CA on appeal from QBD (Mr Justice Morison) before The Master of the Rolls, Rix LJ; Longmore LJ. 16th October 2006.

Lord Justice Longmore :

1. This application (which was heard at the same time as the ***AstraZeneca*** case in which we have just given judgment) is an application for permission to appeal from a decision of Morison J in the Commercial Court in which he held that the shipowners' application to set aside an arbitral award for serious irregularity under section 68 of the Arbitration Act 1996 ("the 1996 Act") was to be dismissed. Having dismissed the application the judge refused permission to appeal. Section 68(4) of the 1996 Act provides:-

   "(4) The leave of the court [viz the judge hearing the application in the High Court] is required for any appeal from a decision of the court under this section."

   The question that arises is whether, in the light of that statutory provision, this court has jurisdiction to entertain an application for permission to appeal from the substantive decision of the judge to the effect that there was no serious irregularity on which the shipowners could rely.

2. The serious irregularity alleged was that the award was infected by the apparent bias of the umpire or third arbitrator (who had been appointed by the other two arbitrators), Mr Duncan Matthews QC. The apparent bias was said to arise because on a previous occasion, Mr Matthews in his capacity as leading counsel had been instructed by a shipowner in another (earlier) matter ("the B case") who alleged that the opposite party was or might be concealing relevant documents. The terms of the charter were in dispute; a Mr Moustakas was the shipbroker and there was an application for disclosure of the broker's file pursuant to section 43 of the 1996 Act. Mr Matthews was not counsel in the case but was instructed on that application and, in due course, a consent order was made for production of the file to the arbitration tribunal on certain terms. As far as Mr Matthews was aware he had had no contact with Mr Moustakas on that occasion. Mr Moustakas was, however, a witness for the respondent shipowners in the arbitration before Mr Matthews and his co-arbitrators from which the current proceedings arise.

3. As to that, the position was that on 4th August 2004 the parties were notified of Mr Matthews' appointment as third arbitrator, by which date a 3 day hearing had been fixed for 5th-7th October 2004 in order to hear a number of preliminary issues arising in the charterers' claim against the shipowners. On the morning of the first day of the hearing Mr Moustakas, who was due to give evidence on that day, inquired who the third arbitrator was and on being told that it was Mr Matthews, suggested to Mr Zaiwalla, of the shipowners' solicitors, that an objection should be made because Mr Matthews had what Mr Moustakas said were "close connections" with the charterers' solicitors (Messrs Waterson Hicks). Mr Moustakas later told Mr Zaiwalla's assistant that Mr Matthews had been instructed for shipowners by Waterson Hicks in the B case and that, in that case, serious allegations of a personal nature had been made against Mr Moustakas. (It later transpired that, after the section 43 application to the court, there was indeed a complaint that the consent order had not been complied with but by that time counsel previously involved had resumed the conduct of the case and Mr Matthews had no further involvement.)

4. Be that as it may, there was no opportunity for Mr Moustakas to give and for Mr Zaiwalla to receive full instructions about the concerns of Mr Moustakas before he began to give his evidence. Mr Zaiwalla considered the position at the end of the day but could not talk to Mr Moustakas since he was giving evidence. Mr Moustakas completed his evidence the following day and towards the end of his evidence made a reference "to another case to do with the production of a file". It was this reference together with a fax of 6th October from Mr Zaiwalla that brought the earlier B case to Mr Matthews' mind and, having reflected overnight, Mr Matthews read out a statement about the extent to which he had been involved in the B case. He concluded by saying that it would be wrong in principle for him to recuse himself. That led to a definite instruction by the shipowners to Mr Zaiwalla that an objection be made to Mr Matthews' continuing to sit as arbitrator. Nevertheless the arbitration proceeded, shipowners' leading counsel saying that his clients reserved their position on their stated objection to Mr Matthews continuing to sit.

