JUDGMENT : Lord Justice Toulson: Commercial Court. 14th February 2007

Introduction

1. On 6 July 2001 Sumukan (or more precisely its corporate predecessor) entered into a written short-term consultancy agreement with the Commonwealth Secretariat ("the Secretariat") to provide services for the government of Namibia in developing a prototype online group purchasing scheme, which was intended to help manufacturers in sourcing the materials they needed.

2. The Secretariat was established at a meeting of Commonwealth Prime Ministers in 1965.

3. The Commonwealth Secretariat Act 1966 provided that the Secretariat should have the legal capacity of a body corporate. Section 1(3) of the Act (as amended by the Arbitration Act 1996) provided that every written contract entered into by the Secretariat, if it did not contain an express provision for the reference of any dispute in connection with the contract to arbitration, should be deemed to contain such a provision, and should accordingly be treated as an arbitration agreement for the purposes of part 1 of the Arbitration Act 1996.

4. The 1966 Act also provided the Secretariat with immunity from suit and legal process subject to limited exceptions, one of which was in respect of arbitration proceedings relating to any written contract entered into by the Secretariat.

5. The contract between Sumukan and the Secretariat contained an arbitration clause in the following terms:

"The Secretariat and the consultant shall endeavour to settle by negotiation and agreement any dispute which arises in connection with this contract. Failing such agreement the dispute shall be referred to the Commonwealth Secretariat Arbitral Tribunal [CSAT] for settlement by arbitration in accordance with its statute which forms part of this contract and is available on request."

6. The statute referred to was an internal statute of the Secretariat. The version then current was introduced in 1999. A revised version was introduced on 18 February 2004.

7. The 1999 statute included the following provisions:

"ARTICLE II

1. The Tribunal shall hear and pass judgment upon any application brought by:
(a) a member of the staff of the Commonwealth Secretariat;
(b) the Commonwealth Secretariat;
(c) any person who enters into a contract in writing with the Commonwealth Secretariat which alleges the non-observance of the contract…

ARTICLE IV

1. The Tribunal shall normally be composed of one member who shall be the President or if the President is for any reason unable to sit, some other member of the Tribunal designated by the President.

2. In exceptional cases where, in the opinion of the President the complexity of the matter requires it, the Tribunal shall sit as a three-member Tribunal empanelled by and including the President but no two members may be nationals of the same country.

4. The members of the Tribunal, all of whom shall be Commonwealth nationals, shall be of high moral character and must:
(a) hold or be qualified to hold high judicial office in a Commonwealth country;
(b) be jurisconsults of recognised competence with experience as such for a period of not less than 10 years.

5. The President of the Tribunal and four other persons shall be appointed by the Commonwealth Secretary General on a regionally representative basis after consultation with governments and the Commonwealth Secretariat Staff Association to be available to serve as members of the Tribunal. Each appointment shall be for a period of three years and may be extended for further periods of three years.

7. The President of the Tribunal shall hold office until a successor is appointed.

ARTICLE V

1. The Secretary-General shall make the administrative arrangements necessary for the functioning of the Tribunal, including designating a secretary who, in the discharge of duties, shall be responsible only to the Tribunal.

ARTICLE VI

1. Subject to the provisions of the present Statute, the Tribunal shall draw up its rules and shall determine its procedure.

ARTICLE VII

3. The seat of the Tribunal shall be the principal office of the Secretariat. The Tribunal may not exercise its functions elsewhere in the territories of the member countries of the Commonwealth.

ARTICLE IX

2. The judgment of the Tribunal shall be final and binding on the parties and shall not be subject to appeal. This provision shall constitute an "exclusion agreement" within the meaning of the laws of any country requiring arbitration or as those provisions may be amended or replaced.

ARTICLE XIII
The present statute may be amended by the Secretary-General. Before making any amendment, the Secretary-General shall seek the views of the President and shall consult with Commonwealth governments and the Commonwealth Secretariat Staff Association."

8. Rules made by the CSAT included the following:

"Rule 1
The President shall direct the work of the Tribunal.

Rule 2
If the President should cease to be a member of the Tribunal or should resign the office of President before the expiration of the normal term, the Secretary-General shall appoint a successor for the unexpired portion of the term.

Rule 3
The term of office of the President and members of the Tribunal, unless they sooner resign or for whatever reason cease to be members of the Tribunal, shall continue until the disposal of any applications commenced before them."

