

Cases

Recent Cases on Serious Irregularity

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INTRODUCTION

Recent case law shows that challenging an arbitrator's award because of serious irregularity is no easy option. There are limited grounds upon which a challenge can be made. Even if a case falls within one of them, a party will only succeed in its challenge if it can show that it has suffered a substantial injustice. A technical breach will not suffice. Cases which, under the Arbitration Act 1950, would have been remitted back to the arbitrator because of technical misconduct, will now not be remitted because they either do not fall within the limited grounds or because they have not caused substantial injustice.

Over three years have elapsed since the Arbitration Act 1996 (AA 1996) came into force and there is still little case law on the subject of serious irregularity. Most cases in which it has been alleged have had it as an alternative to either a breach of substantive jurisdiction or an appeal on a point of law. If one of the aims of AA 1996 was to restrict the intervention of the courts in dealing with arbitration proceedings, this lack of case law illustrates an unqualified success.

Challenges for serious irregularity must be made within 28 days of the date of the award. The lack of case law therefore can only be explained on the basis that parties do not believe they can overcome the hurdles involved with making a challenge.

AA 1996 s68(1) states:

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 s73) and the right to apply is subject to the restrictions in s70(2) and (3).

Only an award can be challenged. This includes both a partial award and a final award but not an interim decision. Serious irregularity is not, however, limited to the content of the award; the serious irregularity may relate to matters affecting the tribunal or the conduct of the proceedings.

The grounds on which a challenge can be made for serious irregularity are set out in s68(2)(a) to (i):

- (a) failure by the tribunal to comply with s33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction, s67);
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

This article will focus on the grounds of challenge in s68 which have recently come before the courts.

FAILURE TO COMPLY WITH s33 (GENERAL DUTY OF TRIBUNAL)

AA 1996 s33(1) imposes a mandatory duty on arbitrators to:

- (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

Section 33(2) states that arbitrators must exercise this duty in making decisions not only on matters of procedure and evidence but also in respect of all the other powers. Section 33(1)(a) reflects the arbitrator's common law duty to act in accordance with the principles of natural justice. This requires that each party have an equal opportunity to present its case in reply to its opponent's. Each party must know the case it has to meet. Arbitrators may not be biased towards any party.

A failure by arbitrators to act in accordance with the principles of natural justice will amount to a serious irregularity. Whether there is substantial injustice will depend on the facts. Most cases that allege a serious irregularity also allege a breach of AA 1996 s33(1). In *Rustal Trading Ltd v Gill & Duffus SA*,¹ Moore-Bick J held that an allegation of impartiality was subject to the same test as that in AA 1996 s24(1). He applied and summarised the principles which apply at common law to the question of apparent bias, relying on dicta of Lord Goff in *R v Gough*:²

having ascertained the relevant circumstances, the Court should ask itself whether having regard to those circumstances, there was a real danger of bias on the part of a relevant member of the Tribunal in question in the sense that he might unfairly regard (or have unfairly regarded) the favour or disfavour of the case of a party under consideration by him.

Moore-Bick J further relied on *Laker Airways Inc v FLS Aerospace Ltd*,³ where Rix J held that AA 1996 s24 lays down an objective test which reflects the position at common law, saying:

Perhaps the two most important principles to bear in mind in the present case are, first, that the Court must make its judgment on the basis of the circumstances as it finds them to exist and is not concerned with whether the Arbitrator did or did not in fact allow his mind to be affected by them; secondly, that the circumstances must be such as objectively to justify genuine doubts as to the Arbitrator's impartiality.

The *Gough* test has not, however, been universally accepted. In *Locabail (UK) Ltd v Bayfield Properties Ltd* the Court of Appeal referred to the *Gough* test:⁴

It has not commanded universal approval elsewhere; Scotland (*Doherty v McGlennan* 1997 SLT 444), Australia (*Webb v The Queen* 181 CLR 41) and South Africa (*Moch v Nedtravel (Pty) Ltd* 1996 (3) SA 1) have adhered to the reasonable suspicion or reasonable apprehension test, which may be more closely in harmony with the jurisprudence of the European Court of Human Rights . . .

