JUDGMENT : MR. JUSTICE AKENHEAD : TCC. 23rd April 2008

Introduction

1. This matter relates to an arbitration award dated 24 October 2007. The losing party in the arbitration, L Brown & Sons Limited ("Brown"), seeks leave to extend its time for service of an application under Section 68(2)(g) of the Arbitration Act 2008. The case raises some relevant issues as to the approach to be adopted by the Court in relation to the principles to be applied to such an application, particularly the weight to be given to the relative strength or weakness of the underlying application.

2. Crosby Homes (North West) Limited ("Crosby") were developers who employed Brown as main contractor to design and build a residential apartment building, Melia House, Red Bank, Cheetham Hill Road, Manchester. The building was to comprise 114 flats on 11 levels. The contract was in the standard JCT form with Design (1998 Edition); the Contract Sum was £9,349,923.32. Gardiner & Theobald Management Services ("GTMS") were the "Employer's Agent" under the contract. Completion was to be achieved by 17 August 2004 and liquidated damages were to be the rate of £2,150 per day. It was intended that the dwellings should be sold with the benefit of NHBC (National House Builders Council) insurance.

3. Following a number of successful (from Brown's point of view) adjudications (six in number), two arbitrations have been started, one ("the First Arbitration") by Crosby in effect to reverse the decision in the second adjudication and the second ("the Second Arbitration") started by Brown in which it claims for loss and expense and variations. Mr Kevin Hayes FRICS FIArb was and is the arbitrator in the First Arbitration whilst Mr Paul Jensen is the arbitrator in the Second.

4. The First Arbitration was concerned with various alleged incentive agreements which were said to have been agreed between Brown by its Mr Murphy and Crosby by its Mr Teague, both managing directors of their respective companies. Each alleged or actual agreement is said to have involved bonus payments to be paid to Brown if it finished all or some of the dwellings by certain times or events and waivers of liquidated damages for arguably late completion. There were said to be five agreements of which only one was admitted by Crosby. Each of the contested agreements required oral evidence from principally Mr Teague and Mr Murphy to establish whether the agreements were made at all and in essence the credibility of each was in issue.

5. About five weeks before the issue of the award by the arbitrator, disclosure of documents was given in the Second Arbitration and by about 18 October 2007, Brown's solicitors, Hammonds became aware that, as it believed, some (seven in number) of the newly disclosed documents were documents ("the Missing Documents") which should have been disclosed in the First Arbitration by Crosby; these, they thought, related to the motivation for Crosby to enter into the last three alleged agreements. The award, against Brown, was issued about a week later. Over the next few weeks until 23 November 2007, Brown and its solicitors formed the view that the Missing Documents were so clear in their content that they demonstrated that Mr Teague had lied and indeed committed perjury in his sworn witness statement in the arbitration.

6. On 23 November 2007, the 28 day period for issuing any challenge under Section 68 expired. On the same day, Hammonds wrote to Crosby's solicitors in effect requesting Crosby to agree to the terms of the award being reversed and threatening proceedings to set aside the award. However, although that request was turned down, it was not until 28 January 2008 that Brown applied for an order extending time for service of the Section 68 application, some 66 days late.

The arbitration

7. Following the appointment of Mr Hayes, he held a preliminary meeting in the First Arbitration on 5 February 2007 and ordered the exchange of pleadings and witness statements. Disclosure was left to be on a basis of co-operation and liaison between the parties and the order stated:

   "7.Both parties seek disclosure of documents by the other. For that purpose the parties are to make written application to the other and co-operate with one another.

   8. If either party wishes to apply for an order for disclosure, the application is to:

   (a) be made by no later than 28 days after delivery of the Statement of Reply to Defence to Counterclaim; and

   (b) be accompanied by evidence of a written request for disclosure of the documents or class of documents in question."

   A two day hearing was fixed for 9 and 10 July 2007. In fact, both parties did produce a list of documents, Crosby's being dated 23 May 2007.

8. Pleadings were exchanged and an issue arose between the solicitors about disclosure particularly about documents involving Crosby's auditors. On 7 June 2007, Mr Hayes ordered that the evidence of the witnesses concerned should be put on affidavit. Mr. Bate, the partner at Hammonds, Brown's solicitors, in his first witness statement (at Paragraph 6.38) describes this order of the arbitrator as having "*effectively torpedoed the application and [meaning] that [the application for specific disclosure] was not dealt with*". I am not convinced that the verb *"torpedo" is* the right word. What it meant however was that there was no order as such for disclosure at all. It led to the witness statement of Mr Teague of Crosby being on affidavit.

9. Mr Bate at Paragraph 6.38 of his first statement says that, following the arbitrator's direction, Brown withdrew its application but correspondence followed in which "Crosby *continued to be evasive and disingenuous in this matter*". I have looked at the 76 pages of correspondence relied upon by Mr Bate and do not see that this serious charge

is made out. The context is that this correspondence is over the four week period before the hearing and there was no order requiring disclosure.

10. The substantive hearing took place on 9 and 10 July 2007 with both sides represented by experienced junior Counsel, Mr Simon Henderson for Brown and Miss Nerys Jefford (now QC) for Crosby. Written openings and closings were submitted. A verbatim transcript was taken of the proceedings. Mr Teague and Mr Murphy of Brown were both called and keenly and extensively cross-examined. Other witnesses were called, Mr Bridge, the commercial director of Crosby, Mr Hillen, a senior quantity surveyor at Brown and Mr Hawksworth, Brown's construction director.

11. The arbitrator produced his Award No 1 on 24 October 2007. He found against Brown upon the basis that there were no agreements which entitled Brown to bonuses. In effect, he reversed the second adjudicator's decision and ordered Brown to repay the sum of £208,000 paid by Crosby pursuant thereto, together with interest.

The evidence and arguments in the First Arbitration

12. I review here the evidence and argument as considered by the arbitrator in the First Arbitration.

13. Crosby's holding company was The Berkeley Group plc ("Berkeley"). In August 2003, there was an agreement for a management buyout of the Crosby Group. The buyers had to generate £450m of cashflow over seven years and had to make milestone payments to Berkeley, failing which the buyers would not receive dividends or have voting rights in respect of their shares.