9. The 2004 statute was introduced by or with the approval of Commonwealth governments (to whom power to make future amendments was transferred by Article XIII). For present purposes, the most significant changes were to Article IV. The power of selection of the President and members of the Tribunal was transferred from the executive (the Secretary-General) to Commonwealth governments. Article IV now provided:

"5. (a) The Secretary-General shall appoint as the President and four other members of the Tribunal those persons selected by Commonwealth governments on a regionally representative basis.
(b) The President and members shall be appointed for four year terms provided that governments may agree, in the interests of continuity of Tribunal membership, that the Secretary-General should appoint not more than three of the five members initially for periods of two years only.
(c) Governments may re-select members for one additional term.

6. Before selecting a person for appointment as the President or as a member of the Tribunal, Commonwealth governments shall consider any views expressed by the Secretary-General and the Commonwealth Secretariat Staff Association."

10. There were also changes in the rules about hearings. The revised form of Article IV provided:
"1(a) The Tribunal hearing an application shall be composed of three members empanelled by the President. Unless the President otherwise decides, he or she shall be included in the panel and shall preside over the proceedings.
(b) If during the course of the proceedings, a member is, for any reason, unable to continue participating in a case for which he or she has been empanelled, the President may, if that inability seems likely to be of short duration, adjourn the proceedings; otherwise the President may assign another member to the case and order either a re-hearing or, with the consent of the Parties, continuation of the proceedings from that point.

2. No two members of the Tribunal may be nationals of the same country."

11. On 28 April 2003 Sumukan began proceedings against the Secretariat in the CSAT. The dispute involved, in particular, an issue about ownership of the website created by Sumukan.

12. An oral hearing took place in London from 8 to 11 February 2005. The Tribunal was constituted by Professor Duncan Chappell as President, Rt. Hon. Dame Joan Sawyer and Ms Anesta Weekes QC.

13. By an award dated 25 April 2005 the Tribunal held that the website was owned by the Secretariat.

14. On 23 May 2005 Sumukan issued a claim form under sections 68 and 69 of the Arbitration Act 1996.

15. Its application under section 69 for leave to appeal on the grounds of an error of law was considered by Colman J on 20 February 2006. At the end of the hearing he indicated that he would have given leave to appeal, because he considered that the Tribunal's ruling on ownership of the website was open to serious doubt, but he concluded that an appeal was excluded by Article 9.2 of the CSAT statute. (This article was the in the same form in the 1999 and 2004 versions.) He said that he would give his reasons in writing.

16. In his written judgment at [2006] EWHC 304 (Comm), [2006] 2 Lloyd's Rep 53, Colman J first considered the effect of Article 9.2 without reference to ECHR considerations. He then considered whether section 3 of the Human Rights Act 1998 and Article 6 of the Convention impacted on the enforceability of the exclusion agreement and concluded that they did not. An appeal against his judgment has recently been heard.

17. On 9 May 2006 Aikens J gave Sumukan permission to amend its claim form.

18. In brief, the present issues are whether the award should be declared to be of no effect or set aside, under sections 67 or 68, on grounds of lack of substantive jurisdiction or serious irregularity.

19. The matter came before me for an oral hearing on 15 and 16 November 2006. The proceedings had been served on the Secretariat which administers the CSAT but not on each member of the tribunal individually. After I had reserved judgment I was notified that Professor Chappell and possibly other members of the tribunal wished to make submissions. At a further directions hearing I said that I would be prepared to consider written

submissions from them. Professor Chappell made a statement dated 12 January 2007. The other tribunal members have said that they do not wish to make additional submissions.

The issues under section 67 and 68

20. In its original claim form, Sumukan made no complaint under section 67. As to section 68, it stated: *"For the avoidance of doubt, no allegations are advanced as against the arbitrator members of the Tribunal in person (individually or collectively qua Tribunal)."*

21. Its complaint under section 68 was that the CSAT was incapable of complying with the general duty of fairness under section 33 of the 1996 Act or with Article 6 because it was not a tribunal independent of the Secretariat.

22. In its amended pleading, Sumukan has withdrawn its previous statement that it makes no complaint about the arbitrators personally, but Mr Speaight QC has made it clear that he does not suggest actual bias.

23. The amended claim form also invokes the powers of the court under section 67 (lack of substantive jurisdiction) and section 24 (power of the court to remove an arbitrator). CPR 62.6 requires that where a claim is made under section 24, each arbitrator must be made a defendant. That was not done and Mr Speaight has not sought an order under that section at this stage.

24. The Secretariat submits that all the complaints are misconceived, but that in any event under section 73 of the 1996 Act Sumukan lost its right to make any of its objections by taking part in the arbitration and waiting until after it had lost before advancing them.