However, the Court of Appeal stated that, whatever the merits of the reasonable suspicion or reasonable apprehension test, the *ratio decidendi* of the House of Lords in *Gough* was binding on every subordinate court in England and Wales.

In *AT&T Corporation v Saudi Cable Co.*⁵ the Court of Appeal was asked to consider whether in arbitration proceedings the test of reasonable suspicion should apply. It held that it would be surprising if a lower threshold applied to arbitration than to the courts and held that the test for bias was the same for both judges and arbitrators.

Where there is an arbitration under the rules of a trade association, it can be assumed that the parties have agreed that the dispute should be resolved by persons who are actively involved in that trade. This is a benefit which arbitration has over litigation. Moore-Bick J in *Rustal Trading* referred to *Tracom SA v Gibbs Nathaniel (Canada) Ltd*⁶ and said: 'In the case of a Trade Tribunal the fact that an Arbitrator has previously had commercial dealings with one or both parties has never been

¹ [2000] 1 LI Rep 14.

² [1993] AC 646.

³ [1999] 2 LI Rep 45, 48.

⁴ [2000] 2 WLR 870, 883-4.

⁵ *The Times*, 23 May 2000.

⁶ [1985] 1 LI Rep 586.

regarded as sufficient of itself to raise doubts about his ability to act impartially.’

In *Rustal Trading* the fact that one of the parties had been in dispute with the arbitrator on a previous occasion was not sufficient in itself to raise doubts about his impartiality to deal with the present arbitration. The issue was whether the event which had previously occurred could be regarded as a simple part of the ordinary incidents of commercial life. Moore-Bick J held that it was important for every trade arbitrator to be alert to the possibility that particular circumstances of a case might, viewed objectively, give rise to justifiable doubts about his ability to act impartially. In *Save & Prosper Pensions Ltd v Homebase Ltd and Peter J Clark*⁷ the court held that the relationship between the arbitrator and associate company of one of the parties was such as to give rise to justifiable doubts about his ability to act impartially.

In *Fox v PG Wellfair Ltd*⁸ the court had held that it was a fundamental principle of natural justice that an arbitrator must not act on secret knowledge. This issue was raised in *Sanghi Polyesters Ltd (India) v The International Investor*⁹ where the arbitrator made reference in his award to 18 textbooks and other works which had not been referred to by either side’s experts or by the arbitrator in the course of the proceedings. Mr D. Mackie QC, sitting as a deputy High Court judge, held that there is a distinction between litigation and arbitration and that an arbitrator is not obliged to imitate the usual practice of an English judge; and that on the facts the arbitrator had also been given additional powers to act as expert. However, the deciding point in favour of finding that there was no serious irregularity under s68 was that the applicant could not point to any injustice caused by the arbitrator’s conduct in citing the additional material.

*Egmatra v Marco Trading Corpn*¹⁰ focused on the need to give each party a reasonable opportunity of putting its case. The claimant’s solicitor had written to the arbitrators suggesting that expert evidence might assist the tribunal. The arbitration was completed under London Metal Exchange (LME) Rules, art9.2 of which states: ‘The Tribunal may

allow, refuse, or limit the appearance of witnesses, whether witnesses of fact or expert witnesses.’ The arbitrators declined to hear expert evidence from the claimant. The claimant alleged that the expert evidence would have shown that there had not been a breach of contract. Tuckey J held that there had been no serious irregularity in the conduct of the arbitration; that there was no evidence that the arbitrators would have reached a different conclusion; and that they were well aware of the points raised by the claimant’s expert saying: ‘I can see nothing in the criticism which is made of them in this respect, still less can I see anything which could possibly be characterised as a substantial injustice by their refusal to allow expert evidence to be put before them.’

