitee to an advance of expenses in respect of litigation which is not unarguably within the scope of the Deed before it is finally determined that the relevant proceedings are *prima facie* indemnifiable.

46. Construing the Deed in accordance with both its terms and commercial common sense, the Company is generally required to meet expense claims promptly and only raise disputes about a claim in good faith and the Indemnitee is required to make only arguably valid claims. Article 2 requires payment "*within 10 calendar days after the receipt by the Company of a valid written request*". Prompt payment is conditional upon the making of a "*valid*" expenses request. It is obvious without the need for any elaborate analysis that the proceedings to which the expense request relates will not constitute valid claims if they do not even potentially fall within the parameters of "*Indemnifiable Proceedings*" as prescribed by the Deed. Whether the Indemnitee may be required to refund expenses received because of findings of fraud or dishonesty against them made at the end of the proceedings which are *prima facie* indemnifiable is an entirely different matter.

47. This is why the Deed can only sensibly be understood as requiring the Indemnitee to file a "claim" for indemnification, triggering the following consequential steps:

(a) the Board accepts or approves the claim;

(b) if the Board accepts the claim, an advancement of expenses request may be made;

(c) if the Board rejects the claim, the Indemnitee can apply to Independent Counsel to determine whether the proceedings are indemnifiable;

(d) if the Independent Counsel determines the proceedings are indemnifiable, the Company is bound and a request for an advancement of expenses can be made;

(e) if the Independent Counsel determines the proceedings are not indemnifiable, the Indemnitee can apply to the Supreme Court for a final binding determination on whether the proceedings are *prima facie* indemnifiable;

(f) an application for an advancement of expenses will ordinarily be made in relation to proceedings which have already been agreed or determined to be indemnifiable. So whether the request is "valid", triggering an obligation for prompt payment, ought generally to depend on an assessment of the validity of the request in quantum terms. This is the sort of assessment the Supreme Court would be expected to carry out on a summary basis.

48. In the present case, the best argument the Respondent could advance for prompt payment was that the Deed did not require even a *prima facie* case that the proceedings were indemnifiable to be established before expenses were paid. Properly analysed, this was a hopeless argument. No rational company would assume a liability to advance expenses in relation to proceedings which did not *prima facie* fall within the scope of its indemnification obligations. Moreover, the Respondent could not even credibly assert that the dispute raised by the Appellant about whether the Trade Secrets Proceedings were potentially indemnifiable was not arguable, in the face of the findings set out in the IC Determination in favour of the Appellant on this very issue.

Validity of Supplementary Notice of Appeal

49. Mr Potts KC objected to the Supplementary Notice of Appeal on the grounds that the Appellant had no right to supplement the grounds in relation to which the Judge had explicitly granted leave. Mr Zellick KC rightly contended that the Appellant was entitled to amend its Notice of Appeal by the Supplementary Notice of Appeal dated 9 February 2024, filed almost four months in advance of the 6 June 2024 appeal hearing. There is no gap in this Court's Rules which needs to be filled under Order 2 rule 35 by reference to the England and Wales procedural regime. Order 2 rule 2 of the Rules of the Court of Appeal for Bermuda provides:

> "*(8) A notice of appeal or a respondent's notice (as provided in rule 13 of this Order) may be amended—*
>
> *(a) by or with the leave of the court, at any time;*

> *(b) without such leave, by supplementary notice served upon each of the parties upon whom the notice to be amended was served, not later than seven days before the first day of the sitting of the Court at which the appeal is set down for hearing*." [Emphasis added]

50. The Appellant was clearly entitled to rely on its supplementary ground of appeal which was advanced in accordance with this Court's Rules.