25. Sumukan contends that it did not know, and could not with reasonable diligence have discovered, the grounds for its objections at the time of the hearing and therefore section 73 has no application. It also argues that section 73 should be construed so as to comply with European human rights jurisprudence relating to the waiver of Article 6 rights, and that there has been no such waiver.

26. Sumukan's complaint under section 67 centres on the manner and duration of the appointment of Professor Chappell. One of the available grounds of challenge to a tribunal's substantive jurisdiction is that it has not been properly constituted: see section 30. Sumukan submits that Professor Chappell lacked jurisdiction to act as a member of the Tribunal both because of deficiencies in his manner of appointment and because his appointment had expired.

27. Under section 68 Sumukan complains that there was serious irregularity causing substantial injustice in that on an objective view the Tribunal lacked the necessary appearance of impartiality. Mr Speaight submitted that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias, albeit unconscious.

28. Mr Speaight relied in particular on the judgment of the Privy Council delivered by Lord Steyn in *Lawal* ***v Northern Spirit Ltd*** [2003] ICR 856. Lord Steyn cited the speech of Lord Hope in ***Porter v McGill*** [2002] 2 AC 357 at paras. 102-103, to the effect that the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased, and continued: *"The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under Article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in* ***Porter v McGill*** *[2002] 2 AC 357 has as its core the need for 'the confidence which must be inspired by the courts in a democratic society'…Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in* ***Johnson v Johnson*** *[2000] 201 CLR 488, 509, para. 53 by Kirby J when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious'."*

29. Mr Speaight's submissions under section 68 fell into two parts. He submitted that under the 1999 statute there was a structural lack of independence giving rise to an appearance of bias. Secondly, he submitted that the internal processes surrounding Professor Chappell's appointment were such as to give rise to reasonable perception of a risk of unconscious bias.

30. Mr Speaight made no criticism of the 2004 statute. His complaints therefore have no relevance in relation to Dame Joan Sawyer (the President of the Bahamas Court of Appeal and former Chief Justice of the Bahamas), who was appointed a member of the Tribunal under the 2004 statute. Moreover, for practical purposes, the position of Ms Weekes can also be disregarded. Although criticism was made by Mr Speaight of her initial method of appointment, before she became involved in the dispute she had been reappointed with the approval of Commonwealth governments. In substance, therefore, Sumukan's complaints concern the position of Professor Chappell. It is necessary to set out in some detail the history of his membership of the Tribunal, because it is central to the complaints made under sections 67 and 68.

Professor Chappell's membership of the CSAT

31. Professor Chappell undoubtedly fell at all relevant times within the category of "jurisconsults of recognised competence with experience as such for not less than ten years". He has had a distinguished academic career, principally in criminology and criminal law, and has held professorial and other teaching posts at well-known universities in Australia, England, the USA and Canada. He is a former commissioner of the Australian Law Reform Commission and from 1990 served as deputy president of the Australian Federal Administrative Appeal Tribunal.

He has also undertaken work for Commonwealth and United Nations institutions. In short, his legal credentials are impeccable. There is no evidence before me which would impugn his actual independence. (For the avoidance of doubt, I have not overlooked a criticism which Mr Speaight made about Professor Chappell's view regarding the decision of David Steel J in *Mohsin v Commonwealth Secretariat* (unrep) 1 March 2002 as to the court's jurisdiction over the CSAT, or the later observations of Michael Brindle QC in *Faruqi v Commonwealth Secretariat* (unrep) 26 March 2002 about Professor Chappell's view on the issue). Sumukan's complaint is not about his personal eligibility for appointment. It is about the manner of his appointment, and whether, notwithstanding his personal eligibility, the manner and circumstances of his appointment were such as to give rise to a perception of the possibility of subconscious bias in the mind of a reasonable person.

32. In 1999 the director of the Secretariat's Legal and Constitutional Affairs Division ("LCAD") put forward to the Secretary-General various names for possible appointment as members of the CSAT. The LCAD acts for the Secretariat in all arbitration proceedings, but it appears at this time also to have played a prominent role in organising the appointment of members of CSAT. The name of Professor Chappell was put forward by a senior member of the staff of the LCAD, Ms Dianne Stafford. She is an Australian lawyer and had first met Professor Chappell when she was employed in the Criminal Law Division of the Attorney-General's Department in Australia and he was chairman of the Institute of Criminology. She suggested his name because of his legal skills, his experience on the Administrative Appeals Tribunal in Australia and his lengthy experience in Commonwealth and international matters.

