CA on appeal from High Court Chancery Division (Mr Justice Lawrence Collins) before Clarke LJ; Jonathan Parker LJ. 10th June 2003

Lord Justice Jonathan Parker :

INTRODUCTION

1. This is an appeal by Warborough Investments Ltd against an order made on 27 November 2002 by Lawrence Collins J dismissing an application by the appellant under section 68 of the Arbitration Act 1996 ("the 1996 Act") relating to a rent review arbitration between the appellant (as landlord) and S. Robinson & Sons (Holdings) Ltd (as tenant) pursuant to a lease of premises at Robinson Industrial Estate, Shaftesbury Street, Derby DE28 8YB ("the subject premises"). S. Robinson & Sons (Holdings) Ltd is the respondent to the appeal.

2. In the proceedings, the appellant seeks an order that the award of the arbitrator, Mr Raymond Valenti, be remitted for reconsideration, on the ground of serious irregularity. It contends that the arbitrator reached his determination by adopting an approach to valuation which was not advocated by either party; that no prior information was given by the arbitrator of his intention to adopt that approach; and that in consequence neither party was given an opportunity to make submissions as to the correctness of that approach. It further contends that the arbitrator based his award on unsupported factual statements. In consequence, so it is contended, the appellant has suffered serious injustice in that had it been alerted to the arbitrator's intentions it would have made further representations and presented further evidence which would have raised a real possibility of an outcome more favourable to the appellant. In the event, so the applicant contends, the award which the arbitrator made is significantly lower than the market value of the subject premises at the review date, with a knock-on effect not only on the rental income from the subject premises but also on the capital value of the reversion in the subject premises and of other comparable reversions owned by the appellant.

3. In his judgment dismissing the application, the judge concluded that the matters complained of by the appellant did not amount to an irregularity, within the meaning of section 68. He went on to express himself as not satisfied that the appellant had suffered substantial injustice as a result of them.

4. The judge granted permission to appeal.

THE RELEVANT STATUTORY PROVISIONS

5. Section 1 of the 1996 Act, which is headed 'General principles', provides as follows (so far as material):

"The provisions of this Part are founded on the following principles, and shall be construed accordingly –

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; ...."

6. Section 33 of the 1996 Act, which is headed *'General duty of the tribunal'*, provides as follows (so far as material):

"(1) The tribunal shall –

(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 .... so as to provide a fair means for the resolution of the matters falling to be determined.

(2) ....."

7. Section 68 of the 1996 Act, which is headed 'Challenging the award: serious irregularity', provides as follows (so far as material):

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. ....

(2) 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 –

(a) failure by the tribunal to comply with section 33 (general duty of tribunal); ....

(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, ..."

THE BACKGROUND

8. The background to the matter is helpfully and clearly set out in part II of the judge's judgment, comprising paragraphs 5 to 13, and I can do no better than set those paragraphs out in full, as follows:

"5. By a lease dated October 5, 1981, and made between Derby City Council as lessor and S Robinson & Sons (Engineering) Limited as lessee, premises at Shaftesbury Street in the City of Derby were demised for a term of 125 years commencing on February 17, 1981 at a yearly rent of £11,250 subject to review as provided. In 1991 the reversionary interest under the lease became vested in the landlord and the lease was transferred to the tenant. The premises are a light industrial estate ("Robinsons Industrial Estate") of 29 terraced nursery units, located on the north side of Shaftesbury Street, Derby, a short distance from the junction of Shaftesbury Street and Osmaston Road, approximately 1 mile from the city centre.

6. There are some similar, but much smaller, properties on Osmaston Road, Nos. 244, 246, 248 and 250. All of them, like the Robinsons Industrial Estate, were to be the subject of rent reviews as at February 17, 1989 and as

at February 17, 1997. The 1989 rents on Nos. 244, 246, 248 and 250 had been settled by agreement, and there had been settlements of the 1997 rents for Nos. 244, 246 and [248].

7. Clause 2(k) of the Robinsons Industrial Estate lease restricted the use of the premises to light industrial or warehousing purposes only. The use of Nos. 248 and 250 Osmaston Road was similarly restricted. The use of No. 244 was limited to light industrial or warehousing purposes and as a wholesale/retail warehouse for the sale of carpets and other floor coverings, and that of No. 246 for light industrial or warehousing purposes and for the retail sale of ceramic tiling products and tiling and decorating materials only (but was later extending to use for double glazing retail business).

8. In 1989 the agreed new rents per square yard were as follows: (1) Robinsons Industrial Estate: £1.94; (2) 244 Osmaston Road: £3.10; (3) 246 Osmaston Road: £3; (4) 248 Osmaston Road: £2.17; (5) 250 Osmaston Road: £2.46.

9. In 1997 settlements were reached for Nos. 244, 246 and 248 as follows: (1) 244 Osmaston Road: £4.62; (2) 246 Osmaston Road: £4.70; (3) 248 Osmaston Road: £4.65.

10. Subsequently the rent on No. 246 Osmaston Road was increased to £5.63 when the retail use was extended to double glazing.

11. There is an estate called Osmaston Park Industrial Estate about a mile away, which is one of Derby's principal industrial estates.

12. Under clause 5 of the lease provision was made for the rent to be reviewed in accordance with clause 5 of the lease every 8 years. By clause 5(1):

'(1)(a) The yearly ground rent shall be such sum as shall be assessed as a reasonable ground rent for the demised premises as at the review date based on the then current market value of land available for development …

(b) For the purpose of each rent review the demised premises shall be considered as a vacant site available for development for the then current purpose with equal statutory service connections and otherwise on similar terms and conditions as are herein contained except as to the amount of rent payable.'

13. The rent fell to be reviewed as of February 17, 1997 and in accordance with the rent review clause, the parties, in default of agreement, applied to the President of the Royal Institution of Chartered Surveyors for the appointment of a single arbitrator to determine the question. Mr Valenti, BSc FRICS ACI Arb was appointed by the President of the Royal Institution of Chartered Surveyors as arbitrator to determine the rent payable in respect of the review date. Prior to that date the rent was as settled in 1989, £1.94 per square yard or £18,500 per annum."

9. It is also convenient at this stage to note the provisions of the lease of the subject premises relating to user. Clause 2 contains the tenant's covenants. Subclauses (k) and (l) of that clause are in the following terms (so far as material):

"(k) To use the demised premises for light industrial or warehousing purposes only but not for any other purpose whatsoever PROVIDED that with the previous written consent of the Council the demised premises may be used for some other trade or business which does not (in the opinion of the Council) conflict with the principles of good estate management and is a use within Classes III or X of the Town and Country Planning (Use Classes) Order 1972.