Merits of appeal (Ground 3): the Award and issue estoppel

51. Whether the Judge was wrong to reject the Appellant's case that the Award created an issue estoppel preventing the Respondent from pursuing inconsistent claims in the Spottiswoode Proceedings requires analysis of two contentious issues:

    (a) whether the Bermudian courts are bound by the three-pronged test for issue estoppel as between co-defendants articulated by the Judicial Committee of the Privy Council in *Musammat Munni Bibi-v- Tirloki Nath* [1931] LR 38 Ind App 158; and

    (b) if (a) is answered affirmatively, whether the Appellant is able to meet the requirements of that test.

52. The central controversy on the impact of *Munni Bibi* turned on whether the principles it articulates are distinguishable in the context of the circumstances of the present case. It is common ground that Privy Council decisions on general common law issues unaffected by local statutes are binding on the Bermudian courts: *Grayken-v-Grayken* [2011] Bda LR at paragraph 18. The decision in *Munni Bibi* is an appeal from the High Court of Judicature at Allahabad in India, reportedly one of the country's oldest courts now based in a city now known as Prayagraj, in Uttar Pradesh, occupying grand premises with apparently gracious grounds[3]. Sir George Lowndes opened the Privy Council judgment in 1931 by noting that the disputed property (a house in Agra) had "*provided the parties with litigation for over forty years*". The dispute related to the validity of a deed of gift which the late Joti Persad purportedly executed in favour of his wife (Bibi Mukandi) before his death. The ownership contenders were:

    (a) Munni Bibi, the appellant (deceased by the date of the Privy Council appeal), a descendant of Joti's sons, who occupied the property after their father's death; and

[3] https://wikipedia.org.

(b) Tirloki Nath and others, descendants of Joti's late widow Mukandi.

53. The history of proceedings was aptly described Sir George Lowndes as "*a tangle*". The appeal resulted from an action in which the Subordinate Judge found in Munni Bibi's favour on title but was reversed by the High Court. Both courts ruled that the question of title was not *res judicata* as a result of a 1909 decision in favour of Munni Bibi's predecessor in title. In those proceedings a creditor of one of Joti's sons' heirs was seeking to levy execution on the property. Munni Bibi's predecessor in title and the debtor had been joined as co-defendants for the specific purpose of deciding which of them owned the property; enforcement against the property would not have been justified unless Munni Bibi's predecessor in title was found to be the owner. The plaintiff creditor succeeded in 1909 in establishing that Munni Bibi's predecessor in title owned the property. The Privy Council held (at page 5):

> "*In such a case three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) It must be necessary to decide the conflict in order to give the plaintiff the relief he claims and (3) The question between the defendants must have been judicially decided.*
>
> *Their Lordships are of opinion that these conditions are established in the present case. ...It was only if the house belonged to Amar Nath that the plaintiff's suit could succeed. If it belonged to Mukandi, he must fail…* "

54. Mr Zellick KC bravely sought to undermine the seemingly irresistible force of the straightforward argument that this decision was binding on this Court. Firstly it was argued (Skeleton Argument, paragraphs 90-98) that the *ratio* of *Munni Bibi* is limited to the factual circumstances of that case. This contention must be rejected because there is no fair way in which the Privy Council's reasoning can be read in such a limited manner. The summary of principles just cited was preceded by the following words of considerable generality (at page 4):

> "*For the general principles upon which the doctrine should be applied, it is legitimate to refer to decisions in this country….That there may be res judicata as between co-defendants has been recognised by the English Courts and by a long course of Indian decisions. The conditions under which this branch of the doctrine should be applied are thus stated by Wigram V.-C., in Cottingham v Earl of Shrewsbury, 3, Hare, 627 at 638: 'If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case and the co-defendants will be bound; but if the relief given to the plaintiff does not require or involve a decision of any case between co-*

> *defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the relief the plaintiff obtains*…"

55. It is tempting to succumb to Mr Zellick KC's invitation to question the rationality of this principle as a rule of general application. However, in my judgment any such reconsideration can only properly be carried out by the Privy Council. It follows that the supposedly "*underwhelming*" attitude of the English courts to *Munni Bibi* (Skeleton Argument, paragraphs 99-110) cannot possibly justify Bermudian courts departing from binding Privy Council authority. Mr Potts KC succeeded in demonstrating in oral argument that the suggestion that *Munni Bibi* does not reflect the current English law position is more easily asserted than substantiated. I feel bound to find that the three-pronged test laid down by the Privy Council had to be satisfied if any issue estoppel between the parties in the present case was to arise. I reach this conclusion with some reluctance because the soundness of the principles underpinning this test have been doubted as the President observes below.