In *Ranko Group v Antarctic Maritime SA*¹¹ Toulson J was asked to consider whether there had been a serious irregularity in the conduct of the proceedings where the arbitrator refused to order disclosure of documents. It was alleged that disclosure was required in order to reach a just decision on the claim. Toulson J held:

Under the small claims procedure there is no provision for discovery as such, but the arbitrator has power to order the production of documents if he considers it appropriate. In the present case, having regard to the material which was before him, he did not consider it appropriate to make the Order for production of the logs which Ranko and Verbist sought. Under the Arbitration Act s34, questions of that kind are expressly given to the arbitrator. This Court would be extremely slow to conclude that an arbitrator’s decision in a small claims procedure on an issue of that kind constituted serious irregularity within the meaning of s68. The matter complained of here falls far short of anything which could properly be regarded as serious irregularity. Nor am I persuaded that there is any foundation for concluding that the Arbitrator’s decision has caused substantial injustice within the meaning of s68 (2). That challenge therefore also fails.

In only two cases have the courts concluded that there has been a serious irregularity and that substantial injustice has been caused to one of the parties. In *Gbangbola v Smith and Sherriff*¹² the arbitrator failed to give a party the opportunity to make representations on the issue of costs. The

⁷ (2 March 2000, Ch D Judge Rich QC unreported). This case involved an application under AA 1996 s24(1)(a).

⁸ [1981] 2 LI Rep 514.

⁹ [2000] 1 LI Rep 480.

¹⁰ [1999] 1 LI Rep 862.

¹¹ [1998] ADRLJ 35.

¹² [1998] 3 All ER 730.

court held that this was a serious irregularity which justified its intervention. In *Pacol Ltd v Joint Stock Co. Ltd Rossakhar*,¹³ Colman J held that, where arbitrators had opened up issues of liability which had previously been agreed by the parties but not addressed in the arbitration, a serious irregularity occurred. He stated that it was particularly important in arbitrations conducted on documents only that arbitrators should be alive to the danger of introducing into their awards matters which had not been or had ceased to be in issue. There had been fundamental breaches of natural justice:

what has happened in this case is that an award has been made on a basis which the claimants never had a reasonable opportunity of making the subject of their submissions or the subject of evidence. They were never given the opportunity of addressing the tribunal on the effect of the agreement of 18 February on liability. They were never given the opportunity of addressing the tribunal in relation to the legal principles which ought to apply in the determination of the question of their liability arising out of that agreement. They were never given the opportunity of addressing the tribunal on whether there was any residual accrued liability left by that agreement, whatever might be its effect in respect of future performance. Further, they were never given the opportunity of adducing evidence relating to the question arising, or which might arise, out of the agreement of 18 February 1998 whether the respondents were indeed able to perform the contract by making the necessary payments at a later stage, that is to say by 24 April 1998.

In those circumstances, I have no hesitation in concluding that there has in the present case been a serious irregularity within the meaning of s68(1) of the 1996 Arbitration Act. Accordingly this award will have to be set aside.

FAILURE BY THE TRIBUNAL TO DEAL WITH ALL ISSUES PUT TO IT

It is a principle of common law that a final award must deal with all the issues put to the tribunal.¹⁴ A final award that does not do so is imperfect. This does not mean that arbitrators must deal with each individual item separately but they must take each item into consideration in arriving at their conclusion.¹⁵ Where, however, the parties expressly or by

inference intend each item in dispute to be dealt with separately, arbitrators are obliged to deal with it in that form. Such an inference may arise if the parties have agreed that their claims should be pleaded in the form of a Scott Schedule and arbitrators will be obliged to address each aspect of the Schedule. In *Ledwood Construction v Kier Construction*¹⁶ the arbitrator failed to address each of the issues raised in the Scott Schedule. The court held that the failure constituted misconduct and remitted the award to the arbitrator. Judge Hicks QC held:

There is really no room for doubt, to my mind, that both parties intended, expected and understood that the arbitrator would express his award by reference to the Scott Schedule. In my judgment failure on the part of the arbitrator, in the circumstances of that interlocutory history and of the conduct of the hearing, to frame his award in such a way as to enable the parties to see what his decision had been on each Scott Schedule item, would mean that, in Lord Donaldson MR's words, 'some aspect of the dispute . . . [had] not been . . . adjudicated upon as fully as or in a manner which the parties were entitled to expect'.