14. The arbitrator then takes up the basic history, which is at least now uncontroversial:
"By April 2004 all or most of the apartments at Redbank had been sold, that is to say, contracts for their sale had been exchanged. However, the Works had been delayed. Crosby was concerned that the Plastering Completion Date of 30 April 2004 and the Date for Completion would not be met. Crosby's accounts were required to be prepared in accordance with an accounting policy imposed by Berkeley. Under the terms of the Berkeley accounting policy, if the Plastering Completion Date was achieved, then providing that contracts for sale had been exchanged, the first 70% of the profit on the Redbank apartments could be included in Crosby's accounts for the year ending 30 April 2004. At paragraph 3 of DT1 Mr Teague explains that was important because the profits in question had been included in the budget for the year and a failure to achieve the budget was likely not only to impact on the Crosby group but also on Berkeley because it is publicly quoted. Crosby therefore considered how the delay to the Works might be recovered so that Plastering Completion Date and the Date Completion could be achieved." (Paragraph 18 of the award)

15. In short, in the First Arbitration, there were up to five possible agreements between the parties whereby Crosby was said to have offered and Brown accepted incentives to complete the Works somewhat earlier than they might otherwise have been completed with in some cases a possible waiver of liquidated damages against Brown. The five actual or alleged agreements were as follows:
    (a) In April 2004, Crosby offered to Brown a completion bonus on various conditions including completion by the contractual completion date of 17 August 2004. A deed was drawn up to this effect. Crosby contended that that offer was never accepted and the deed not executed and in any event the terms were not fulfilled. The arbitrator referred to this as "the April Agreement".
    (b) In July 2004, Crosby made Brown a further written offer of a completion bonus (for apartments handed over in August and September) and a waiver of liquidated damages if a "notice to complete" was served for all flats by 15 October 2004. This offer was accepted in writing but its terms were not fulfilled. That was common ground in the arbitration between the parties. This was referred to as "the July Agreement".
    (c) Crosby then made a further written offer dated 7 October 2004 of a completion bonus for apartments certified by the NHBC by 15 October 2004 and a waiver of liquidated damages for properties if Crosby was able to complete the sale of every apartment by the end of October 2004. Crosby's case was that this offer was never accepted whilst Brown contended that this was the confirmation of an agreement already reached. In any case its terms were not fulfilled and no claim was made, as such, under this alleged agreement. This was referred to as "the 7 October Agreement".
    (d) It was then alleged by Brown that there was an agreement on 14 October 2004 to extend the dates in the earlier 7 October Agreement to 15 November and the end of November 2004 respectively ("the 14 October Agreement").
    (e) Finally, there was said by Brown to be a further agreement ("the November Agreement") whereby the parties agreed orally to exclude levels 10 and 11 from the 7 and the 14 October Agreements with at least one result that liquidated damages were not to be payable for late completion of levels 10 and 11.

16. There clearly was a substantial dispute on the evidence, primarily as between Mr. Teague and Mr. Murphy who were the main people said to have been involved in reaching these signed agreements. Thus, the credibility of each of these witnesses played an important part in the decision reached by the arbitrator.

17. The arbitrator reached his decision on the four disputed agreements on the basis set out in the following paragraphs.

(a) The April Agreement

18. The only issue was whether the draft agreement which had been sent by Crosby to Brown was actually accepted. Brown's case was twofold: primarily the document, it is said, was signed on behalf of Brown and handed to

Mr. Teague and Mr. Bridge at a meeting on 6 May 2004; alternatively it was said the offer was accepted by conduct. If the contract terms had been signed, neither party had retained a copy. Mr. Murphy said that he was one of two signatories on Brown's side. He could not however apparently remember who the other person who signed the document was. The arbitrator found it extraordinary (Paragraph 62 of the award) that Mr. Murphy could not remember who the other signatory was; neither could the other two possible signatories recall signing the agreement. The arbitrator found (Paragraph 66) that Mr. Murphy's evidence in the second adjudication was inconsistent with the evidence which he gave in the arbitration. The arbitrator (Paragraph 68) found that his evidence presented "a fragmented and ... evolving account of events" and clearly found him an unreliable witness in that regard. He found Brown's version of events implausible in too many respects and rejected Brown's primary case. He rejected the secondary case.

(b) The 7 October Agreement

19. In rejecting Mr. Murphy's evidence, the arbitrator gave weight to the fact that there was no written reply sent by Brown accepting the offer which had been set out in Crosby's letter of 7 October 2004, particularly in the context that there had been a written acceptance to the July Agreement. The arbitrator found it "*inconceivable*" (Paragraph 103) that Brown would not have sent a written acceptance. At Paragraph 108, the arbitrator set out the fact that Mr. Murphy had accepted in evidence that by the time he received the letter of 7 October "*or at most within a day or so of receiving it, he was aware that the terms of the 7 October Agreement could not be met because he knew by then the apartments would not be finished by 15 October*". Put another way, the arbitrator was saying it was most unlikely that the 7 October offer was accepted because Mr. Murphy must have known that no bonus could ever be payable under it in the light of the status of completion which remained to be reached. In fact (at Paragraph 109), the arbitrator confirms that Mr. Murphy did not actually apparently say in evidence that agreement had been reached orally in any discussion prior to the letter of 7 October 2004.

(c) The 14 October Agreement

20. (i) As was argued by Crosby's counsel, the 14 October 2004 agreement, given that it was supposedly a variation of the 7 October 2004 agreement, could not easily survive if there was no 7 October 2004 agreement.

(ii) It is clear that the arbitrator carried out a thorough review of the evidence and argument in relation to this alleged agreement. He considered the different points: motivation, management buy-out implications, commercial sense, other offers in writing, the principal witnesses' recollections of the meeting, evidence of other witnesses, waiver of liquidated damages, reversal of burden of proof, working to 15 November, abatement of bonus and later correspondence in March 2005. The arbitrator apparently considered each carefully and thoroughly.

(iii) In dealing with motivation, the arbitrator rejected the suggestion that a saving in interest could be a motivator for Crosby in agreeing to pay bonuses to secure completions of sales by the end of November because the amount of interest saved would have been far less than the completion bonuses. Similarly, the auditing rules imposed by Berkeley which allowed incomes from completion within the four-month period after the end of the financial year to be brought back into the earlier financial year did not explain or provide a motive. Flats which were complete by the end of November were seven months after the end of Crosby's financial year. The arbitrator considered the rules contained in an "**Audit Clearance Report**" which had been disclosed and agreed with Mr. Teague's understanding of the policy.

(iv) I will not go into all the other reasons why the arbitrator formed the view that Crosby's evidence was to be preferred to Brown's. However, Mr. Murphy apparently in oral evidence conceded that the alleged offer made in respect of the alleged 14 October Agreement was a "*gift horse*". The arbitrator, perhaps unsurprisingly, formed the view that there was no commercial reason for Crosby to have made an offer as alleged (Paragraph 137). Again the absence of any confirmation or record in writing influenced the arbitrator.

(d) The November Agreement

21. (i) Brown's case comprised two elements, the first being an allegation that Mr. Teague instructed Brown orally on 8 November 2004 to divert labour resources from levels 10 and 11 so that they could concentrate on levels 1 to 9. The second related to an alleged private meeting on the same day whereby Mr. Teague is said to have agreed that, if Brown achieved NHBC completion of the flats on levels 1 to 9 by 15 November and if sales could legally be completed by the end of November, Brown would receive a £2,000 per apartment bonus and a waiver of liquidated damages.