56. The Appellant's fall-back position was that the requirements of the three-pronged test were in any event met in all the circumstances of the present case. This was a beguiling argument because there was considerable force to the contention that the interests of Mr Chishti and Afiniti Inc. were adverse. Afiniti Inc. could have benefited from dissociating itself from its employee's misconduct, denied vicarious liability and sought to demonstrate that it had put appropriate safeguards in place to prevent such misconduct. Since this did not occur, and Afiniti Inc. elected to make common cause with Mr Chishti in the arbitration, it is not properly open to the Appellant to contend that the latent or hypothetical conflict of interest between the arbitration respondents was adjudicated by the Arbitrator in actual terms. As Mr Potts KC submitted in the Respondent's Skeleton Argument:

> "*63.4 It was clearly not necessary for the late Mr Birch to seek to decide any conflict between Afiniti, Inc. and the Respondent in order to give Ms. Spottiswoode the relief that she sought. He did not even purport to do so on the face of the alleged Arbitration Award*…"

57. For these reasons, the Judge was correct to find that the requirements for an issue estoppel had not been met. The Appellant's supplementary ground of appeal is accordingly dismissed.

Merits of appeal (Ground 2): the Award and abuse of process

58. The third and final ground of appeal is that the Learned Judge erred in failing to decide that the Respondent's attempt to obtain an advancement of expenses in relation to the Spottiswoode Proceedings was an abusive collateral attack on the Award. The first strand of this ground of appeal was the complaint that the Judge wrongly concluded that the judicial portion of the Award was inadmissible.

59. This limb of the appeal is clearly meritorious. The Award was admissible in evidence as a matter of law once the Judge correctly found that, as a privy, the Appellant was entitled to rely upon its findings. The submission made to the Judge that the Award could be admitted as expert evidence was misconceived and distracted the Judge from focussing on the most straightforward basis upon which the Award was admissible.

60. The only valid objection to reliance being placed upon it which Mr Potts KC advanced before this Court was the failure to comply with the procedural requirements of section 41 (a) and (b) of BICA. Section 41 (a) was substantially complied with; section 41 (b) was not. But this procedural irregularity could easily have been cured by filing further evidence as I found in *Re an Application to Enforce an Arbitration Award* [2013] Bda LR 51(at paragraphs 5-9, 27), Those procedural requirements have now been met, but the failure to do so prior to the 20 September 2023 hearing in the Supreme Court did not justify the inadmissibility ruling which was made.

61. As for the merits of the abuse of process argument, the Appellant significantly submitted:

> "*163. Standing back, and viewing the matter through the eyes of right-thinking members of the public, there is nothing which would make sense about Mr Chishti's attempt, in proceedings in which he is seeking advancements under the Deed, to deny and relitigate the question of whether he subjected a young woman to a serious sexual assault, in circumstances where an arbitral tribunal, which was the exclusive forum to determine that question in a full and fair hearing, conclusively determined that question against him. In fact they could only consider it outrageous, and an affront to justice.*"

62. This pivotal argument was at first blush compelling. In the circumstances, it is not a valid answer to suggest that the Appellant has no business advancing what appears to be an objection only Ms Spottiswoode could properly advance. The Appellant, after its subsidiary has been found civilly liable for serious mistreatment of a former employee, must surely be entitled:

(a) as a privy of Afiniti Inc, to accept that it is bound by the Award; and

(b) positively to rely on the Award to prevent aggravating the harm that has been caused because any other course would be inconsistent with modern notions of commercial morality and risk serious damage to its corporate brand.