33. Without consulting Commonwealth governments as required by Article 4(5) of the 1999 statute, on 3 November 1999 the Secretary-General wrote to Professor Chappell:

"I believe that the legal and constitutional affairs division of the Secretariat has been in touch with you regarding the possibility of your being available to serve as a member of the Commonwealth Secretariat Arbitral Tribunal and I understand that you will be willing to do so.

I am therefore pleased to send you this formal letter of appointment as a member of the Tribunal in terms of Article 4.5 of the statute of the Tribunal."

34. In 2001 the President of the CSAT wished to retire without completing his full term of office for health reasons.

35. On 26 June 2001 Ms Stafford, now herself the Director of the LCAD, sent a memo to the Secretary-General suggesting that he could appoint as a replacement one of the existing Tribunal members, of whom there were three including Professor Chappell. She also suggested reasons for not appointing either of the other two. She added that whatever action was taken required consultation with the staff association and endorsement by governments. This was incorrect advice. The statute required consultation both with governments and with the staff association.

36. Ms Stafford must have sounded out Professor Chappell about his willingness to accept the Presidency, because on 17 July 2001 he sent her a fax from Sydney to say that his minister was happy for him to serve in the proposed position.

37. A handwritten note of Ms Stafford dated 19 July 2001 records that the Secretary-General had spoken to the chair of the staff association about his intention to appoint Professor Chappell.

38. On 20 July 2001 Ms Stafford wrote on behalf of the Secretary-General to the Australian High Commissioner in London (but not to other Commonwealth governments) to advise him of the Secretary-General's wish to appoint Professor Chappell as President of the CSAT.

39. On 30 July 2001 the Secretary-General wrote to Professor Chappell formally asking him to accept the position of President until January 2002, when his predecessor's term of office was due to expire.

40. On 31 July 2001 the Secretary-General issued a circular letter, no. 17/2001, to Commonwealth governments stating:

"The rules of the Tribunal require that when a President resigns mid-term I shall appoint a successor for the remainder of the term of the President. Accordingly I have asked Professor Duncan Chappell of Australia who himself was appointed a member of the Tribunal in November 1998, to take over as President of the Tribunal until the expiry of the term of the President in January 2002."

41. Mr Nicholls QC invited me to view this letter as a form of consultation but he did not press the argument. In reality it was a notification of action taken rather than consultation about a possible course of action.

42. By January 2002, when Professor Chappell's appointment was due to end, no steps had been taken either to reappoint him, after proper consultation, or to appoint another person as President.

43. The next relevant event was a meeting on 29 May 2002 between Mr Winston Cox, Deputy Secretary-General, and the Chair and Vice-Chair of the Staff Association. A minute of the meeting recorded:

"2. Mr Cox informed the CSSA representatives that the Secretary-General had delegated to him the authority to appoint a chair of the CSAT pursuant to Article 4 of the CSAT statute. The Secretary-General was named in a matter before the CSAT and wished to avoid any conflict of interest in CSAT appointments.

3. Mr Cox advised the CSSA that, after giving due consideration to the members of the CSAT, it was his intention to appoint Mr Duncan Chappell as the Chair."

44. A comment was also noted that some staff had expressed concern about Professor Chappell's association with the Director of LCAD, who was the Secretariat's chief in-house counsel. For the avoidance of doubt, I stress that whatever might or might not be read into the comment there is now no suggestion of personal intimacy; they were professional colleagues who had come to know each other socially. After further informal discussions, the representatives of the staff association confirmed to Mr Cox that they had no objections to Professor Chappell's appointment. However, no such further appointment of Professor Chappell was made at that stage or thereafter.

45. On 8 July 2002 Mr Cox issued a circular letter stating:

"The Secretary-General's circular letter no. 17/2001 advised you that upon the mid-term resignation of the founding President of the Commonwealth Secretariat Arbitral Tribunal he had, in reliance on the rules of the Tribunal, appointed Professor Duncan Chappell of Australia to serve as President of the Tribunal for the remainder of the original term of appointment of Justice Cross. That term of office has now expired and the Secretary-General has authorised me to deal with matters relating to the Tribunal.

Professor Chappell is in the course of handling three cases one of which has been set down for hearing and two other applications have commenced. Accordingly it is my view that it would be inappropriate to seek to make any new appointment at this time.