In *Husmann (Europe) Ltd v Al Ameen Development and Trade Co.*¹⁷ one issue was whether it was a serious procedural irregularity for the tribunal to fail to deal with issues that were put to it. Under the Arbitration Acts 1950 and 1979 the courts have remitted awards to arbitrators where there were clear failures to deal with the issues raised. In *Husmann* Thomas J held that the arbitrators had not failed to deal with the issues that were put to them but:

Even if I had considered that all of these points amounted to irregularity (which I do not) I would not have considered them, even cumulatively, as amounting to a serious irregularity. The arbitration award did deal with the two main issues that were put to the tribunal, namely the amount due from the Establishment or the Company to HCN and the amount of commission payable by HCN. Those were the fundamental issues in the arbitration and they are comprehensively dealt with in the award. I therefore conclude that this ground of the application fails.

Irregularities as to the form and content of an award will not be enough to found a challenge; for

¹³ [2000] 1 Ll Rep 109.

¹⁴ *Wakefield v Llanelly Railway and Dock Co.* [1865] 3 De G J & Sm 11.

¹⁵ *Sig Bergesen DY & Co v Mobil Shipping and Transportation Co.* [1992] 1 Ll Rep 460.

¹⁶ [1996] 68 Con LR 96.

¹⁷ (2000) New Law Digest (Case No. 200047501).

there to be serious irregularity there must be substantial injustice.

UNCERTAINTY OR AMBIGUITY AS TO THE EFFECT OF THE AWARD

The requirement that the award be certain and free from ambiguity derives from the common law, that an award which was uncertain was invalid.¹⁸ The test is whether the award is uncertain to the parties. The award may be uncertain to a third party but clear to the claimant and respondent. In *Plumber v Lee*¹⁹ an award which stated that interest should run from 'the date of the last settlement' was held to be valid, because the parties were not in disagreement about that date. An award that is ambiguous renders the award uncertain.²⁰ Where part of the award is uncertain, the courts may enforce the part that is certain and remit the remainder, if this is possible.²¹ In *Gbangbola* an application was made under s68 to challenge an award because, among other things, it contained ambiguities and uncertainties. The respondent argued that before making such a challenge the applicant was obliged to ask the arbitrator under s57 to correct that ambiguity or uncertainty and that failure to make such an application was a bar under s70(2)(b) to bringing a challenge under s68. Judge Lloyd QC rejected this argument on the facts of the case, saying: 'there might be an award in which there is uncertainty or ambiguity as to its effect, without there being uncertainty and ambiguity requiring the possibility of correction, or clarification or removal under s57(3)'. The ambiguities or uncertainties were not necessarily a bar to a challenge under s68, even if no application had been made under s57(3). The central issue was whether the uncertainty or ambiguity went to the part of the award that was in question:

[Counsel for the Respondent] says that the purpose of the Act is to ensure that both the arbitrator and the courts are not troubled by repeated applications, but also that the courts should have the totality of the arbitrator's views as clarified and with ambiguities removed in all respects before considering any appeal or process. He relies on the words of sub-sections (2)

and (3) in referring to any available process of appeal and any process of appeal or review. I see the force of that argument. It certainly must apply where the uncertainty or ambiguity has affected or may affect that part of a result which is in question (and also perhaps in some cases the reasoning leading to that result). However, one must carefully consider what would be the point of delaying an appeal on a matter which as here would be completely unaffected by any possible outcome of going back to the Arbitrator to clarify an ambiguity or uncertainty.

A challenge cannot therefore be made on the basis of uncertainty or ambiguity as to the effect of the award unless the party seeking to challenge has first referred the matter to the arbitrator for rectification. Only when the ambiguity and uncertainty remains after such a referral can a challenge succeed under this head. Where the sole cause of challenge is the ambiguity and uncertainty, the applicant can only make an application under s68 if it has first sought to remit the award back to the arbitrator to have the ambiguity and uncertainty removed under s57.