63. *Prima facie*, it is an abuse of process for the Respondent to seek to relitigate the issues determined by the Award before the Bermudian courts. Various judicial statements of principle were relied upon by the Appellant. In *Tinkler-v-Ferguson* [2021] EWCA Civ 18, Jackson LJ summarised the relevant principles in the following terms:

> "*35. In summary, the power to strike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act.*"

64. Mr Potts KC added important strokes of colour to what initially appeared to be a black and white picture. Most significantly, he pointed out that the Spottiswoode Proceedings are not solely concerned with undermining the Award. In part at least, they seek to enforce the confidentiality provisions of the arbitration agreement, which Mr Chishti believes Ms Spottiswoode has breached. In these circumstances, this Court ought not in my judgment to make abuse of process findings detached from the advancement application which the Supreme Court may still potentially be required to determine. Neither this Court nor the Supreme Court has received the benefit of full argument on the nature of claims asserted in the Spottiswoode Proceedings and precisely how they potentially undermine the Award or as to the extent that they do not do so.

65. Apart from these considerations, it is important not to lose sight of the proper course of the advancement of expenses proceedings pursuant to the Deed. Properly construed, the Deed contemplates the following:

(a) where there is a *bona fide* dispute about whether an expenses claim falls within the scope of the Deed, whether the underlying proceedings are potentially indemnifiable must first be determined by independent counsel and/or the Supreme Court;

(b) the merits of the advancement claim, including an evaluation of the extent to which the claim is an abuse of process in relation to all or part of the underlying proceedings, will only ordinarily be appropriately determined after the *prima facie* indemnifiable determination has been made in the contractually agreed manner.

66. In the present case it is, to say the least, seriously arguable that the Spottiswoode Proceedings are not *prima facie* indemnifiable because they were initiated by Mr Chishti. This Court was told that steps are currently in train to have that issue finally determined through the contractually agreed mechanism. The Deed provides that the Company is bound by independent counsel's determination in favour of the Indemnitee. That makes it inappropriate for this Court to make a summary determination that no genuine dispute exists about whether the underlying proceedings are *prima facie* indemnifiable, against the Indemnitee, at the present stage. The exclusive *fora* for adjudicating that issue are independent counsel and/or the Supreme Court in an application made for that purpose.

67. The abuse of process argument theoretically would only need to be adjudicated to the extent that the Respondent succeeds in establishing that either (a) one or more of the underlying proceedings are *prima facie* indemnifiable or (b) that the Appellant cannot in good faith credibly contend that a proceeding is not *prima facie* covered by the Deed. Only (a) is apparently engaged at the present juncture. However, in the present case, the Respondent commenced proceedings for advancement in respect of the Spottiswoode Proceedings which are clearly an abuse of process, but only to the extent that they seek to relitigate the findings of the Award. The ambit of that extent ought to be determined, if necessary, at this stage. I say "if necessary" because the Spottiswoode Proceedings may be unindemnifiable simply because they were initiated by Mr Chishti without the permission of the Appellant's Board. Such a conclusion would avoid the need to assess what advancement (if any) was needed in respect of Proceedings that were only partially indemnifiable.

68. In my judgment, it is not appropriate or necessary to record a finding more specific than that in the context of the present interlocutory appeal. Defining the precise extent to which the Respondent is relitigating the Award would require further analysis of the precise claims advanced in the Spottiswoode Proceedings which are governed by US law. Those issues were not fully canvassed before the Supreme Court or before this Court. For these reasons, I am bound to conclude that the Judge erred in failing to adjudicate the Appellant's abuse of process arguments, which ought to have been accepted to the extent that they are capable of showing that the Appellant is relitigating the Award. The Appellant's third ground of appeal is also allowed as regards the challenge to the finding that the judicial determinations contained in the Award were inadmissible. They were admissible in support of the abuse of process claim.