(l) Not to use the demised premises for retail sales of any description …."

THE MATERIAL BEFORE THE ARBITRATOR

10. The arbitration was conducted on the basis of written reports (variously described as submissions or statements of case) by Mr Stephen Gillott, of Messrs Fisher Hargreaves Proctor, Chartered Surveyors (for the appellant) and Mr Neil McNab, of Messrs Raybould & Sons, Chartered Surveyors (for the respondent). Following exchange of their first reports, supplementary reports were exchanged in which each commented on the other's first report. This was in accordance with a procedure which had previously been directed by the arbitrator. No provision was made for further reports addressing any new matters raised in the supplementary reports.

11. In his first report, Mr Gillott puts forward four comparables, of which only three are relevant for present purposes. The three relevant comparables put forward by Mr Gillott are numbers 244, 246 and 248 Osmaston Road, Derby. Each of the three properties is the subject of a long lease granted by Derby City Council for a term of 125 years commencing on 17 February 1981 and providing for 8-yearly rent reviews: in other words, leases in terms which are in those respects identical to the lease of the subject premises. However, the provisions of the leases of numbers 244 and 246 as to user differ from the equivalent provisions in the lease of number 248 and in the lease of the subject premises. Thus, the lease of number 244 allows use for light industrial or warehousing purposes and as a wholesale and/or retail warehouse for the sale of carpets and other floor coverings; while the lease of number 246 allows use for light industrial or warehousing purposes and for retail sale of ceramic tiles and associated tiling products and tiling and decorating materials. This is in contrast to the lease of number 248, which, like the lease of the subject premises, allows no retail use at all.

12. Mr Gillott cites as comparables the rents of those premises as reviewed in February 1997: viz. £4.62 per sq. yard for number 244, £4.70 per sq. yard for number 246 and £4.65 per sq. yard for number 248. In relation to number 246 he noted that, subsequent to the 1997 review, the rent was increased to £5.64 per sq. yard in

consideration of a widening of the user covenant to allow user for retail purposes. He makes no reference to the rents as reviewed at the first rent review in February 1989.

13. Mr Gillott goes on to say (in paragraph 8.6 of his first report) that "the most relevant piece of evidence" is the settlement of number 248 at £4.65 per sq. yard. In paragraphs 8.9 and 8.10 he says this:

"8.9 In analysing the evidence, the opening up of the user clause of 246 Osmaston Road by 20% is important in illustrating the tight user restriction and evidence of what tenants will pay for wider use clauses.

8.10 The settlement of 248 Osmaston Road at £4.65 is on a directly comparable user clause."

14. Mr Gillott then goes on to conclude that a net deduction of 5% then fell to be made, reflecting a deduction of 10 % for 'quantum' and the adding back of 5% "for the wider use within the review clause of [the subject premises]". The adding back of the 5% is on the basis (as I understand it) that the "then current purpose" within the meaning of the rent review clause included an element of retail use, and that, notwithstanding the user provisions in the lease, some of the units in the subject premises were in fact being used for retail purposes. This calculation produces a figure of £4.40 per sq. yard, giving a total rental for the subject premises (which consists of 9,535 sq. yards) of £41,954 per annum exclusive of rates, which Mr Gillott rounds up to £42,000 per annum.

15. In his first report, Mr McNab lists a large number of comparables. The list of comparables is divided into two parts. Part A of the list contains details of what Mr McNab describes as "Capital land transactions 1989-1997" (i.e. sales of land), it being his primary contention that the reviewed rent of the subject premises ought to reflect the fact that there had been no growth in capital value since the 1989 review: in other words, that the rent should remain at the 1989 level. Part B of his list of comparables lists nineteen transactions in ground rents during the period 1989 to 1998, as being relevant transactions should his primary contention not be accepted. Number (1) in Part B of the list is the 1989 reviewed rent in respect of the subject premises (£1.94 per sq. yard); number (2) is the 1989 reviewed rent of number 244 Osmaston Road (£3.10 per sq. yard); number (3) is the 1989 reviewed rent of number 246 Osmaston Road (£3 per sq. yard); number (4) is the 1989 reviewed rent of number 248 Osmaston Road (£2.17 per sq. yard); and number (5) is the 1989 reviewed rent of number 250 Osmaston Road (£2.46 per sq. yard). Number 250 Osmaston Road is not mentioned in Mr Gillott's first report. According to Mr McNab, number 250 Osmaston Road was, in 1989, subject to a lease in the same terms, so far as material, as the subject premises.

16. At number (15) in Part B of Mr McNab's list of comparables is the 1997 reviewed rent of number 244 Osmaston Road (given by Mr McNab as £4.65 per sq. yard, whereas Mr Gillott gives a figure of £4.62, reflecting a difference of measurement); and at number (16) is the 1997 reviewed rent of number 246 Osmaston Road (given by Mr McNab as £4.70 per sq. yard, the same figure as appears in Mr Gillotts' first report).

17. There is no reference in Part B of Mr McNab's list of comparables to the 1997 reviewed rent in relation to either number 248 or number 250 Osmaston Road. This is because, as Mr McNab states later in his first report, it was his belief that in respect of each of those properties the tenant had purchased the reversion prior to the date of the 1997 rent review. In fact, this was not the case so far as number 248 Osmaston Road was concerned, the 1997 reviewed rent of which was relied on by Mr Gillott (see above). In the case of number 250 Osmaston Road, however, it would appear that Mr McNab was correct since there is no reference to a 1997 reviewed rent for that property in either of Mr Gillott's reports. In his supplementary report Mr McNab stated that he had not included the 1997 reviewed rent of number 248 Osmaston Road in Part B of his list since Mr Gillott had not been supplied him with particulars of it, but this conflicts with Mr Gillott's statement (in his supplementary report) that he had supplied such particulars. However, nothing turns on this conflict for present purposes.

18. Part B of Mr McNab's list of comparables also lists the current rents of seven properties in the Osmaston Park Industrial Estate.

19. Part B of Mr McNab's list concludes with a section headed "Rental surcharges for retail consent", in which Mr McNab list four properties, including numbers 244 and 246 Osmaston Road. In respect of these last two properties, Mr McNab's report states that prior to the 1989 rent reviews agreement was reached between landlord and tenant for the relaxing of the user covenants so as to allow an element of retail use, in consideration of an uplift of the rent of 28.75% in relation to number 244 and 25% in relation to number 246.