SUBSTANTIAL INJUSTICE

AA 1996 s68(2) states: 'Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant.' In all cases substantial injustice must be shown. Although AA 1996 does not define substantial injustice, the Report of the Advisory Committee of the Department of Industry (DAC) para. 280 gives guidance on how the words should be construed. This guidance has received judicial support in a number of recent cases. The Report states that the test for substantial injustice was intended to be applied to support the arbitration process and not to interfere with it and that it expected the courts to take action only where arbitrators had acted in a way that was far removed from what could reasonably be expected:

The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 is really designed as a longstop,

¹⁸ *Re an Arbitration between Marshall and Dresser* (1843) 3 QBR 878; *Margulies Bros Ltd v Dafnis Thomaidis & Co. (UK) Ltd* [1958] 1 LI Rep 250.

¹⁹ (1837) 2 M&W 495.

²⁰ *The Duke of Beaufort v Welch* (1839) 10 Ad & El 527.

²¹ *Miller v De Burgh* (1850) 4 Ex 809.

only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls for it to be corrected.

Mr D. Mackie QC cited para. 280 in *Sanghi Polyesters Ltd (India) v The International Investor*²² as indicating when a substantial injustice would occur.

In *Gbangbola* the court stated that it would view the pecuniary losses to the applicant as material in deciding whether or not there had been substantial injustice:

I am not satisfied that, and indeed I cannot see that, there has been, or will be, substantial injustice to the respondent as a result of these apparent uncertainties or ambiguities as to the affect of the award. This is particularly so in relation to the small item of window blinds and other matters, the monetary value of which is not large. Accordingly it is perhaps strictly not necessary to decide whether the award is uncertain as to its effect although in my judgment it is not, although there may well be uncertainties or ambiguities in the arbitrator's reasoning. Unless substantial injustice can be established there is no serious irregularity for the purposes of s68(2).

In *Egmatra v Marco Trading Corporation*²³ Tuckey J referred to the Report's comments on substantial injustice: 'So this is no soft option clause as an alternative to a failed application for leave to appeal. Substantial injustice has to be shown before the Court will intervene.'

In *Conder Structures v Kvaerner Construction Ltd*²⁴ a number of issues were raised as to whether an arbitrator had committed a serious irregularity in the conduct of the reference. Conder Structures alleged that by reason of failures by the arbitrator in the conduct of a reference, they would incur further costs and delay and had lost confidence in the ability of the arbitrator. Dyson J did not examine the particular allegations raised by the applicant but focused on the issue of substantial injustice under s68(2). He held that Conder's liability for costs, which was no more than a contingent liability, came nowhere near amounting to a substantial injustice. On the issue of loss of confidence in the arbitrator:

I do not accept an alleged loss of confidence in an arbitrator caused by an irregularity in the proceedings is capable itself of being substantial injustice. In my judgment, an applicant who evokes s68 must show that the irregularity has caused, or will cause him to suffer substantial concrete or substantive prejudice. It is not sufficient to show that the irregularity has demonstrated incompetence on the part of the arbitrator and has undermined the confidence of the applicant in the ability of the arbitrator. Loss of confidence is neither a sufficient nor a necessary condition of substantial injustice. It is simply not the test. It is possible for an arbitrator to commit an irregularity which raises a question as to his competence and yet which causes no injustice to either party, still less any substantial injustice.

On the third issue raised by Conder relating to delay, Dyson J stated:

I would not be prepared to hold that the delay of several months in entering into the arbitration will cause Conder to suffer substantial injustice. If Conder is successful at the end of the day, there is no reason to suppose the arbitrator will not award it interest on the sum awarded for the whole period during which it will have been kept out of its money. There is no evidence that Conder is in a parlous financial state, such that delayed payment would be likely to cause it serious harm and therefore substantial injustice.