Merits of the Respondent's Cross-Appeal

69. The Cross-Appeal had two main strands to it:

(a) the Judge should have struck-out Logan 2 and its exhibit entirely because it was filed late and without permission and wrongly sought to support arguments which ought not to have been deployed in opposition to the Respondent's summary claim; and

(b) because the Respondent's right to summary relief had been impeded, this Court ought to either grant relief itself or direct the Supreme Court to expeditiously do so.

70. The first limb of the Cross-Appeal rings somewhat hollow because the Judge ruled the IC Determination was inadmissible and excluded reliance on the findings which formed the basis of the Award. The timing of the filing of Logan 2 was, as regards the IC Determination, made that very day, unsurprising. The late production of the Award was less excusable, but in my judgment the Judge was entitled to grant retrospective leave for it to be filed. Contrary to the expectations of Mr Potts KC, substantive relief could not realistically be expected to have been granted on 20 September 2023. This was due to a combination of factors including:

(a) the Respondent's own attempts to deliver a knock-out blow to the Appellant's opposition to the AOS by applying to strike-out Logan 2;

(b) the fact that the Deed was a bespoke document the construction of which was understandably subject to genuine controversy; and

(c) the fact that, properly construed, the Respondent was not entitled to be granted summary relief in circumstances where genuine controversy existed as to whether the underlying litigation fell within the scope of the Deed at all.

71. The Judge clearly treated the matters she was required to decide as interlocutory in nature, rejecting the Respondent's procedural complaints and the additional submission that it was not open to the Respondent to raise significant factual disputes. She held:

> "74. *Beyond the Plaintiff's complaint that the Defendant breached the timelines imposed by Mussenden J's directions, Mr. Potts KC took issue with the prospect*

> *of the parties engaging in any substantial factual disputes. Having plunged away at various procedural irregularities, Mr. Potts KC criticized the Defendant for having tainted these proceedings with factual dissension by its assertions that Mr. Chishti sexually assaulted and harassed Ms. Spottiswoode, notwithstanding his denials…*
>
> *76. RSC O. 5/4 does not bar the parties from ventilating serious factual issues to be determined. It is procedural guidance. The question for the Court is whether the factual issues are sufficiently relevant and material to warrant further procedural directions as to how they might be addressed at a trial.*"

72. The first limb of the Respondent's Cross-Appeal must be dismissed. The clearly over-ambitious second limb of the Cross-Appeal was only advanced in oral argument in muted form. The suggestion that this Court should determine the entirety of the AOS was sensibly not pursued. Instead, Mr Potts KC sought to characterise as a modest alternative this Court ordering the Appellant to pay an unarguably due minimum amount, in the region of $1 million, rather than the full $45 million the Respondent sought. As a final fall-back position, this Court was encouraged to give firm directions to the Supreme Court to deal with the AOS and the Respondent's application for interim relief expeditiously.

73. The first of these two submissions assumed that this Court was able to properly determine that a minimum amount of expenses would inevitably be found to be due. Reliance was primarily based on the notion that the sole time for evaluating whether or not a claim was indemnifiable was at the conclusion of the underlying proceeding(s). Reliance was also placed on the fact that the Respondent was, in accordance with the relevant clause in the Deed, willing to undertake to repay any amounts paid by way of advance which were ultimately found not to have been properly due. That construction of Article 2 of the Procedural Appendix is firmly rejected. Prompt payment is in my judgment only required to take place in response to an advancement claim which is a "valid" one. This assumes that:

(a) it is agreed or has been determined that advancement claim relates to a proceeding which is prima facie indemnifiable under the Deed; and

(b) the quantum of the claim is reasonable.

74. An assumption that the Respondent's advancement request is valid in this sense and has triggered an obligation to meet it within 10 days is not justified in respect of either:

(a) the three sets of proceedings initiated by Mr Chishti without Board approval which appear to fall outside the scope of the Deed (the Spottiswoode Proceedings and the Respondent's New York Proceeding); or

(b) the Trade Secrets Proceedings, in light of the non-binding IC Determination in favour of the Appellant.