(ii) Because the arbitrator had found that there was no agreement on 14 October, the case had to fail in relation to the November Agreement. He found that it was not credible that Crosby would have made an agreement as alleged, there being no commercial reason for Crosby to do so. There was no written confirmation of the alleged agreement.

(iii) He rejected the case that there was any agreement in November as alleged either by way of variation of an earlier agreement or by way of a fresh agreement.

22. Looking at the award overall, the submissions and the evidence, it is clear that there were a significant number of factors, other than commercial motivation, deployed by both parties as to why their particular witness' evidence was to be preferred. Whilst commercial motivation was undoubtedly an important factor, particularly deployed by Brown, there were other equally arguable factors of equal or greater weight. It is clear from the award that the arbitrator took into account all material factors.

The law

23. Section 68 of the Arbitration Act 1996, materially, says as follows:

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

(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 ... (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy ...".

24. Section 70(3) makes it clear that any application under section 68 (amongst others) must be brought within 28 days of date of the award. Section 80 (5) states:

"Where any provisions of this Part requires an application or appeal to be made to the court within the specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period described by the rules apply in relation to that requirement ...".

25. The relevant rule in the CPR in relation to section 80 (5) is rule 62.9 which states:

"(1) the court may vary the period of 28 days fixed by section 70(3) of the 1996 Act for (a) challenging the award under s.67 or 68 of the Act ..."

26. A number of cases in the Commercial Court have identified factors which should be taken into account in deciding whether an extension of time should be given to making of an application under section 68. In ***AOOT Kalmneft v Glencore International AG and Another*** [2002] 1 Lloyd's LR 128, the case related to a 14-week delay in relation to a section 68 application. Colman J made the following introductory remarks before setting out the considerations which would be material on any application to extend:

"48. The effect of s.80(5) is to introduce the broad discretionary approach under this rule and for applications for the extension of the 28 days time limit under ss. 67, 68 and 69 of the 1996 Act.

49. It is therefore necessary to identify the criteria applicable to such applications under the Arbitration Act, for they may differ from those applicable under the CPR.

50. In determining the relative weight that should be attached to discretionary criteria the starting point must be to take into account the fact that the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR.

51. Thus, the twin principles of party autonomy and finality of awards which pervade the Act tend to restrict the supervisory role of the Court and to minimize the occasion for the Court's intervention in the conduct of arbitrations. Nowhere is this more clearly demonstrated than in s.68 itself where there was superimposed upon the availability of a remedy for what used to be called 'misconduct' by the arbitrator and was redefined as 'serious irregularity' a requirement that it had caused or would cause substantial injustice to the applicant. No longer was it enough to demonstrate failure by the arbitrator scrupulously to adhere to the audi alterem partem rule.

52. ... Further, the relatively short period of time for making an application for relief under ss. 67, 68, 69 also reflects the principle of finality. Once an award has been made the parties have to live with it unless they move with great expedition. Were it otherwise, the old mischief of over long unenforceability of awards due to the pendency of supervisory proceedings would be encouraged.

53. At this point it is necessary to have in mind the general principle set out in s. 1 of the 1996 Act:

"(1) 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; ..."

54. The reference to unnecessary delay is pertinent to identifying the relevant discretionary criteria ...

56. It is however also to be remembered that the threshold requirement set out in s. 79(3)(b) for extension of time limits to which s. 79 relates - 'that a substantial injustice would otherwise be done' is not expressed to be applicable to extension of time under s. 80 (5). In that respect therefore a lower unfairness threshold must be presumed to be intended.

57. In approaching the identification the applicable criteria it is also important to take into account the fact that, at least in international arbitrations, English arbitration is probably the most widely chosen jurisdiction of all. It is chosen because of the ready availability of highly skilled and experienced arbitrators operating under a well-defined regime of legal and procedural principles in what is often a neutral forum. Supervisory intervention by the Courts is minimal and well-defined and the opportunities for a respondent with a weak case to delay the making of an award or to interfere with its status of finality are very restricted. Accordingly, much weight has to be attached to the avoidance of delay at all stages in an arbitration, both before and after an interim or final award. If the English Courts were seen by foreign commercial institutions to be over-indulgent in the face of unjustifiable non-compliance with time limits, those institutions might well be deterred from using references to English arbitration and their contracts. This is a distinct public policy factor which has to be given due weight in the discretionary balance.

58. On the other hand it has to be recognised that because of the extremely wide international nature of the market for English arbitration many of the parties may be located in remote jurisdictions and may have little or no previous experience of international or English arbitration. When these relatively unsophisticated parties find

themselves involved in such an arbitration, it is only to be expected that they move somewhat more tentatively than would an international trading house well experienced in this field. It would therefore be wrong to fail to make at least some allowance for this factor in elevating the element of fault in failing to comply with time limits."

27. Colman J then turned to what considerations might be material to an application to extend time for an application under section 68. He listed them in paragraph 59 of his judgment:

"(i) length of the delay;

(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;

(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;

(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the Court might now;

(vi) the strength of the application;

(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

28. In the ***Kalmneft*** case, Colman J formed the view that given the lack of a satisfactory explanation for the delay in submitting the section 68 application and the intrinsic weakness of the application, time would not be extended.

29. In ***Nagusina Naviera v Allied Maritime Inc*** [2002] EWCA Civ 1147, the Court of Appeal considered the various factors set out by Colman J in ***Kalmneft*** case, in reviewing the first instance decision. At Paragraph 39 Mance LJ (as he then was) identified that the "*primary factors*" were factors (i) to (iii). He confirmed that factor (iv) was not *"an essential pre-condition"* (see paragraph 39). He indicated that factor (v) was "*a relatively minor factor*". In relation to factor (vi) Mance LJ stated this:

"As to (vi), it is right that Andrew Smith J did not explicitly refer to the strength, or indeed the weakness, of the claim. Perhaps this was not discussed before him. Mr. Hancock [Counsel] suggested that the present situation was, in any event, one where courts would not engage in any detailed way with the prospects, except perhaps in a clear case. In my judgment, this was, and is, clearly not a case where the owners' claim can be regarded as so strong that it would obviously be a hardship for them not to be able to pursue it; if anything, rather the contrary. On any view, the prospects here were clearly not such as to have affected what was otherwise the judge's view as to the right exercise of his discretion."

30. In relation to factor (vii) Mance LJ stated as follows:

"Finally, as to factor (vii), general considerations of fairness, the judge must have had well in mind considerations of overall justice and fairness. They must, however, always be viewed in the particular context that Parliament and the courts have repeatedly emphasized the importance of finality and time limits for any court intervention in the arbitration process."

31. In ***Thyssen Canada Ltd v Mariana Maritime S.A & Another*** [2005] EWHC 219 (Comm), Cooke J's approach on the evidence in that case in relation to factor (vi) is set out at paragraph 56:

"Whilst the strength of the application is one, which the Court can take into account, it is self-evident in the present case that there are expensive conflicts of evidence between the parties. ... At all events, I am not in a position to evaluate the evidence as it appears on the statements in a way which enables me to take this into account as a factor one way or the other in the context of an extension of time."