20. There then follow some four pages of comment and analysis. Towards the foot of the first of those pages Mr McNab says:

"My understanding is that the Ground Lessees of the adjoining properties numbered 248 and 250 Osmaston Road purchased the Landlords Freehold Reversionary interests prior to the 1997 rent reviews. [I pointed out earlier that in relation to number 248 this was an error on Mr McNab's part.]

Of course, prior to the 1989 reviews of 244 and 246 Osmaston Road, the City Council, as the then Landlords, agreed to the extension of the User Clauses to include the right to retail from those two premises for limited purposes, in exchange for an increase in the Ground Rentals, the details of which are clearly set out .... above.

What appears to be quite clear from Raybould & Sons settlement relating to No 250 Osmaston Road in 1989, where the User Clause remained as originally drafted for Light Industrial and Warehousing purposes, was that the originally agreed 25% uplift was maintained in respect of the retailing element for Nos. 244 and 246, which were settled at around £3 per sq. yd per annum.

Therefore, to me, the rent that I negotiated in respect of [the subject premises] at that same date recognises a quantum discount of around 20% based on the Light Industrial and Warehousing User only.

You would have thought that in those circumstances it would have been a straight forward task to utilise the same formula in 1997, but in fact if you do, and base it on the settlements relating to Nos 244 and 246, you arrive at a figure of £2.78 per sq. yard [in fact, the correct figure resulting from this calculation is £2.98 per sq. yard], which is not compatible with the other evidence, especially when, in addition, you bear in mind the location, the need to make an allowance for quantum and the increase in gross income from the 29 units comprising [the subject premises] over the period between the two rent review dates."

21. Mr McNab goes on to express doubts as to the reliability as comparables of the 1997 reviewed rents of numbers 244 and 246. He continues:

"I have no indication from any of [the surveyors involved in negotiating such rents] of what, if any, evidence was brought forward to support the proposed increases, but when you look at the negotiated settlements from the Osmaston Park Industrial Estate at that time, and add 25% for the partial retailing uplift, you really cannot see any justification for more than a rent of £3.75 per sq. yard per annum, some 20% less than the rents agreed."

22. Later in his report (towards the foot of the second of the four pages following the lists of comparables), Mr McNab says this:

"A 20% quantum allowance appears to have been established be reference to the 1989 rentals, comparing [the subject premises] with Nos 248 and 250 which retain their original restricted uses, and I do not believe there is any evidence to support the argument that had they fallen to be the subject of rent reviews in 1997, they would have been settled, using all comparable evidence, at a figure which simply represented a 25% deduction from the settlements achieved in respect of Nos 244 and 246. That would have represented £3.50 per sq. yard, which, in my view, cannot be substantiated by reference to not only the Osmaston Park Industrial Estate comparables set out above, but those in respect of other sites around the City.

Despite some of the original buildings now showing their age, the Osmaston Park Industrial Estate remains the premier industrial location in the City ..."

23. On the penultimate page of his first report, Mr McNab says this:

"I have to submit that the safest rental evidence is that emanating from the Osmaston Park Industrial Estate, but that applying that to the subject site, I need to make an allowance, firstly for location and secondly for quantum, at the same time having an eye to the percentage increase in gross income generated by [the subject premises] between 1989 and 1997.

Therefore, my view is that the general tone of standard sized sites at Ascot Drive [a reference to land forming part of the Osmaston Park Industrial Estate which appeared at number (10) in Part B of his list of comparables], not including those fronting Ascot Drive itself which have a premium value, would have been around £3 per sq. yd. in February 1987, but that had the location been in Shaftesbury Street [where the subject premises are situated], it would probably have attracted a rental of around £2.50 per sq. yd. per annum.

Utilising the quantum allowance of 20% established in 1989, this obviously provies a rental per sq. yd. of £2 for the subject site and a total of £19,000 p.a., based on the demised area of 9535 sq. yds.

This appears to be entirely in line with the evidence from the capital land transactions set out .... above.

However, I am concerned that our Clients have enjoyed an increase of their gross income from the Estate during the same period of 17.47%, an increase in which I believe the Ground Landlord should also share and, accordingly, I submit that had the subject site been offered to the market, by way of a long leasehold, full repairing and insuring Ground Lease, as at the 17th February 1997, it would have attracted a developer Lessee at a rental in the close region of £21,750 per annum [i.e. £2.28 per sq. yd.]"

24. Mr McNab accordingly invites the arbitrator to make an award in that sum.

25. In his supplementary report, Mr Gillott says that he does not consider capital land transactions to be relevant to a ground rent review. Accordingly he does not comment on the detail of the transactions listed in Part A of Mr McNab's list of comparables beyond noting that Mr McNab provides no "validation": in other words, no proof that such transactions had taken place. Later in his report he describes Mr McNab's attempt to link capital values with rental values as lacking logic and as disregarding evidence of rent review settlements.

26. Mr Gillott adopts the same stance in relation to the 1989 rent reviews listed in Part B of Mr McNab's list, stating that they are irrelevant to the task in hand and noting that Mr McNab has not provided "validation".

27. As to the 1997 reviewed rent in relation to number 244 Osmaston Road, Mr Gillott says that both landlord and tenant were professionally advised, and notes that only limited retailing use was allowed. As to the reviewed rent in relation to number 246 Osmaston Road, Mr Gillott notes that, as in the case of number 244 Osmaston Road, the retailing use was restricted. He also refers to a variation in the user clause, which was effected after the 1997 review had been completed, whereby unrestricted retail use was allowed, in consideration of an increase in the rent from £4.70 per sq. yard to £5.64 per sq. yard.

28. In response to Mr McNab's reference to an "agreed 25% uplift", Mr Gillott says this:

"I cannot see the relevance of [the] 1989 reviews of 244 and 246 Osmaston Road. These have subsequently been superseded by reviews in 1997. .... He [Mr McNab] comments that a 25% uplift was agreed. I find no such agreement. Additionally, [Mr McNab] has ignored the 1997 settlement of 248 Osmaston Road."