The statute of the Tribunal states that 'the President of the Tribunal shall hold office until a successor is appointed'. The rules of the Tribunal expressly provide for a situation where the term of office of the President or a member expires when applications have commenced before them. I therefore propose that Professor Chappell remain as President of the Tribunal. I will consult with governments, as is required by the statute of the Tribunal when circumstances permit the making of a new appointment as President of the Tribunal.

I am sure that you will agree that the course of action I propose is the only possible one in the circumstances. If I do not receive opinions to the contrary by 15 August 2002 I shall advise Professor Chappell accordingly."

46. It was not argued on behalf of the Secretariat that this process constituted an appointment of Professor Chappell. Rather, Mr Cox was giving his reasons for not considering it necessary or appropriate to make an appointment (as he had been intending to do at the time of his meeting with representatives of the Staff Association two months earlier).

47. Professor Chappell's status therefore depended on Article 4.7 and/or Rule 3 (to which Mr Cox referred in the third paragraph of the circular).

48. Article 4.7 has in my view to be read with the remainder of the article. Under Article 4.5 the President was to be appointed for a period of three years after consultation with governments. It would be inconsistent with the object of that provision for the Secretary-General to extend indefinitely the President's term by simply taking no steps to initiate the appointment of a successor. I would read the purpose of Article 4.7 as being to prevent an interregnum if, despite proper efforts being made to appoint a President in accordance with Article 4.5, an interregnum would otherwise have occurred (for example, because of a short delay in a new appointee's availability to take up office).

49. The rules are subject to the statute, and I would read Rule 3 as having an interim purpose, i.e. of permitting members of a tribunal to continue to hear an application once they had embarked on it, but not as a basis for deferring the entire appointment process under Article 4 of the statute.

50. In any event, the cases referred to in the second paragraph of Mr Cox's circular were concluded by November 2002, at which point the CSAT had no outstanding cases.

51. Still nothing was done to regularise Professor Chappell's position or to appoint a successor.

52. Sumukan began its arbitration on 28 April 2003.

53. On 26 June 2003 Mr Cox wrote to Professor Chappell apologising for not having answered letters from him and saying:

"We share your concern that action be taken to place the membership of the Tribunal on a firm footing and are conscious that your own position as President rests, at this time, on Article 4.7…I see the way forward now as having a revised Statute for the Tribunal approved by Commonwealth governments in the next few months and hopefully well before heads of government meet in Nigeria late this year.

As you will see from the draft statute with this letter, the system of appointment by the Secretary-General is to be replaced by a system of selection by member governments. We have not yet drafted the transitional provisions that will be needed to deal with the terms of current members….

If you are agreeable to remaining as President until governments select new candidates for appointment I would be most grateful."

54. On 29 October 2003 the Secretary-General issued a circular letter about proposed changes to the statute. The letter stated:

"The major revision proposed is to the selection process for the Tribunal members. I am currently responsible to appoint the Tribunal members on a regionally representative basis, after consulting with governments and the Commonwealth Secretariat Staff Association (CSSA). With the proposed amendments to Article 4, the responsibility

for the selection of Tribunal members would rest with governments. My views, as well as those of the CSSA, would be considered by governments before the selections would be made. This change is generally consistent with the approach adopted by other international organisations and would allow member governments, who are independent from the Tribunal proceedings, to have a more direct role in selecting the appropriate jurists to serve on the Tribunal…

I am keen that we expedite the process of amending the statute so that it is universally accepted as fully consistent with the principles of fairness, transparency and international human rights law…"

55. As already recorded, the new statute was finally approved and came into force on 18 February 2004.

56. In July 2004 Professor Chappell determined that the constitution of the Tribunal to hear Sumukan's claim should be himself, Ms Weekes and Dame Joan Sawyer, and Sumukan was notified accordingly. At that stage the hearing was set to begin on 23 August but it later had to be postponed.

57. On 9 September 2004 Ms Weekes conducted a directions hearing. Among other things, she directed that on the first day of the oral hearing (which was then due to be 3 November 2004) the Tribunal would rule on the Secretariat's submission that it had no jurisdiction to deal with part of Sumukan's claim which alleged slander and negligent misrepresentation.

58. In October 2004 Mr Justice Banda was appointed to be the President of the CSAT. He took up his duties on 1 January 2005.

59. Mr Cox's letter to Professor Chappell dated 26 June 2003 had referred to the need to draft transitional provisions to deal with the terms of current members, but none were drafted. There was some discussion in argument about the effect of the change in statute in terms of the contract between the parties. It does not seem to me to be critical, but I would construe the reference to the statute in the contract as a reference to the statute in force at the relevant time. In other words, I would accept (and Mr Speaight does not dispute) that Dame Joan Sawyer was validly appointed for the purposes of the contract, although she was appointed under the terms of the 2004 statute.