It is perhaps of interest that in the ***Thyssen*** case the application for extension of time was, none the less, rejected.

32. Drawing these authorities together, I conclude as follows:

(a) The time limits for any court intervention in the arbitration process (including by way of application under section 68) are important and reflect the policy expressed in section 1 of the 1996 Act.

(b) Factors (i) to (iii), that is the length of delay, its causation and the reasonableness of the parties' conduct as identified by Colman J in the ***Kalmneft*** case are the primary factors.

(c) The weight to be given to factor (vi) (the strength of the section 68 application) is not a primary factor. However, an intrinsically weak case will count against the application for extension whilst a strong case would positively assist the application. An application which is neither strong nor weak will not add significant weight to the application for extension of time.

33. Turning now to the application of section 68(2)(g) of the Arbitration Act 1996, there has been some material authority. In ***Profilati Italia S.r.L. v Painewebber Inc and Another*** [2001] 1 Lloyd's LR 715, Moore-Bick J (as he then was) addressed section 68(2)(g) in the context of documents that were said to have been withheld in the arbitration. Materially, he said as follows:

"17. It would be unwise in my view to attempt to define the circumstances in which an award might be set aside or remitted on public policy grounds, but in the light of that comment and of the language of sub-s. (2)(g) as a whole I think that where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the Court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in his favour. Moreover, I do not

think that the Court should be quick to interfere under this section. ... the expressions 'serious irregularity' and 'substantial injustice' are intended to be reserved for only the most serious cases. ....

19. Where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favour the Court may well consider that he has procured that award in a manner contrary to public policy. After all, such conduct is not far removed from fraud. The position is more difficult, however, where there has been a failure to disclose a document as a result of negligence or a simple error of judgment. ...

21. ...I do not think that proceeding with a reference following an innocent failure to disclose a document, even one of importance, can properly be described as acting contrary to public policy. If anything, the withholding of a document under these circumstances can more nearly be equated to what used in some cases to be described as 'procedural mishap' and its subsequent discovery to the discovery of fresh evidence. Under the Arbitration Act, 1950 the Court had a wide jurisdiction to set aside or remit an award and would sometimes do so, for example, where fresh evidence came to light or there had been some misunderstanding not amounting to misconduct. ...

22. The scheme embodied in s. 68 of the Arbitration Act, 1996 is quite different. An application to challenge the award may only be made on the grounds of serious irregularity which is itself carefully defined in sub-s. (2). The Court has no general jurisdiction to interfere with the working of the arbitral process and some of the grounds on which the Court would formally have acted find no place in s. 68. One such ground, which is particularly relevant for the present case, is the discovery of new evidence: the Court no longer has the power to remit an award simply on the grounds that new evidence has come to light. I agree with Lord Goldsmith [counsel for the respondent] that to allow a challenge to the award to be made on the grounds of an innocent failure to give proper disclosure would be contrary both to the spirit and to the wording of the Act."

34. In the ***Thyssen*** case, Cooke J quoted paragraph 17 of the judgment in ***Profilati*** with approval at paragraph 14 and went on:

"Whichever limb of section 68(2)(g) of the Act is relied on by the Claimants, they must establish that the Defendants acted in such a way as to obtain the award by fraud or to procure it in a way which was reprehensible or involved unconscionable conduct. .... The section 68 jurisdiction is a 'longstop' and, to some extent at least, the existence of lying witnesses must be considered, if not an ordinary incident of litigation/arbitration, at least one that is not uncommon. It is for the parties to prepare for hearings, whether in Court or arbitration and to adduce the evidence which they wish to establish the truth. If a decision is to be challenged on the basis of false evidence, this can only be done by an applicant where the Defendant can fairly be blamed for the adducing of that evidence and the deception of the Tribunal. In the present case, it can make no difference whether the application is made on the basis that the Award was obtained by fraud or procured in a manner that is contrary to public policy. In each case the Claimant must establish that the Defendant was responsible for the fabrication of perjured evidence, which has brought about a result which has caused them substantial injustice."

35. There is substantial authority for the proposition that Section 68 must not be used in effect as a basis for challenging evidential findings made by an arbitrator. It is only if one of the grounds in Section 68 can be established together with substantial injustice that an effective challenge can be mounted.

36. From the above authorities on Section 68, I draw the following conclusions:

(i) The deliberate withholding of documents which had been ordered to be disclosed in the arbitration may in certain circumstances be considered to be reprehensible conduct and thus contrary to public policy under S.68(2)(g).

(ii) It must, at least, be less reprehensible (if reprehensible at all) for a party to withhold disclosure where disclosure has not as such been ordered by the arbitrator. Under some agreed or standard procedures for disclosure (for instance the IBA Rules) disclosure is voluntary unless specific documents are either agreed or ordered to be disclosed.

(iii) On balance, I consider that the withholding or non-disclosure of documents which have not been ordered to be disclosed by the Arbitrator or have not been agreed to be disclosed, cannot be described as reprehensible or fraudulent unless such non-disclosure is clearly part of some other fraud or reprehensible conduct on the part of the non-disclosing party.

(iv) Lying, being not uncommon in arbitration or in civil proceedings in general, can be a basis upon which an award is obtained by fraud or in a way which is contrary to public policy but where the credibility of the witness in question was a primary feature of the arbitration or the arbitration hearing it is less likely that it will be considered to be a serious irregularity.

(v) If there are grounds under Section 68(2)(g) based on lying or deception on the part of the respondent to the application, it is necessary to demonstrate that the award was dependent upon or was reached as a result of the lying or deception.

(vi) If the grounds under Section 68(2)(g) are established, it is still necessary to show that substantial injustice would be caused to the applicant as a result thereof. That may prove not to be very difficult to establish if the grounds under Section 68(2)(g) are established.

The delay

37. I now review the facts to determine whether Brown acted reasonably in all the circumstances and whether Crosby caused or contributed to the delay. There is no dispute here that 66 days of delay has occurred since the award was issued. The parties have proceeded on the basis that the award was dated the 26 October 2007 (although

nominally the 24 October appears on the award). Thus the Section 68 application should have been issued on or by the 23 November 2007. Brown's application to extend time was issued 66 days later.

38. Mr. Bate in two witness statements has sought to explain and excuse the delay which has occurred. His first witness statement is 69 pages long and attaches 15 exhibits and it seems fair to conclude that Mr. Bate has examined and re-examined the evidence and argument in the arbitration exhaustively. Indeed, the summary costs bill submitted by Hammonds shows over 200 hours of work by Mr Bate. As I say later in this judgment, much of this was unnecessary.

39. Mr. Bate deals with the delay in paragraphs 10 and 11 of his witness statement together with a *"chronology"* which he exhibits as SB2 in which he spells out on a week by week basis what it is said happened. I will not reiterate in infinite detail precisely what happened. I will address only the key facts and dates.