29. Throughout his supplementary report, Mr Gillott repeatedly makes the point that Mr McNab has not commented on number 248 Osmaston Road, suggesting that Mr McNab had preferred to ignore it. Mr Gillott also challenges Mr McNab's reliance on the rents of properties in Osmaston Park Industrial Estate. Mr Gillott concludes his supplementary report by saying that nothing in Mr McNab's report has persuaded him to alter his valuation, and he accordingly invites the arbitrator to award a rent of £42,000 per annum in accordance with his first report.

30. In his supplementary report, Mr McNab responds to Mr Gillott's reliance on number 248 Osmaston Road as follows:

"This review has not previously been brought to my attention by the Landlord's Surveyor and, accordingly, the assumption that I made in my Submission, that the Ground Lessee had purchased the Freehold interest, is clearly incorrect.

Bearing in mind that the User is restricted to Light Industry and Warehousing only and that the premises shall not be used for Retail sales of any description, or for open storage, I cannot believe that any Surveyor acting on behalf of Ground Lessees could have recommended their acceptance of a rent which is clearly based on a straight comparison with the other two quasi-retailing units fronting Osmaston Road, especially when the evidence from across the City at other locations in no way supports the rent agreed.

I know of no open market evidence, nor have any of the Surveyors involved put forward any, to justify such a Ground Rent based on a restricted Light Industrial and Warehousing use and must therefore ask you to treat this settlement with considerable suspicion, despite the involvement of the Hanley firm of Surveyors.

For them to have recommended their Clients to accept a rent based on a totally different use from the comparables which would obviously have been put forward by Fisher Hargreaves Proctor and not to have referred the matter to Arbitration is, I submit, nothing less than astonishing."

31. In paragraph 7.7 of his supplementary report, Mr McNab says, in relation to number 248 Osmaston Road:

"Clearly, if you take the settlement at face value, what the Ground Lessees Surveyor recommended to his Client was a rent which drew no distinction between Light Industrial/Warehousing and the retailing of carpets, tiles, and subsequently double glazing [a reference to the subsequent extension of the user clause in relation to number 246]."

32. Under the heading 'Final Conclusions', Mr McNab says this:

".... I am, however reluctantly, forced to the conclusion that the other comparables put forward in support of the landlord's claim [i.e. including numbers 244 and 246] must all be considered to be unsafe, in that all three have been borne out of a situation between Landlord and Tenant that gave rise to settlements which had no justification in terms of market evidence. ....

In my view, there is simply no justification whatsoever for the rents that have been agreed in respect of the three units fronting Osmaston Road [i.e. numbers 244, 246 and 248], and I submit they are not representative of the general market in capital values in particular, nor the available ground rental settlements, even though they have been achieved by negotiation rather than by reference to Open Market transactions.

To have relied, almost wholly, upon his own Osmaston Road settlements has, I submit, resulted in the Landlord's Surveyor failing to recognise the overwhelming evidence from other locations which clearly conflict with them to a substantial degree. ...."

33. Mr McNab accordingly maintains his figure of £21,750.

THE ARBITRATOR'S AWARD

34. After summarising the rival contentions of Mr Gillott and Mr McNab, the arbitrator says this (in part 8 of his award, headed 'Valuation Reasons'):

"Mr McNab has made some very valid contentions in the presentation of his case. However the style of his submissions, the nature of some of his opinion evidence and his significant reliance on unsubstantiated evidence and hearsay evidence has been of serious concern. This together with the absence of the mandatory RICS Statement and the lack of any clear definition of the nature of his instructions gives me the strong impression that his role was one of advocate as opposed to Expert Witness.

I have decided that the most appropriate comparables are the Rent Reviews carried out in respect of 244, 246 and 248 Osmaston Road. However the settlement in respect of number 248 is not totally reliable as it clearly does not reflect the complete prohibition against any retail operations when compared with the two adjoining settlements. An adjustment will therefore need to be made and I have decided that it is appropriate to look to the 1989 Rent Reviews for guidance in that respect.

If one takes the average of the 1989 review settlements for numbers 244 and 246 Osmaston Road a figure of £3.04 per sq. yd. is produced. The 1989 settlement for 248 Osmaston Road was £2.16 per sq. yd. and therefore the uplift for retail use at that time was 41%.

The Rent Review in respect of [the subject premises] in February 1989 was settled at a figure equating to £1.94 per sq. yd. and this can be compared with the settlement for 248 Osmaston Road to produce an end allowance of 11.34% reflecting the differences due to quantum and prominence.

No evidence has been submitted to suggest that the appropriate allowance for a restricted retail use should be any different in 1997 than it was in 1989. The agreement to slightly widen the existing retail user of 246 Osmaston Road in consideration of a rental uplift of some 20% gives little guidance towards any changes in such allowances as this only shows the value of a <u>further</u> enhancement to an existing retail consent.

In view of the above I have decided that the settlement in respect of 248 Osmaston Road should be adjusted to reflect a 41% end allowance for the restricted retail consent and following that allowance the adjusted rate per sq. yd. equates to approximately £3.30 per sq. yd.

I shall make a further allowance of minus 11.34% for quantum and prominence which is in line with the settlements of the 1989 Rent Reviews in respect of [the subject premises] and number 248 Osmaston Road. Accordingly I will adjust my basic rental valuation of £3.30 per sq. yd. by an end allowance of 11.34% which produces a net valuation of £2.93 per sq. yd."

35. £2.93 per sq. yard gave a total figure of £27,897 per annum, which the arbitrator rounds up to £27,900. That is his award.

MR GILLOTT'S WITNESS STATEMENT

36. Before the judge were witness statements by (among others) Mr Gillott and Mr McNab. In his witness statement, Mr Gillott says that his understanding was that in his first report Mr McNab had specifically rejected the notion of a 25% uplift for retail use. After referring to what he considers to be a lack of probative evidence to support many of Mr McNab's assertions, Mr Gillott says this (in paragraph 16 of his witness statement):

"Had I known that the arbitrator was content to assume that the 1989 settlements reflected an adjustment for retail use I would have responded in detail to such an approach. First, I would have made all the evidential points referred to above. Secondly, I would have made inquiries to attempt to establish how the 1989 settlements were reached and to what extent they could be relied on to support an inference that the differences between them reflect the differences in the user clause."

37. In paragraph 19 of his witness statement, Mr Gillott says this:

"I would further have submitted that the 1989 settlements were inherently unreliable, rather than the benchmark that the arbitrator seems to have regarded them as. This is because the manner in which the local authority settlements are negotiated differs radically from the approach taken by commercial freeholders. .... For this reason, in my experience, settlements achieved by local authorities are less reliable in determining open market value, and also cannot be assumed to have been negotiated with the same attention to detail and the same emphasis on established principles of valuation as those negotiated in the private sector."