75. It is plainly at least arguable that each of those proceedings are not *prima facie* indemnifiable so that the advancement requests the Respondent has made are not valid. There is no proper basis for this Court to grant the interim relief the Respondent contends the Supreme Court ought to have granted. Further, in respect of the TRG proceedings I would regard it as appropriate for the procedure to which I have referred at [47] above to take its course.

76. Clearly the Supreme Court ought to promptly adjudicate the pending *de novo* application for a final determination of whether the Trade Secrets Proceedings are *prima facie* indemnifiable, and any similar applications which may be filed. However, I see no justification for making any formal directions in that regard. The Respondent's cross-appeal is accordingly dismissed.

Summary

77. For the above reasons, the findings I have arrived at in relation to the Appellant's appeal are that:

(a) Ground 1 is allowed in part. The IC Determination was admissible as evidence of what occurred in the first stage of the contractually agreed process for determining whether the Trade Secrets Proceedings are indemnifiable. To the extent that the Appellant contended that it had binding effect (its primary argument), Ground 1 is dismissed;

(b) Ground 2 is allowed. The Judge ought to have ruled that the Award was admissible in evidence pursuant to sections 40 and 41 of BICA and that it was arguably an abuse of process to relitigate the issues determined against the Respondent by the Award. However, the Court declines to make abuse of process findings which will have to be determined by the Supreme Court in future proceedings~~;~~

(c) Ground 3 is refused. The Judge correctly rejected the argument that the Award gave rise to an issue estoppel.

78. The Respondent's Cross-Appeal is dismissed. The Judge rightly declined to strike-out Logan 2 and no grounds have been made out for this Court to order the Appellant to make an interim payment on account of the Respondent's advance of expenses claim.

79. I would direct the parties to submit written submissions on costs within 14 days of the date of delivery of the present Judgment.

SIR ANTHONY SMELLIE JA

80. I agree and wish to add only the following observation. While, for the reasons expressed by Kawaley JA, I consider that we are bound by the generality of the Privy Council's dictum from *Munni Bibi*, the universal applicability of its three-pronged test is brought into question by circumstances such as those presented here by the Award where co-defendants, having joined common cause, were found jointly liable without the need to resolve any conflict which might otherwise have arisen for resolution between them in the case. One might think that in such circumstances, an issue estoppel to prevent either of them from relitigating the outcome would, a fortiori, have arisen.

SIR CHRISTOPHER CLARKE, P

81. I, also, agree, and add three observations of my own.

82. Firstly, in relation to the question of issue estoppel my agreement comes with some reluctance. It seems to me that we are bound by the decision of the Privy Council to which Kawaley, JA, has referred; and that it is not possible to treat the conditions there expressed as confined to the facts of that particular case. I have, however, difficulty in accepting that neither Afiniti Ltd nor Mr Chishti should be bound by the finding of an arbitration to which both Afiniti Ltd.'s privy and Mr Chishti were parties, simply because they made common cause. Stanley Burnton J (as he then was) had a similar difficulty in the first instance decision in *Sweetman v Nathan* [2002] EWHC 2458 at [59], where he found an issue estoppel to arise between two defendants as a result of a decision in an earlier action against the two defendants who had not, in that action, taken issue with each other.

83. Secondly, on the material presently before us, it seems to me clear that Mr Chishti is not entitled to an indemnity (or, therefore, an advancement of costs) in relation to proceedings which he has himself initiated. I am, however, content for the matter to be determined by the contractually agreed mechanism.

84. Thirdly, I regard it as entirely open to the Court to decline to make any advance of expenses when there is a genuine dispute as to whether the Proceedings are prima facie indemnifiable before the procedure specified in the Deed has been carried out, since, until that is done, it is unclear whether any claim to an advance is a valid one.