40. Crosby gave disclosure in the Second Arbitration on 17 September 2007. Mr. Bate received actual copies of all the documents in the first week of October 2007. Following his review of them, it was on 18 October 2007 that he realised that Crosby had disclosed some documents which he believes ought to have been disclosed in the First Arbitration. He did not request the arbitrator to withhold his award.

41. Following the publication of the award, Mr. Bate in late October 2007 had a long telephone conversation with Mr. Murphy of Brown and discussed the award with counsel two days later; Mr. Henderson advised orally that there were no realistic prospects of bringing a successful challenge.

42. By letter dated 9 November 2007, Mr. Bate wrote to Eversheds and attached a schedule identifying which documents had not been disclosed as well as raising numerous unrelated queries as to other documents. These were identified as documents at File 4/48, 52, 70, 79 and 87 and Files 5/2, 8 and 9. In the schedule Eversheds were asked for an explanation why the particular documents were not disclosed. Eversheds were asked to explain what was said to be "serious omissions" from the disclosure in the First Arbitration and in relation to one document, a weekly status report from GT for 15 November 2004, it was stated:

"Why was this not disclosed in Arbitration 1 as item 1.1 relates to progress in October and apartments signed-off by NHBC? It provides motive as to whether incentive agreements were extended. Please explain the serious omission from the disclosure in arbitration 1."

43. In the text of the letter, it was said that there were a number of serious issues in relation to Crosby's disclosure in the Second Arbitration. One issue which they summarised at the end of the letter was:

"The disclosure of documents which are clearly relevant to the issues that were decided by the arbitrator in the first arbitration between our clients, which were not disclosed in that arbitration."

Mr. Bate awaited Eversheds' urgent response to the issues raised.

44. Eversheds responded on 14 November 2007 in the following terms:

"We will reply to that letter and attach schedule in detail when we have had an opportunity to go through the schedule ...

We have no reason to suspect that the affidavits sworn by Mr. Teague and Mr. Bridge during the course of the first arbitration between the parties were incorrect or insufficient in any way ..."

45. An important letter in the chronology is Hammonds' letter of 23 November 2007 to Eversheds. It was headed *"Arbitrations 1 and 2"*. It refers to the fact that Hammonds had not had a "*meaningful response*" to the concerns expressed in their letter of 9 November 2007. They explained that matters are serious. The letter considers several of the documents said to be missing and say that it is clear that these documents should have been disclosed. It was said that the documents went to "*motive*" for Crosby to extend the incentive agreements to November 2004." The following was said:

"Had your client disclosed these documents they would have opened up a further line of cross-examination for your client's witnesses but would have undoubtedly supported our client's case on motive. We are certain of this because of the references in the note at 10 November 2004 to the criticality of the NHBC issuing certificates on 10/11 and 12 November, e.g:

D T-critical to obtain search. But if outst. Worked to much and not completing 2 weeks to end.

Our client's counsel did not have the opportunity to cross-examine Mr. Teague on this cryptic but important note."

46. Mr. Bate in this letter then went on to say as follows:

"Pursuant to CPR 31.23 our client can bring proceedings for contempt of court. CPR 31.23 provides the proceedings may be brought against the person if he makes, or causes to be made, a false disclosure statement without an honest belief in its truth. Pursuant to this our client is considering bringing proceedings for contempt of court against Mr. Bridge, Mr. Teague, Crosby Homes (North West) Limited.

In the alternative our client can bring proceedings for breach of contract or negligence against the same persons, in respect of the duty to disclose relevant documents further to the agreements made by the arbitration agreement as varied by the subsequent agreements of the parties.

Further or in the alternative, our client can apply to the court to challenge the arbitrator's decisions on the grounds of serious irregularity or that it offends against the interests of justice and principles of fairness enshrined in the Arbitration Act 1996.

In the light of the above, our client requires your confirmation by immediate return that your client will:

(I) Immediately repay to it the sum of £198,747.36 paid on Friday 2 November 2007 in respect of the Arbitrator's Award Number 01 ...

(III) enter into a settlement agreement confirming that the award in Arbitration 1 is invalid and that Arbitration 2 can proceed on the footing that your client is not entitled to levy liquidated and ascertain damages;

(IV) pay our client's costs at Arbitration 1 in their entirety (it follows that your client would also have to agree that it is not entitled to any costs of Arbitration 1) to be assessed if not agreed.

If your client does not provide this confirmation by immediate return or does not accept these conditions, then, given the serious nature of these issues and the fact that our client's time for applying to court to challenge the arbitrator's award is running out, our client will instruct us to:

1. as soon as reasonably practicable, issue proceedings in the Technology and Construction Court to claim the relief set out above ...

2. as soon as reasonably practicable issue proceedings for contempt of court against Mr. Bridge, Mr. Teague and Crosby Homes (North West) Limited and any other relevant person;

3. as soon as reasonably practicable, issue proceedings in the Technology and Construction Court to challenge the Arbitrator's Award and Arbitration 1."

47. I therefore draw the following conclusions of fact:

(a) Mr. Bate had known for some five weeks that documents which he believed should have been disclosed in the First Arbitration had not been.

(b) He had had a full and sufficient opportunity to take instructions from his clients by 23 November 2007. Indeed I assume that he did have instructions to write the letter which he did write on 23 November 2007.

(c) He knew that the time for the lodging of an application under Section 68 was 23 November 2007.

(d) He believed on one ground or another that the alleged non-disclosure of documents in the First Arbitration in so far as it impacted on the evidence given by Mr. Teague and Mr. Bridge was such that it could found an application in effect to have the award in the First Arbitration set aside.

(e) He had by then had plenty of opportunity to examine the Missing Documents against the evidence and the award of the Arbitrator to determine whether or not there were properly arguable grounds to establish a viable argument under Section 68.

(f) He made no attempt to contact counsel with regard to the Section 68 application in November at all.

48. It was only in the week commencing 26 November 2007 that Mr. Bate said that he first realised that Mr. Teague had committed "*perjury*", given that his written evidence had been given on affidavit.

49. On 29 November 2007, Mr. Bate wrote to Eversheds confirming that he had not received a response to his letter of 23 November 2007 and saying this:

"We require a response immediately.

If we do not receive a response by 4 p.m. tomorrow, Friday 30 November 2007, our instructions are to commence proceedings without further recourse or notice to you."

50. Eversheds did respond in their letter of 30 November 2007 to Mr. Bate. They did not accept that all or some of the notes supported an alleged motive on the part of Crosby to extend the incentive agreements to November 2004. They accepted that certain notes should have been disclosed but explained that the failure to disclose *"was clearly an oversight rather than deliberate concealment"*. They countered the suggestion that there could be a contempt of court. They explained that Brown was too late to issue a challenge to the award as it was beyond the 28 day period. They did not accept the offer to settle the whole matter and indicated that any proceedings would be "*strongly contested*".