38. Mr Gillott goes on to say that he would have submitted to the arbitrator that the anomaly in the 1997 settlements which appeared to trouble the arbitrator was in truth not an anomaly at all, and he lists a number of matters which he says are relevant in this respect but which were not taken into account by the arbitrator.

39. In paragraph 28 of his witness statement Mr Gillott summarises what he would have done had he been given an opportunity to make submissions as to the approach which the arbitrator adopted, as follows:

"Had I had this opportunity I would have (1) made submissions that his formulaic approach was inappropriate in circumstances in which he had available contemporaneous evidence of comparable transactions; (2) made submissions on the (lack of) quality of evidence relating to the 1989 settlements; (3) made submissions on the validity or otherwise of the inferences drawn by the arbitrator; and (4) introduced relevant evidence, in particular relating to (a) the basis upon which the 1989 settlements were fixed; (b) the basis on which the Osmaston Park Industrial Estate settlements were achieved after the sale by the Council to the current freeholders; and (c) the Deed of Variation relating to 246 Osmaston Road, to support these submissions and to show that even if the 1989 settlements did reflect an uplift for restricted retail user, the contemporary evidence shows the value of such user is far lower now than it would (on this hypothesis) appear to have been in 1989."

40. Finally, Mr Gillott raises the possibility that further comparables might have been placed before the arbitrator.

THE ARGUMENTS BEFORE THE JUDGE

41. The judge summarises the appellant's case in paragraphs 22 to 35 and 44 of his judgment, as follows:

"22. It is the landlord's case that the arbitrator's use of the 1989 settlements to adjust the 1997 settlements was an irregularity which has caused substantial injustice to the landlord within the meaning of section 68. The landlord says that the 1989 settlements had been introduced into evidence by Mr McNab, together with much other evidence, in a very long set of submissions. Having referred to the 1989 settlements, and to a formula said to describe the relationship between them, and having made assertions as to how the 1989 settlements had been reached, Mr McNab went on to say that one could not simply apply that formula in any meaningful way to the 1997 settlements since to do so did not produce the "right result" (the figure thus produced was too high for his purposes).

23. Because Mr McNab had expressly rejected reliance on the 1989 settlements, Mr Gillott did not deal with them to any extent in his counter-submissions. The 1997 settlements were relied upon by Mr Gillott (and also a fourth comparable which is not relevant on this application). They related to three properties which shared a review date and the feature of eight yearly rent reviews with the subject property. 248 Osmaston Road was relied upon as a direct comparable by virtue of the identical user clauses.

24. Mr McNab advocated a series of approaches to valuation including (1) changes to capital land values between 1989 and 1997; (2) changes to ground rental values between 1989 and 1997; and (3) an increase in the profitability of the Robinsons Industrial Estate between 1989 and 1997. In supporting his approach, Mr McNab included a wealth of evidence, including reference to comparables. Included in the comparables were (1) the 1989 settlements in relation to Nos. 244, 246, 248 and 250; and (2) the 1997 settlements in relation to Nos. 244 and 246.

25. *Mr McNab asserted that prior to the 1989 reviews of Nos. 244 and 246, the City Council (the then landlord) agreed to the extension of the user clauses to include the right to retail from those premises for limited purposes, in exchange for an increase in ground rentals. He then asserted that the 1989 settlement in relation to No. 250 (with an un-extended user clause) demonstrates that the "originally agreed uplift of 25% [to reflect broader use] was maintained in respect of the retailing element for 244 and 246". A settlement relating to the nearby Robinson Industrial Estate "recognises" a discount of 20% to reflect a non-retail user clause.*
26. *He went on to consider whether it was appropriate to "utilise the same formula" in 1997. He rejected this approach because that the result of applying "the formula" was "not compatible with the other evidence". He also "questions the appropriateness" of relying on the settlements relating to Nos. 244 and 246.*
27. *What Mr McNab did was (a) to derive a formula from the four 1989 settlements which he asserted reflects a prior agreement to an uplift to reflect broader user; but (b) rejected the use of the formula in relation to evidence of 1997 settlements.*
28. *In the circumstances it was reasonable for Mr Gillott not to deal in detail with the assertions made by Mr McNab as to the inferences to be drawn from the four 1989 settlements. He did not argue in response to the second proposition since Mr McNab expressly rejected the use of the "formula" in relation to the 1997 evidence. It would have been futile and an unwarranted waste of time for Mr Gillott to have dealt with a proposition which was expressly rejected by Mr McNab. It follows that it would have been similarly futile for Mr Gillott to respond in any more detail to the first proposition above. The first proposition is only of relevance if it is used to support the second. Since the second was rejected the first was irrelevant. Mr Gillott was not only reasonable but right not to waste the arbitrator's time by dealing with it in any detail.*
29. *It is the landlord's case that the approach taken by the arbitrator constitutes a serious irregularity. Having considered the respective written submissions of the parties' surveyors, he rejected both the landlord's approach based on the 1997 rent review settlements and the tenant's invitation to base his conclusion on the other comparables relied upon by the tenant. Faced with Mr McNab's objections to the apparent anomaly between 248 Osmaston Road on the one hand and Nos. 246 and 244 Osmaston Road on the other hand, he decided that "it is appropriate to look to the 1989 Rent Reviews for guidance". Once having done that, he (1) deduced a 41% uplift in the rent settled (in 1989) for 248 Osmaston Road over and above the rent settled for Nos. 244 and 246 and (2) found as a fact that it represented an uplift for retail use. He then applied an 11.38% adjustment to represent differences in quantum and location between the Osmaston Road properties and the subject premises.*
30. *Having taken this approach to analysing the 1989 data, he then applied the same formula to the figures available for the 1997 settlements, observing that "no evidence has been submitted to suggest that the appropriate allowance for a restricted retail use should be any different in 1997 than it was in 1989." In this way the arbitrator arrived at a rent which he concluded was properly payable. This approach was taken notwithstanding that it was not the approach relied upon by either surveyor. The arbitrator relied upon "evidence" contained in Mr McNab's original submissions which was not substantiated, namely, the alleged existence of an agreement between the original landlord and the tenants. He applied an approach which was in any event rejected by Mr McNab.*
31. *The arbitrator accordingly took an approach (1) which neither surveyor advocated; (2) of which neither surveyor was aware when preparing either submissions or counter-submissions; and (3) on which neither surveyor was given an opportunity to comment. The arbitrator did so on the basis of evidence he appears to have supplied or inferred for himself, namely (a) factual evidence supporting the contention that there was an uplift to represent a wider user clause (Mr McNab's original evidence on this was hearsay and not accepted by Mr Gillott); and (b) expert evidence as to the correctness of applying the same uplift to reflect wider user in 1997 as had been applied (assuming it had been applied) in 1989.*
32. *The questions of (1) the relevance of the 1989 rent reviews, (2) the reason for the alleged 41% difference between the settlements for 244 and 246 Osmaston Road, and the settlement for 248 Osmaston Road, and (3) whether the evidence show that any such percentage uplift to reflect wider user was rightly to be applied in the 1997 market, were matters which required both evidence and submissions on behalf of each of the parties. The approach taken by the arbitrator, to which the challenge is now mounted, was not one on which he had heard submissions or in relation to which he had been provided with relevant evidence, and it was not one which he at any stage indicated to the parties he was minded to take.*
33. *It is the landlord's case that it will suffer serious injustice as a result of the irregularity. If the landlord had been called upon to meet the approach adopted by the arbitrator it would have adduced evidence to demonstrate, and/or would have submitted that, the approach was wrong (1) in finding on the evidence that there was an original uplift to reflect wider user clauses; (2) in calculating that any such uplift (which is in any event not admitted) was 41%; and (3) in assuming that, even if (1) and (2) are wrong, the same uplift is to be applied in the market conditions in February 1997.*
34. *The landlord was given no opportunity to produce evidence or submissions on any of these points. Had the landlord's representative been given the opportunity to address the approach adopted by the arbitrator it would have been contended: (1) that there is no or no satisfactory evidence that the "uplift" identified prior to the 1989 settlements is properly regarded as reflecting the tenant's negotiation of a wider user clause, nor that any such uplift is reflected in the 1989 settlements; (2) that in any event such uplift even on the tenant's (hearsay) evidence was in the region of 25%, and not the 41% adopted by the arbitrator; (3) that even if an uplift based on extended user is found to have characterised the 1989 settlements, there is no justification for automatically extrapolating from the market conditions of 1989 to those obtaining in 1997, nor for applying without close*