60. The full hearing did not commence on 3 November 2004. Instead there was a further directions hearing at which it was ordered, among other things, that the parties were to file written submissions on the jurisdiction issue identified in Ms Weekes' directions by 15 December 2004, after which the Tribunal would aim to give a written ruling by 21 January 2005. The substantive hearing was re-fixed for dates in February 2005, when it duly took place.

Did Professor Chappell have jurisdiction to act as an arbitrator in 2005?

61. Professor Chappell received two appointments. The first appointment was by the Secretary-General's letter dated 3 November 1999 appointing him to be a member of the Tribunal. The second was by the Secretary-General's letter dated 30 July 2001 inviting him to be President until January 2002, which offer was formally accepted by Professor Chappell on or about 24 August 2001. Neither appointment complied with the consultation requirement of the 1999 statute. The only basis for his continuation after January 2002 was either Article 4.7 or Rule 3. If I am right in thinking that the purpose of Article 4.7 was to prevent an interregnum before a successor could take up office, it was unsatisfactory for Professor Chappell to remain in office for a lengthy period when nothing was done to make a further appointment. However, it does not follow that his appointment as President lapsed on 31 December 2001. Despite the unsatisfactory circumstances I conclude that Professor Chappell remained President within the letter of the statute by reason of Article 4.7 until he was succeeded by Mr Justice Banda on 1 January 2005.

62. The question remains whether Professor Chappell had jurisdiction to continue to act in the arbitration after 1 January 2005. This depends on Rule 3. It could be argued that on a strictly literal reading of Rule 3 the President's jurisdiction to hear any case would terminate automatically on his ceasing to be President because of the words "unless they sooner resign or for whatever reason cease to be members of the Tribunal", but that would defeat what I take to be the intention of the rule, namely that a panel should be able to dispose of matters which it had begun to deal with before the term of one of them expired, in order to avoid potential delay and wastage of time and costs. Mr Speaight did not suggest that, so construed, the rule would be ultra vires.

63. In this case by 31 December 2004 the arbitration had reached the point that the constitution of the panel had been fixed, directions had been given on various matters and it was ready for the substantive hearing (which was in fact overdue but there had been a late adjournment). In my judgment the panel was on any sensible view by that stage seized of the arbitration and Rule 3 authorised Professor Chappell to continue to act as arbitrator until its conclusion.

Was there serious irregularity causing substantial injustice?

64. The first limb of Sumukan's argument was that because under the 1999 Statute
    (1) the Tribunal was appointed by the head of the Secretariat which would always be a party to the case before the Tribunal,
    (2) the Secretariat was responsible for providing administrative arrangements for the Tribunal and meeting its expenses, and
    (3) the Secretary-General had power to amend the Statute, a fair-minded observer would conclude that there was a real possibility of the Tribunal being biased, regardless of who the individual arbitrators were.

65. I do not accept that argument. The provisions of the Article IV.4 and IV.5 were reasonably designed to ensure that any member of the Tribunal would be a person of high moral and professional standing, who could be relied upon to act independently.

66. I have taken note of concerns expressed by the Joint Committee on Human Rights in its comments on the International Organisations Act 2005 to the effect that, if immunity from suit is to be compliant with Article 6 of the Convention, the CSAT needs to be institutionally independent of the Secretariat. But that Act has no effect in relation to the contract between the parties. In the present case the court would have jurisdiction to intervene if there was serious irregularity causing substantial injustice. I am not persuaded that this is established merely by the lack of institutional independence under the 1999 statute of which Sumukan complains.

67. The second limb of Sumukan's argument raises in my view more difficult issues. Sumukan's strongest points were these. Professor Chappell's appointment first as a Tribunal member and then as President were never the subject of consultation among member states. He had effectively been nominated for the role of President by the Director of the LCAD, who had put forward the idea of appointing one of the Tribunal members for a short-term appointment and had suggested that he was the only appropriate person. The LCAD not only provided administrative services for the CSAT but was the body responsible for representing the Secretariat in all arbitrations before the CSAT, and the Director was a former professional colleague and friend of Professor Chappell. This was not an open process of appointment. Thereafter his short-term appointment as President had been extended de facto.