51. Papers were sent to counsel by Mr. Bate on 6 December 2007. Mr. Henderson was, I was told, not available so Mr. Simon Hargreaves was consulted. He is said to have given telephone advice on 11 December 2007. Due to his workload, he could not assist for the next four weeks or so.

52. Little seems to have been done in the period up to Christmas actually progressing any application under Section 68 or to extend time for serving such an application, other than taking counsel's advice on the telephone.

53. Mr. Bate did write to GTMS (Mr. Myall) to request a meeting to discuss some of the newly disclosed documents. Mr. Murphy attempted to make contact with Mr. Duffill who although he had given a proof of evidence in the First Arbitration had declined to attend at the hearing.

54. Mr. Bate was away on holiday, apparently from about 21 December to 2 January 2008.

55. On 3 January 2008, Eversheds served a response to the schedule of documents which had been sent to them by Hammonds on 9 November 2007. They said that five of the documents were not discloseable in the First Arbitration but seemed to accept that two notes relating to meetings on 8 and 10th November 2007 were discloseable; in effect this had been by accident rather than deliberate. Between 3 January 2008 and the date when the application in this case was issued Mr. Bate undoubtedly spent a considerable time working on his statement for the application and various other court papers. However, it does appear that he delegated little to other solicitors within his firm. It is also clear that he spent a substantial amount of time (understandably) on other matters including in connection with what is called the "roof" issue in the Second Arbitration which was proceeding to a hearing in January 2008, a House of Lords matter and a matter in the Court of Appeal.

56. He met Mr. Duffill, although this meeting seems not to have been very productive. He also met Mr. Myall of GTMS and again that seems (perhaps unsurprisingly) also to have been somewhat unproductive.

57. In my view there is no good reason or excuse why the application under Section 68(2)(g) could not have been brought within the 28 day period allowed by the 1996 Act and the rules. Mr. Bate was aware as early as 18 October 2007 that there were documents which, disclosed in the Second Arbitration, he believed should have been disclosed in the First Arbitration. It is wholly clear that by no later than 9 November 2007 (when he wrote in such terms to Eversheds) he was wholly aware that the alleged failures to disclose these particular documents, he believed, represented serious omissions from the disclosure in the First Arbitration and that they went to motive and to other matters in issue in the First Arbitration.

58. It is similarly clear that by the time that he wrote his letter of 23 November 2007 Mr. Bate was wholly aware that there was (he believed) an arguable case that the arbitrator's award should be set aside because not only documents which he believed should have been disclosed had not been but also in effect that these documents demonstrated that Mr. Teague (and Mr. Bridge possibly to a lesser extent) were wrong and in effect had misled the Arbitrator. At least there was a sufficient misleading as to justify not only the award being set aside but a finding in effect that Brown were bound to win on the evidence. He had the opportunity not only to take instructions from his client in the preceding four weeks. He also had the opportunity to seek the advice of appropriate counsel as to what was the appropriate course of action. He was also aware that a 28 day period applied to the lodging of applications under the 1996 Act.

59. I find it impossible to accept the assertion made by Mr. Bate that in effect a, or a primary, reason for a delay was the awaiting for a response in detail from Crosby's solicitors to his letter of 9 November 2007. He knew from Eversheds' letter of 14 November 2007 that Crosby were saying that Mr. Teague's and Mr. Bridge's affidavits were not incorrect or insufficient in any way. He must have known that in effect his client had a fight on its hands so far as the first award was concerned. What he says is not consistent with what actually happened. I would have expected Mr. Bate, if he really had felt that the service of his client's application was being delayed by the lack of a response to the letter of 9 November 2007, to have said so at the time. It is particularly telling that his detailed letter of 23 November 2007 (see above) makes no mention of this problem nor indeed do any of the other letters which have been disclosed to me in the December 2007 period.

60. Again, Mr. Bate's assertion that in effect he could not delegate this matter to anyone else is surprising and it does not, in my view, give rise to an adequate excuse or explanation for the delay. As a competent solicitor, Mr. Bate would and should have been aware of the need for expedition in making the applications. Indeed, Mr. Bate was obviously wholly aware of the need to bring the application within the requisite 28 day period. Given the importance of expedition, I would have expected Mr. Bate to instruct a competent assistant solicitor to do all the necessary "legwork" or, as usefully, to instruct junior counsel to do the same if there was no one else available within his firm. He explains at Paragraph 11.19 of his first witness statement that there had been "internal staffing problems". Even if that is so, that does not prevent the instruction of junior counsel, well versed in drafting the requisite documents, to do just what was required.

61. It seems to me that by early November, there was sufficient information available to Mr. Bate to enable him so to have delegated the requisite task of preparing, doubtless under Mr. Bate's supervision, the relevant documentation.

62. Having reviewed carefully the facts and matters in issue on the substantive application, I do not consider that the task of preparing such an application was peculiarly difficult or onerous. In making this remark, I take the following matters into consideration:

    (a) A consideration of the award shows that there were in essence substantive areas of disagreement in relation to the April agreement, the 7 October, 14 October and November agreements.

    (b) There were transcripts of the evidence available together with the written opening and closing submissions and the witness statements or affidavits from the parties. There clearly was not a very large amount of relevant contemporaneous documentation going to the issues about these agreements.

    (c) What was required was an analysis against the Arbitrator's award of the evidence given in writing and at the hearing by, primarily, Mr. Teague. That analysis needed to take into account the Missing Documents which in essence only comprised some six or seven new documents.

63. I cannot see that to a moderately experienced assistant solicitor or junior counsel this exercise would have taken anything more than some 50 to 60 hours, and possibly much less. The drafting of the relevant witness statement and exhibits could have been done in relatively short order. I have been very surprised (and not a little dismayed) by the vast quantity of documentation which Mr. Bate has thought necessary to exhibit and include, mainly, in his first statement. Much of it seems to be unnecessary.

64. Mr. Bate in some way seeks to explain or excuse the make delay in making the application by reason of the supposed need to meet Mr. Myall and Mr. Duffill. So far as the latter is concerned, he had not been co-operative particularly for the hearing of the First Arbitration and it was unlikely that he would be of much assistance. Similarly it was unreasonable to expect that Mr. Myall would assist much given that GTMS was employed by Crosby on an ongoing basis and was likely to owe duties of confidentiality towards them. Furthermore, I do not see that there was any good reason not to seek to meet them in November 2007.

65. For the reasons indicated above, I am wholly unsatisfied that there was any reasonable excuse or explanation for the delay in making the application. To the contrary I am wholly satisfied that there was no good reason why the application under Section 68(2)(g) should not have been issued within the time allowed by the Act. I am also wholly satisfied that as a matter of fact Mr. Bate and Hammonds were not delayed and indeed did not in reality perceive themselves as being delayed as a result of any default or act or omission on the part of Crosby.