scrutiny any formula which may be deduced from the 1989 settlements to the 1997 settlements. Indeed such an approach leads to a result which the tenant's representative described as "not compatible with the other evidence". In particular, it would be denied that any premium attached to retail use in 1997, or, if it did, that it was of the same order as that which may have applied in 1989.

35. If the award is not remitted so that the arbitrator can hear the landlord on these matters, the landlord will suffer the losses, namely the reduced capital value of Robinson Industrial Estate, assessed at up to £216,922; and the knock-on effect of the review standing as potential comparable evidence for the landlord's two adjacent freehold properties on 246 and 248 Osmaston Road, which the market would perceive in the light of the award as being over-rented. .....

44. Accordingly the landlord submits: (1) the arbitrator relied upon evidence whose relevance was disavowed by the party in whose favour it was eventually deployed; (2) the arbitrator took an approach to valuation which was not advanced by either party and upon which Mr Gillott had had no opportunity to comment."

42. The judge summarises the respondent's case in paragraphs 36 to 43 and paragraph 45 of the judgment, as follows:

"36. In the submissions to the arbitrator, the landlord took no account of the differentials between the properties when reviewed in February 1989, at which time Robinsons Industrial Estate was £1.94 as against £3.10, £3.00 and £2.17 for 244, 246 and 248 Osmaston Road respectively.

37. The tenant's case was that the rent review clause required the review to take into account capital and rental values: (a) the capital land transactions summarised in the submission showed that land values had gone down between 1989 and 1997; (b) the large number of rentals summarised in the submission showed to some extent that, apart from the properties with retail user, rentals had gone up by about only 20% from about £2.50 per square yard to about £3.00 per square yard between 1989 and 1997.

38. Mr McNab used the 1989 25% uplift for retail use to reject 1997 reviews for 244 and 246 Osmaston Road. He was not rejecting the formula itself, but was saying that the formula was appropriate, and that the differentials at 1989 should be reflected in 1997. The result of the application of the formula is the reason why the 1997 reviews for Nos. 244 and 246 was rejected. This is clear from the wording of the submission and from the fact that his submission goes on to conclude that the Osmaston Road sites are not comparable with Robinsons Industrial Estate and that the safest rental evidence is, instead, that from the Osmaston Park Industrial Estate (subject to making deductions for location and quantum). Some percentage adjustment was needed because that estate is one of Derby's principal industrial estates, and the rentals noted in his comparables were for sites between 1525 and 5905 square yards.

39. Mr Gillott's response in his second submission was considered and forceful. He deliberately chose not to address any of McNab's comparables:

(a) Of the capital land transactions, he simply stated they were not relevant or that there was no validation;

(b) Of the rental transactions, he simply stated that they were not relevant or that there was no validation;

40. Mr Gillott stated that he could not see the relevance of the 1989 reviews of 244 and 246 Osmaston Road, and that he found no agreement of a 25% uplift in the 1989 reviews of 250 Osmaston Road. As regards the 20% discount for quantum, he merely said that he could draw no conclusion as to what Mr McNab was saying, although he agreed that "a quantum reduction should be reflected.".

41. Mr Gillott said that the rent for 244 Osmaston Road was set at £4.62 with restricted user and was extended to £5.64 to reflect retail use and made much of the fact that Mr McNab had failed to comment on 248 Osmaston Road, where the user was restricted and the rent was fixed at £4.65.

42. Mr Gillott rejected the Osmaston Park Industrial Estate comparables and the increase in gross income as not being validated.

43. Mr McNab's second submission threw doubt on the 248 Osmaston Road comparable, stating that it would be astonishing if in 1997 the tenant had agreed a rate of £4.65 for premises with a restricted user covenant when the adjacent premises at Nos. 244 and 246 had rents of £4.65 and £4.70 with retail user. .....

45. The tenant says that Mr Gillott deliberately chose not to address Mr McNab's comparables or the formula. That may constitute an error of judgment by Mr Gillott. It does not constitute an irregularity in the procedure, serious or otherwise. As regards serious injustice, all that the landlord has done is identify what evidence it would like to have put before the arbitrator if it had a second bite at the cherry. Each of those matters which Mr Gillott says he would have put forward could and should (if probative) have been put forward in the arbitration. The submissions of Mr McNab raised all of the areas of dispute covered by the listed items and required that answers be put forward."