These dicta were approved in *Hussmann*, where arbitrators, in breach of s37(1)(b), heard the evidence of an expert in Saudi law in the absence of parties, who were not given the opportunity to comment on that evidence at that meeting. During a subsequent hearing the expert admitted during cross-examination that there had been a hearing between him and the arbitrators. Thomas J held:

Although it was accepted on behalf of the respondents that to have this meeting had been unwise on the part of the tribunal, they submitted it was not an irregularity. I do not agree. It seems to me that on this occasion the conduct of the tribunal in holding this private meeting with the expert to discuss his draft report without obtaining the consent of the parties to such a course fell below the standards ordinarily to be expected of arbitrators. Their failure to inform the parties of the fact of the meeting immediately after was also, in my view, an irregularity.

Thomas J, however, considered that, although the arbitrators had made an error by meeting the expert and failing to tell the parties, it remained no more

²² [2000] 1 Ll Rep 480.

²³ [1999] 1 Ll Rep 862, 865.

²⁴ [1999] ADRLJ 305.

than simply an error. The conduct of the arbitrators did not raise a question about the competence of the tribunal. Furthermore, no prejudice or injustice flowed from that error, because the parties found out about that meeting during the expert's evidence and they had cross-examined him on the content of the meeting.

REMEDIES

Section 68(3) provides the remedies if a serious irregularity is shown.

- (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
 - (a) remit the award to the tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

The courts have not fully developed the law on the differing effects of setting an award aside and remitting it. In *Pacol*, Colman J was asked to set aside and remit an award. It was anticipated that the arbitrators would need to hear further submissions from the parties. Colman J commented: 'I do not understand how, if it is remitted, the arbitrators have jurisdiction under the rules to invite further comment.' It was accepted that the arbitrators had not acted in bad faith or with malice and the applicant was content for the matter to be remitted to them. After hearing leading counsel on the point, Colman J set the award aside, saying: 'Section 68 is a very curious provision.'

Mustill and Boyd write:²⁵

As regards setting aside, it is clear that the effect of an order is to deprive the award of all legal effect, so that the position is the same as if the award had never been made. It is much less clear what happens to the arbitration after the award has been set aside. Logically,

the consequence should be that the arbitration reverts to the position in which it stood immediately before the arbitrator published his award; i.e. that he is not yet *functus officio* and remains seized of the reference. We have not been able to find any reported cases in which this result (which has the same practical effect as remission) has been contemplated, and it would be entirely inconsistent with the assumption in the more recent cases that setting-aside should in the main be reserved for instances where the conduct of the arbitrator has made it undesirable to entrust him with the further conduct of the reference . . . It appears that so far as the courts have given any consideration to the consequences of setting aside, they have assumed that the Order not only annuls the award, but also disseizes the arbitrator of the reference, so that the whole of the arbitral process has to be recommenced. The dispute is, however, still susceptible to arbitration, albeit with a freshly constituted tribunal.

Unfortunately, the DAC Report makes no reference to s68 or its intended effect. Further, no guidance is to be found in any reported case as to the effect of s68(3)(c). On its face there does not appear to be any material difference between an order made under s68(3)(b) and s68(3)(c). Both orders make the whole or part of an award of no legal effect. A possible difference may be the effect the order has on the arbitrator's status. It would appear that an order to set aside has the effect of disseizing the arbitrator of the reference. It is possible that an order declaring the award to be of no effect would not have that result.

CONCLUSION

It is not expected that there will be many cases where a party will succeed on the basis of a serious irregularity. There are limited grounds on which an application can be made and even then a party must show that it has incurred substantial prejudice. The law relating to misconduct under the Arbitration Act 1950 will be of little assistance. An applicant making a challenge under s68 should consider carefully what order the court is being asked to make. Where a challenge is made under s68 then an applicant should further consider what order it requires from the court. As Colman J said: 'Section 68 is a very curious provision.'

²⁵ M. J. Mustill and S. C. Boyd, *Law and Practice of Commercial Arbitration in England*, 2nd edn (Butterworths, London 1989) 565.