The "Missing Documents"

66. Although I have headed this section as I have, it is difficult to describe the documents as "missing" in the sense that the Arbitrator never ordered disclosure or discovery of documents but left it to the parties in effect to co-operate and disclose what they wanted to. It is true and indeed accepted that the seven documents complained of as not having been disclosed in the First Arbitration were not actually disclosed.

67. I now review the seven documents to consider, without making a final decision, their relevance:

A. GTMS Weekly Status Report No 2

(i) Although the front page relates to October dates, the inside suggests that the report relates to 20-25 September 2004.

(ii) Paragraph 9.4 forecasts completion in the week commencing 25 October 2004.

(iii) There is nothing obvious in this forecast which adds credence to Brown's case about the 7 October 2004 agreement.

(iv)The highest that Mr Bate can put it (Paragraph 9.30 (c) of his first statement) is that "Crosby might realistically have (and the Arbitrator might realistically have found) been pursuing internally at least an alternative target date later than 15 October 2004".

(v) However, the undisputed evidence was that Crosby had offered bonuses in writing for any dwellings completed by 15 October and a waiver of liquidated damages if all the dwellings were completed by the end of October 2004. Thus, the terms of the offer anticipated completion of some dwellings by mid October and the possibility of the rest being complete by the end of October.

(vi) I simply do not see that this Status report is obviously prejudicial to the case advanced by Crosby or that it should have been disclosed.

B. GTMS Weekly Status Reports No 4 and 5 (11-15 and 18-22 October)

(i) These explain in apparently uncontroversial terms the progress of the work to date and describe work remaining to be done. For instance there was concern that the external envelope work was falling behind.

(ii) There is some discussion about the NHBC inspector "signing off" flats or not doing so.

(iii) It is implied, if not stated, by Mr Bate (Paragraph 9.38) that in some way the contents of these status reports was such that they demonstrate that there would be motivation for Crosby to extend the incentive agreements until the end of November.

(iv) I do not see that these reports do that at all. Whilst the NHBC did have to sign off before the legal completions could be effected, there is no obvious hint let alone expression that the work had to be finished by the end of November. The reports do no more than indicate that completion of the work is being progressed as quickly as possible.

(v) Again, I simply do not see that these reports are obviously prejudicial to the case advanced by Crosby or that they should have been disclosed.

C. GTMS Weekly Status Report No 7 (1-5 November)

(i) This is said to have had Mr Teague's writing on it beside what is said to have been the key part of the report:

*"1.1 **Programme***

The original brief from Crosby was to "serve notice" at the end of this week-15th Oct on 49 no. apartments across the two cores with purchasers possibly moving in at the end of October.

This did not happen. There were two key reasons; the scaffold was not dropped as planned which impacted on…completing the external areas…The second …was that Crosby's Construction Manager considered the apartment [sic] to be of a very low standard…

A set of revised dates was the agreed. The apartment signoff by NHBC and Building Control and issue of warranties/certificates had to be the 12th November 2004 3 pm. This is the last Crosby serving notice date in 2004-purchasers can occupy the apartments form 26th November 2004".

(ii) This is said to show that, because there was said to be a "last serving notice" date of 12 November 2004, this provides support for the proposition that Crosby had an incentive to complete work and get the NHBC in because there was evidence that legal completion could have been achieved by the end of November so that 30% of turnover and profit represented by such completions could be taken into possibly the previous company year's accounts (ending April 2004). This, it is said, supports the proposition that Mr Teague was lying about possibly the October and the November agreements.

(iii)Whilst that proposition is a possible one, the entry does not necessarily support it. Presumably, and indeed I was told without demur that dates of completion were provided during the arbitration. The entry may well mean no more than there was unlikely to be any more NHBC signing off after 12 November in 2004 for administrative reasons. This entry does not obviously impact on the evidence about the October agreements, from a historical perspective or at all.

(iv) If anything the document does not impact on the November agreement because that agreement relates to levels 10 and 11 which on Brown's case were not going to be completed by the end of November 2004 in any event.

(v)At its highest, this document, to borrow from the old Rules of the Supreme Court and the Peruvian Guano case, might have led to a possibly relevant line of enquiry in the arbitration. I do not see that it necessarily points to Mr Teague's evidence having been dishonest.

(vi)As to whether this document should have been disclosed even if formal standard disclosure had been ordered, I consider that this involved a judgement call as a result of which different solicitors might have disclosed or not.

D. Mr Myall's note of 8 November 2004

(i)This note recorded relatively informal notes of a meeting attended by Mr Murphy, Mr Teague, Mr Bridge and Mr Myall. This was the meeting at which the alleged November 2004 agreement was reached. Mr Murphy's version was that he was effectively instructed to suspend work on Levels 10 and 11 whilst Crosby's case was that it was Mr Murphy who suggested it so as to concentrate on completing levels 1 to 9.

(ii) This note materially says:

"BM [Mr Murphy] feels ignore level eleven & reallocate resources to 9 and 10 [therefore] give Core A&B to 10 and 9"

(iii) On its face it does not support the Brown case at all and it does support the Crosby case. Indeed, it only relates to Level 11.

(iv) It was accepted that this document ought to have been disclosed albeit not prejudicial to Crosby's case. However, I do not see how this could support an argument that this document begins to support an argument that Mr Teague lied about the meeting on 8 November 2004, given that it supports if anything his evidence.

E. GTMS note of meeting on 10 November 2004

(i) This meeting was one attended by amongst others Mr Teague, the GTMS team (including Mr Myall) and a Mr Flewker-Trattles of Brown. The latter was not called by Brown as a witness.

(ii) The note contains the following noted by Mr Myall:

" NHBC attending site 10/11 & 12 Nov. assume obtain certificates what still needs to be completed & can it be done in 2 week time slot.

Levels 10/11 to be forgotten…

DT [Mr Teague]-critical to obtain cert. but if outst. work to [sic] much & not complete in 2 wks to end".

(iii) It was accepted also that this document should have been disclosed. It is on its face a relatively neutral document in that the reference to "Levels 10/11 to be forgotten" is neutral: it is not inconsistent with each side's version of the 8 November meeting. The other references relate to the same matters as Status Report 5.

(iv) Again, I find it difficult to see how this document shows necessarily that Mr Teague was lying.

"Perjury"

68. I make no finding as to whether a deliberate lie made on affidavit to be deployed in an arbitration can amount to perjury. But I will assume that it is so for the purposes of this judgment.

69. Mr Bate refers at some length to the various respects in which he says that Mr Teague perjured himself. He identifies not only those occasions which are said to be demonstrated by the production of the Missing Documents but also a number of occasions which (he suggests) were identifiable before.

70. Although perjury is a crime, and indeed one which is regarded very seriously by the criminal courts, it is not essential to establish perjury as such under Section 68(2)(g). Reprehensible or unconscionable conduct, contrary to public policy, is enough. A demonstrable deliberate material lie which went to the root of the disputes in the arbitration would be sufficient to establish such conduct.