68. In ***Lawal v Northern Spirit Limited***, Lord Steyn commented at paragraph 22: *"What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago."*

69. Mr Speaight drew attention to those comments as pertinent in this case. Although arbitration is essentially a private process, the CSAT occupies an unusual position. The Secretariat is an international organisation and a public body within the meaning of the Human Rights Act. It enjoys qualified legal immunity from suit. He submitted that a person who was "neither complacent nor unduly sensitive or suspicious" would regard it as unacceptable for appointments to such a tribunal to be made by an in-house process of discussion between the legal department, the Secretary-General and the staff association without some wider independent process. He argued that the system as it applied in this case lacked the appearance of a process designed to ensure impartiality and independence of the Tribunal members, and, as Lord Steyn observed, in this area public perception of the possibility of unconscious bias is the key.

70. Professor Chappell was not, of course, responsible for the defects surrounding his appointment. He did not apply for it, and his legal qualifications and experience made it unsurprising that he should be nominated. The financial compensation was incidentally modest. As President he was paid an annual retainer of £2,000 and a daily allowance of £300 for Tribunal work up to a ceiling of £3,000.

71. The question for me is whether a fair-minded observer, knowing all these matters, would have concluded that there was a reasonable possibility, or a real danger, of him being biased in the Secretariat's favour. An observer who looked only at the internal processes of the Secretariat may well have reached that conclusion. But I do not believe that a fair-minded observer would have looked only at the internal processes of the Secretariat. A fair-minded observer would have considered also the eligibility of the person appointed and to what extent the process of appointment might fairly be regarded as tainting the trust which could be placed in him to exercise independent judgment, because it is his possible propensity to bias which is in issue. Taking all those matters into account, I am not persuaded that a fair-minded observer would have reached the conclusion that there was a real possibility or real risk of Professor Chappell being biased towards the Secretariat.

72. If I had decided that a properly informed, independent observer would have concluded that there was a real possibility of bias, I would have found that there was serious irregularity causing substantial injustice within the meaning of section 68 and I would have adopted the reasons given by Morison J in *AS M Shipping Limited v TTMI Ltd* [2006] 1 Lloyd's Rep 375 at paragraph 39(3).

Waiver

73. This issue does not arise in view of my rejection of the complaints of want of jurisdiction and serious irregularity. But the Secretariat contended that Sumukan was barred from advancing either complaint by section 73(1) of the Act. The issue was fully argued. I will not rehearse all the arguments but I will state my conclusions shortly in case the matter becomes relevant.

74. Section 73(1) of the Act provides:
"If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection –
(a) that the tribunal lacks substantive jurisdiction,
(b) that the proceedings have been improperly conducted,
(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the ground for the objection."

75. Sumukan is controlled by Ms Jan Jananayagam and her state of mind can be attributed to the company. Her witness statement in these proceedings included the following points:

i) Prior to the arbitration she had grave reservations regarding the CSAT. If at the time of the arbitration she had been aware of the grounds of legal challenge set out in the amended claim form, she would have raised them.

ii) She had a copy of the CSAT rules in April 2003 and a copy of the 1999 statute in May 2003.

iii) When she was notified in July 2004 of the identities of the members of the panel who would hear the claim, she was concerned that the regional representation of the panel mirrored the top management of the Secretariat.

iv) In late September or early October 2004 she searched on the internet for previous instances of CSAT awards and saw a reference to a summary of the decision in *Mohsin v Commonwealth Secretariat*.

v) She discussed that decision with Sumukan's then solicitor in a conversation on 6 October 2004. The solicitor's attendance note of the conversation includes the following passage:

"What Jan was most anxious about was that she would rather see this case in a Court than the Tribunal. I said that I was satisfied at least that the Secretariat had diplomatic immunity. The only other possibility was an arbitration. She referred to the Mohsin case where that applicant had gone to court. I said that was different because she was appealing against the decision of the Tribunal. Jan agreed. Jan said that her appeal did not succeed because she had not challenged the jurisdiction of the Arbitral Tribunal. I said that was broadly correct but she had lost the chance to appeal because she had failed to raise any objections at the appropriate time."

vi) In late October 2004 Ms Jananayagam instructed Clifford Chance. They obtained from the Secretariat a copy of the current statute which they discussed with Ms Jananayagam at a meeting on 5 November, of which there is also an attendance note. Ms Jananayagam was asked if she had seen the CSAT statute and agreed that she had, not appreciating that there was a difference between the 1999 and 2004 versions. She was advised that if she wanted to raise as an objection that the Tribunal was not independent, she could reserve the issue and appeal later on it, but that the arbitrators *'look like fairly solid citizens'*. Ms Jananayagam had previously written to the CSAT on 1 November reserving the question of the Tribunal's jurisdiction, but without specifying any reason.