THE JUDGE'S CONCLUSIONS

43. The judge sets out his conclusions in paragraphs 62 to 66 of the judgment, as follows:

"62. In the light of the submissions of the parties, I consider that the arbitrator could not be regarded as acting unfairly in listing as matters in dispute whether the 1989 settlements should be taken into account, and the appropriate allowances for the limited retail consent in respect of Nos. 244 and 246, and how they should be reflected in the valuation.

63. The submissions of both Mr Gillott and Mr McNab emphasised the relevance of wider user clauses. Mr McNab mentioned the 1989 differential between Nos. 244 and 246, on the one hand, and No. 250, on the other hand, and the absence of retail user for Robinsons Industrial Estate, and he gave details (by reference to what was said

to be a Derby City submission in Appendix 8 in the 1980s) of 28.57% uplift for retail consent for 246, and 25% for 244, and when Mr McNab comes to talk about the Osmaston Park Industrial Estate, he again envisages that there will be a 25% uplift for partial retailing use. Mr Gillott's reply said he could draw no conclusions from Mr McNab's references to the 1989 settlements, and again relied on the 1997 settlement for No. 248 which was agreed at £4.65 with a use restricted to light industrial/warehousing.

64. The issue is not whether the arbitrator came to the right conclusion. The sole issue is whether he committed a serious irregularity in coming to the conclusion that he did. In these circumstances I consider that the arbitrator could not be regarded as acting in breach of his duty under section 33 in extracting from the submissions an alternative case that the differential in the 1989 settlements should be applied. In taking account of what Mr McNab asserted (even if what Mr McNab asserted was not proved) I do not consider that the arbitrator was supplying or inferring evidence himself. It was not an irregularity for an arbitrator to take hearsay evidence into account, or to apply the 1989 differentials to the 1997 settlements. Mr McNab had put them into the arena and Mr Gillott must be taken to have deliberately avoided tackling them.

65. The issue of substantial injustice does not therefore arise. If it had arisen, I do not consider that it would have been enough for the landlord to have shown that it would have made other investigations and would have been able to present further arguments to meet the case for the application of the 1989 differentials to the 1997 settlements. While the court could not usurp the position of the arbitrator, the party asking for the award to be set aside or remitted would have to show that the irregularity is likely to have made a real difference to the result. I was not satisfied that the evidence submitted by the landlord on this application would have met that test.

66. The application will therefore be dismissed."

THE ARGUMENTS ON THIS APPEAL

44. For the appellant, Mr Nicholas Dowding QC (who did not appear before the judge) submits, on the issue of irregularity, that the arbitrator breached his duty under section 33 in that the exercise which he conducted on the question of a possible uplift for retail use was not the same exercise as Mr McNab had conducted in his first report. Mr Dowding points out that the arbitrator was concerned with a different property (number 248 Osmaston Road as opposed to numbers 244 and 246), and that the arbitrator's exercise resulted in a higher percentage (41% as opposed to 25%). Secondly, he submits that there was no evidence before the arbitrator that in calculating the appropriate deduction for lack of retail use it was appropriate to compare numbers 244 and 246 with number 248 (Mr McNab's comparison being between numbers 244 and 246 on the one hand and number 250 on the other). Thirdly, he submits that there was no material before the arbitrator to justify his assumption that the entire 41% differential in relation to number 248 was attributable to the lack of retail user. Fourthly, he submits that there was no material before the arbitrator to justify his conclusion that the same differential should apply in 1997 as in 1989. Fifthly, he points out that the agreed procedure for exchange of reports did not allow Mr Gillott an opportunity to comment on Mr McNab's challenge, in his supplementary report, to the reliability of number 248 as a comparable. Sixthly, he submits that in any event the retail uplift calculation made by Mr McNab was expressly disclaimed by him as leading to a result which was "incompatible with the other evidence", with the result that it was not reasonably foreseeable by Mr Gillott that the arbitrator would have rely on it and apply it. Lastly, he submits that there was no material before the arbitrator to support a deduction of 41% in place of the 25% deduction made by Mr McNab in his (subsequently disclaimed) calculation.

45. Mr Dowding reminds us of the contents of Mr Gillott's witness statement (summarised earlier), and submits that in all the circumstances the conclusion should follow that the arbitrator's failure to alert the parties to the course which he proposed to take constituted an irregularity which has caused substantial injustice to the appellant in that, had Mr Gillott had the opportunity of taking the further steps identified in his witness statement, there would have been a real possibility that the arbitrator would have made an award materially more favourable to the appellant.

46. In support of his submissions Mr Dowding referred us to ***Handley v. Nationwide Anglia Building Society*** [1992] 2 EGLR 114 and ***Unit Four Cinemas v. Tosara Investment Ltd*** [1993] 2 EGLR 11 as examples of cases in which the issue was whether an arbitrator had acted fairly. However, he did not suggest that those cases laid down any particular principle as to how such an issue should be resolved. He also referred us to the recent decision of this court in ***Checkpoint v. Strathclyde Pension Fund*** [2003] 14 EG 124 (judgments in which were handed down after the judge's decision in the instant case).

47. For the respondent, Miss Rosemary Jackson (who also appeared before the judge) submits that on a correct reading of Mr McNab's first report he never disclaimed the 25% retail uplift formula. Rather, she submits, in saying that its application to the 1997 reviewed rents in respect of numbers 244 and 246 Osmaston Road produced a result which was "not compatible with the other evidence" Mr McNab was throwing doubt not on the validity of the formula but on the rental figures to which it was applied. This, she submits, is borne out by the passage which follows, in which Mr McNab criticises the surveyors involved for settling at those figures. She submits that Mr Gillott's summary dismissal, in his supplementary report, of the 1989 figures as being "irrelevant", without condescending to particulars, left the arbitrator without the benefit of a specific response to Mr McNab's reliance on the 1989 figures as supporting his "retail uplift" thesis. She reminds us that, in his supplementary report, Mr McNab specifically challenges the reliability of number 248 as a comparable on the footing that an adjustment should be made for the lack of retail user. She submits that, given the material before him, the arbitrator was fully entitled to make the adjustment he did in that respect, and that no irregularity has occurred.