71. However, where issues of credibility arise in any event in the arbitration and there is available material which either is actually or could be deployed before the arbitrator, the courts should be very slow to allow the losing party the opportunity again to rely upon the same material in an application under Section 68 (2)(g). The parties will have left to the arbitrator the task of evaluating whether any given witness is or is not lying and party autonomy demands that the arbitrator's decision on that aspect of the referred dispute should be respected save in the most exceptional circumstances. It is imprudent to define exceptional circumstances.

72. I can not see that any exceptional circumstances are likely to arise here. Accordingly, the assertions made by Mr Bate and Brown as to alleged "perjury" which could have been put forward before the production of the Missing Documents can and should be ignored, for the purposes of this and the section 68(2)(g) applications.

The strength of the Section 68 (2)(g) application

73. I consider that this application is an intrinsically weak one for the following reasons:

(a) Credibility was a major issue in the arbitration.

(b) One can and should ignore all suggestions that Mr Teague was lying to the extent that the material for seeking to suggest it was available to Brown at the hearing.

(c) I do not consider it likely that any court would come to the view that the non-disclosure of the Missing Documents was reprehensible or unconscionable given the Arbitrator's limited orders about co-operative

disclosure. Furthermore, I doubt that many of the Missing Documents would have been discloseable in the First Arbitration if some more standard disclosure had been ordered.

(d) I do not consider it likely that a court would do anything other than find that the non-disclosure, assuming disclosure was required, was anything more than inadvertent. If it had been, it is then most surprising that the Missing Documents were then disclosed at all in the Second Arbitration before the award in the First Arbitration was published. This does not suggest some conspiracy or plot to withhold key documents.

(e) I strongly suspect that Mr Bate and those for whom he acts have convinced themselves that there was some "dirty work at the crossroads". I very much doubt that the Missing Documents add very much to the issue as to whether Mr Teague was telling the truth, for the reasons indicated above.

(f) There were numerous other facets of the evidence and the facts which went to influence the Arbitrator of which the absence of any written corroboration or confirmation from Mr Murphy relating to the alleged agreements featured to a significant extent. That factor would always loom large in most tribunals' thinking on such topics, particularly when the alleged agreements were going to produce over £200,000 and save a six figure sum on liquidated damages for Brown.

(g) I have serious doubts as to whether the material produced by Mr Bate is such that any reasonable court would be persuaded that there had been any reprehensible or unconscionable conduct let alone fraud on the part of Crosby or that there had been substantial injustice, to enable any application under Section 68(2)(g) to succeed.

74. To borrow the words of Mance LJ in the ***Nagusina*** case as set out above, at the very least, this was, and is, clearly not a case where Brown's claim can be regarded as so strong that it would obviously be a hardship for them not to be able to pursue it; if anything, it is rather the contrary.

The decision

75. Having regard to the primary factors set out by Mr Justice Colman in the ***Kalmneft*** case, I am satisfied that there was substantial delay in the making of this application, over nine weeks. Brown and its solicitors consciously permitted the time for service of its Section 68 application to go by. It did not act reasonably as the 28 day period allowed by the Act to issue such an application should have been sufficient to enable all the necessary work to be done. The explanations for the delay do not excuse the delay. There was a delay in going to Counsel. It is not a good excuse that no-one else in Hammonds could do the requisite work; the task, once it had been appreciated that the Missing Documents might cast light on the credibility of Mr Teague, was not a massively difficult or time consuming operation; it was furthermore not one which could not have been delegated to an assistant solicitor or junior counsel to do albeit under some supervision from Mr Bate. He did not need to delay Brown's application until he had spoken to Mr Dufill or Mr Myall. Indeed, Brown did not need to delay the application at all. If there were some perceived logistic problems, the application could have been issued and an application made for permission to serve evidence a little late; that would have been the right approach. A short extension might have been granted.

76. There must be some 100 pages of prose in Mr Bate's witness statements and over 4000 pages of documentation by way of documents. The large bulk of this did not need to be done or exhibited. All that was required to support the substantive application was:

(a) An explanation of the disputes and background leading up to the award;

(b) An analysis why each of the Missing Documents demonstrates individually or in combination that a witness is said to have lied;

(c) An explanation as to why this gives rise to a real possibility that the arbitrator would or might have reached a different overall view on any relevant dispute;

(d) The exhibiting of the Missing Documents (and possibly a few other contemporaneous documents), the award, the Arbitrator's orders, Crosby's list of documents, the affidavit of Mr Teague, relevant parts of the transcript of the evidence and, possibly, the opening and closing submissions of Counsel in the arbitration and possibly some selected correspondence between the solicitors in the arbitration.

If the response raised issues of fact which had not been addressed by the applicant, they could be addressed in a further witness statement. Whilst I accept that the supporting documentation needs to be (particularly) carefully prepared to support a charge of dishonesty, it remains unnecessary and indeed unhelpful for vast quantities of documentation and prose to be provided at least initially.

77. So far as the application to extend time aspect of the matter is concerned, I do not consider that it was necessary or even desirable for Mr Bate to provide a 28 page prose commentary as to what he was doing every week between mid September 2007 and late January 2008. He needed to explain only in summary terms what he was doing and why it took as long as it did. If Crosby expressed doubts as to this explanation, he could later go into more detail.

78. I strongly formed the impression that Mr Bate decided that it was necessary to "*cross every t and dot every i*". That was not necessary as it doubtless added to the delay. It is incumbent on parties to comply with the 28 day requirement but, if they do not, to proceed as expeditiously as possible thereafter. I do not consider that Brown did so.

79. I am wholly satisfied that no part of the delay was caused by Crosby. It was not stated by Mr Bate at the time that he needed any action on the part of Crosby before Brown acted. Indeed, he can hardly have been

expecting Crosby to agree with his criticisms of their client's disclosure in the First Arbitration or to *"roll over"* and agree that the award should be set aside and reversed. I do not consider that any delay was actually caused by the answering by Eversheds on 3 January 2008 of Mr Bate's letter of 9 November 2007; that seems to have been coincidental. There is no suggestion that the arbitrator contributed to any delay.

80. The fact that the delay has not caused any real prejudice to Crosby is not a significant factor. The final resolution of the First Arbitration has been delayed albeit that the sums due and some money towards costs has been paid by Brown; I attach no weight to this factor.

81. As to the strength of the Section 68(2)(g) application, although I appreciate that I can not and should not decide it, I have formed the view that this is a sufficiently clear case to form the view that this is very much at the intrinsically weak end of the spectrum. The reasons are set out above. At the very least, this was, and is, clearly not a case where Brown's Section 68(2)(g) application can be regarded as so strong that it would obviously be a hardship for them not to be able to pursue it.

82. Taking into account all these factors, this application should be dismissed.

Mark Rowlands (instructed by Messrs Hammonds) for the Claimant
Nerys Jefford QC (instructed by Messrs Eversheds) for the Defendant