vii) She was not aware of the significance, as the basis for possible legal challenge, of the provisions in the 1999 statute about the method of appointment of arbitrators or of the ability of the Secretary-General to amend the statute, because Clifford Chance was not aware of the existence of the previous version of the statute and therefore gave her no advice about it.

viii) On 26 November 2004 Clifford Chance wrote to the CSAT to clarify outstanding issues. The final paragraph of the letter stated:

"As previously indicated, the applicant's position as to whether this Tribunal has jurisdiction in relation to all the issues is reserved. The applicant's statements and letters (including this letter) are submitted without prejudice to that reservation."

This paragraph was inserted at Ms Jananayagam's insistence.

76. Ms Jananayagam was not aware at the time of the arbitration of the informality in the appointment of Professor Chappell, the absence of consultation with Commonwealth governments, his friendship with the Director of LCAD, or the expiry of Professor Chappell's appointment before the hearing of the arbitration. These matters only emerged from disclosure of documents in the current proceedings.

77. Mr Nicholls submitted that any objection based on the structure of the 1999 statute had to be raised with the arbitrators, because Sumukan had a copy of the CSAT statute and rules at or shortly after the time of the issue of its claim. He accepted that Sumukan neither knew, nor had grounds to suspect, that Professor Chappell had not been appointed in conformity with the terms of the statute, or that his jurisdiction had expired (if that was so), but he submitted that it could with reasonable diligence have discovered those matters by making the request for disclosure of documents which it later made in these proceedings.

78. Mr Nicholls cited ***Rustal v Gill and Duffus*** [2000] 1 Lloyd's Rep. 1 at page 20, where Moore-Bick J said: *"[Section 73(1)] as a whole is designed to ensure that a party who believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings raises that objection if he wishes to do so, as soon as he is, or ought reasonably to be, aware of it. He is not entitled to allow the proceedings to continue without alerting the tribunal and the other party to a flaw which in his view renders the whole arbitral process invalid. That could often result in a considerable waste of time and expense which is no doubt something which the legislation seeks to avoid. There is, however, a more fundamental objection of principal to a party's continuing to take part in proceedings while at the same time keeping up his sleeve the right to challenge the award if he dissatisfied with the outcome."*

79. The objectionableness of such behaviour would apply equally to a person who had actual knowledge of an irregularity and to one who had grounds to believe that there was an irregularity but chose not to raise the matter. That would be akin to "Nelsonian blindness", which is often equated with knowledge. However, it would not apply to someone who neither knew the essential facts constituting the irregularity nor had grounds to believe that there was an irregularity.

80. Reference was made to Article 6 of the European Convention, which in my view supports this approach. To hold that a party waived its right to an impartial tribunal without knowledge of the relevant facts, or of grounds to believe facts which the party chose not to pursue although having the means to do so, would be an unjust and disproportionate restriction of the right to be protected by Article 6. See Lord Hope's observation in ***Miller v Dixon*** [2002] 1 WLR 1615 at paragraph 58 that: *"the Strasbourg jurisprudence shows that, unless the person is in full possession of all the facts, an alleged waiver of the right to an independent and impartial tribunal must be rejected as not being unequivocal."*

81. I do not think that it would be right to construe and apply section 73 so as to hold that Sumukan could with reasonable diligence have discovered facts which it neither knew nor believed nor had grounds to suspect. By participating in the arbitration without raising an objection to the fairness of the procedure on grounds based on the structure of the 1999 statute I would have accepted that Sumukan forfeited the right to raise such an objection later, but not that it also forfeited the right to make a later complaint based on matters of a different kind beyond its previous knowledge or belief, merely on the basis that it would have discovered the latter by pursuing the former. I also doubt whether that would have been so as a matter of fact. If Sumukan had instructed Clifford Chance to raise an objection based on the establishment of the Tribunal by the Secretariat, the most prudent course might well have been to take the point shortly so as to preserve Sumukan's right of appeal, in which case Sumukan would not then have learned the internal history of Professor Chappell's appointment.

Conclusion

82. The application is dismissed, not on grounds of waiver, but because notwithstanding procedural irregularities regarding Professor Chappell's appointment, to which I have referred, I am not persuaded that there was lack of jurisdiction or real possibility of bias.

Mr Anthony Speaight QC and Miss Kate Livesey (instructed by the Claimant directly)
Mr Colin Nichols QC and Mr Tom Poole (instructed by Speechly Bircham) for the Defendant