48. As to the statutory requirement of 'substantial injustice', Miss Jackson submits that, whilst it is not for this court to form a view as to what the award would have been had Mr Gillott been afforded the opportunity to submit a further report along the lines indicated in his witness statement, it cannot be said with any degree of certainty that such a report would have made any real difference to the result.

CONCLUSIONS

49. In the first place, the appellant's complaint that the procedure for exchange of reports had the effect of denying Mr Gillott the opportunity to comment on the contents of Mr McNab's supplementary report seems to me to be misplaced. Had the appellant wished to take that point, the time to take it was before the award, not afterwards. In the event, the point was not taken and the arbitration proceeded on the basis of the four reports.

50. I turn, then, to the award itself. In making his award, the arbitrator accepted Mr Gillott's view that number 248 Osmaston Road was the most appropriate comparable, in preference to Mr McNab's view that the most appropriate comparables were the properties in Osmaston Park Industrial Estate. Having done so, the arbitrator went on to conclude, accepting the point made by Mr McNab in his supplementary report, that an adjustment needed to be made to the 1997 reviewed rent of number 248 to reflect the lack of retail user and to bring it into line in that respect with the subject premises. No complaint is made by the appellant in relation to this second step.

51. The arbitrator then had to decide what would be an appropriate deduction to reflect lack of retail user: a question which neither Mr Gillott nor Mr McNab had specifically addressed. The arbitrator concluded that he should look, "for guidance in that respect", to the 1989 figures relied on by Mr McNab in his first report. It is at this point that, according to the appellant, the seeds of the alleged irregularity were sown.

52. In my judgment, however, the arbitrator was entitled to look to the 1989 figures for this purpose. I accept Miss Jackson's submission that to conclude that Mr McNab disclaimed reliance on those figures involves a misreading of his first report. As I read that report, in saying that a straightforward application of his formula to the 1997 rents of numbers 244 and 246 would produce a result which was "not compatible with the other evidence" he was not disclaiming the formula; rather, he was questioning the reliability of the 1997 rents as comparables. On the other hand, I accept Mr Dowding's submission that the arbitrator deployed the 1989 figures in a manner which was materially different from the manner in which Mr McNab had deployed them. Moreover, the arbitrator treated the 41% differential between (a) the average 1989 rents of numbers 244 and 246 and (b) the 1989 rent of number 248 as being attributable in its entirety to "uplift for retail use". That treatment of the 1989 figures, whilst not inconsistent with Mr McNab's first report, is not one which is to be found in that report.

53. So the questions for decision are:

(a) whether, in deploying the 1989 figures in that way without first giving the parties (in effect, the appellant) the opportunity to make representations as to the appropriateness of so doing, the arbitrator breached his statutory duty of fairness under section 33 of the 1996 Act; and

(b) if so, whether that breach has caused substantial injustice to the appellant.

54. As to question (a), I agree with the judge that the fact that the arbitrator did not invite further representations on the question of the appropriate adjustment to the 1997 rent of number 248 Osmaston Road to reflect lack of retail user does not amount to a breach of the statutory duty of fairness. The issue of an adjustment of the 1997 rent for number 248, based on the lack of retail user, was clearly raised by Mr McNab in his supplementary report; and in his first report he had dealt with the significance of retail user by reference to the 1989 figures relating to numbers 244 and 246. Moreover, Mr Gillott, in paragraph 8.9 of his first report (quoted earlier) Mr Gillott himself expressly recognised the significance of a user clause in comparing rental levels. So in my judgment the judge was right to conclude (in paragraph 64 of his judgment) that these matters had been put into the arena. The fact that Mr Gillott felt able to dismiss the 1989 figures summarily as "irrelevant", without engaging with Mr McNab's analysis of them, cannot in my judgment assist the appellant.

55. That conclusion makes it strictly unnecessary to address question (b) above. However, I do so briefly, on the assumption that an irregularity occurred.

56. In ***Checkpoint***, Ward LJ (who gave the leading judgment) concluded that in determining whether an irregularity in a rent review arbitration had caused substantial injustice to the applicant, the court should not attempt to decide what the award would have been had the irregularity not occurred. As he put it (in paragraph 57 of his judgment): *"It is all too hypothetical for me."*

57. Ward LJ went on to describe the correct approach as follows (in paragraph 58 of his judgment): *"In my view, the approach has to be much more amorphous. The court should not make its own guess at the rental figure and make a comparison with the amount awarded. Rather, the court should try to assess how the [applicant] would have conducted his case but for the irregularity. It is the denial of the fair hearing, to summarise procedural irregularity, that must be shown to have caused a substantial injustice. A technical irregularity may not. The failure to deal with a substantial issue probably will."*

58. In the instant case, I am not satisfied that the case which Mr Gillott would have put had he been afforded the opportunity to submit a further report along the lines indicated in his witness statement would have been so different as to justify the conclusion that the lack of that opportunity in itself caused a substantial injustice, regardless of what the outcome of the arbitration would have been. Nor, for that matter, am I satisfied that the

outcome in that event would have been materially different. Accordingly I agree with the judge that the appeal fails on this question also.

59. Ward LJ concluded his judgment in *Checkpoint* by endorsing the views expressed by Tuckey J in ***Egmatra AG v. Marco Trading Corporation*** [1999] 1 Lloyds Rep 862, where Tuckey J cited paragraph 280 of the Report of the Departmental Advisory Committee which led to the enacting of the 1996 Act. In that paragraph, the Committee said this: *"The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. .... In short, [section 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected."*

60. I would respectfully echo those sentiments. In my judgment, pursuit of the overall objective of arbitral proceedings as set out in subparagraph (a) of section 1 of the 1996 Act ('the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense') requires that, to borrow an expression from another context, the courts should accord a reasonably generous margin of appreciation to arbitrators in the discharge of their functions.

61. That said, however, I do not regard the instant case as a borderline case. In my judgment the instant case is plainly not a case in which the arbitrator has gone so far wrong in his conduct of the arbitration that justice calls out for it to be corrected.

62. I would dismiss this appeal.

Lord Justice Clarke:

63. I agree.

Order: Appeal dismissed; appellant to pay the respondent's costs which have been summarily assessed. (Order does not form part of the approved judgment)

Mr Nicholas Dowding QC (instructed by Messrs Beachcroft Wansbroughs) for the Appellant
Miss Rosemary Jackson (instructed by Messrs Flint Bishop and Barnett) for the Respondent