5. In their opening skeleton in the arbitration, charterers heavily criticised the shipowners' disclosure. They were the same sort of points as had been made by Waterson Hicks (the same solicitors) in the B case in respect of different owners. The judge held that Mr Moustakas had a genuine feeling that Mr Matthews would or might have detected a pattern of misbehaviour in relation to disclosure even though in the B case Mr Moustakas had been the broker while in the current case he was in the shipowners' camp. The judge concluded:- *"The nature of the allegation; the pattern of them; the involvement of the same solicitors; [Mr Matthews'] involvement in the disclosure process a short time before sitting as arbitrator in judgment on the alleged dishonest party persuades me, for the reasons I have given, that [Mr Matthews] should have recused himself after objection was taken."*

6. The judge went on to hold, however, that after Mr Matthews declined to recuse himself, shipowners' counsel should have indicated that that was not acceptable and that an application would be made to have him removed under section 24 of the 1996 Act but that the hearing could be concluded without prejudice to the shipowners' rights. After the conclusion of the hearing, that application should have been made. Instead there was merely a continuing objection in correspondence and the shipowners in due course took up the award. He said:- *"Owners were faced with a straight choice: come to the courts and complain and seek his removal as a decision-maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'head we win and tails you lose' position is not permissible in law."*

The judge therefore held that the serious irregularity of apparent bias had been waived and that was the reason why he dismissed the shipowners' section 68 application.

7. Permission to appeal?

Miss Geraldine Andrews QC who appeared for the shipowners submitted that the judge's holding that the irregularity had been waived was so clearly and obviously wrong that one of two consequences must follow. First there was no decision under section 68 at all either for that reason or because, while waiver might operate as a defence to the claim of a serious irregularity, a decision on waiver was a decision on a defence to the assertion of serious irregularity not a decision on the assertion itself. Secondly she submitted that the judge's decision was an unlawful contravention of Article 6 of the European Convention of Human Rights which guaranteed a fair hearing before an impartial tribunal. If the tribunal was apparently partial as the judge had found, he had no option in law other than to set aside the award and a refusal to do so made the decision unlawful.

8. **"No decision under the section"**

The foundation for this submission was the decision in ***Cetelem SA v Roust Holdings Ltd*** [2005] EWCA Civ 618; [2005] 1 WLR 3555. In that case the judge had made an order (requiring presentation of documents to a bank for approval) which he had no jurisdiction to make under the relevant section of the 1996 Act (section 44) and had refused permission to appeal. This court held that a decision by the judge to exercise a jurisdiction which he did not have was not a "decision under the section" and permission to appeal could, therefore, be granted.

9. That case is very different from the present case. Here there is no doubt that Morison J had jurisdiction either to accede to the application or to refuse it. Whichever way the decision went, it was still a decision under section 68 of the Act and a refusal of permission to appeal was likewise a decision under the section. It cannot, therefore, be challenged by way of appeal even if the decision is wrong or, even, obviously wrong. The fact that waiver (or indeed estoppel) can be said to operate as a defence to a prima facie entitlement is, in our view, nothing to the point. A decision to refuse relief (for whatever reason) is still a decision under section 68 just as much as a decision to grant relief would have been, if the decision had gone the other way.

10. Breach of Convention Right?

It is to be noted that the present case is different from the ***AstraZeneca*** case. In that case it is alleged that the judge, who allowed the appeal from the arbitration tribunal on a point of law, was himself in breach of the Convention when he came to decide whether there should be permission to appeal. This was because he (allegedly) failed to engage intellectually with the applicants' submissions and/or to decide the question of law in a final way treating it as if it were still an open question which could be determined by the arbitrators when in truth it was not. We have held that the judge did not contravene the Convention and that his refusal of permission to appeal cannot be challenged.

11. In the present case the allegation of bias was made against the third member of the arbitral tribunal. That matter has been dealt with by Morison J. That learned judge afforded the parties a public and impartial hearing and there was no apparent contravention of Article 6 in respect of either the application under section 68 itself or in respect of the further determination whether there should be permission to appeal. The present case is therefore, on the face if it, entirely outside the residual jurisdiction identified in ***North Range Shipping Ltd v Seatrans Shipping Corpn*** [2002] EWCA Civ 405; [2002] 1 WLR 2397 (petition dismissed at page 2970).

12. What is said, however, is that if a judge fails to remedy the breach of a Convention obligation he is himself in breach of the Convention because he has not upheld the right which the Convention has itself guaranteed. This contention is misguided for a number of reasons. First, the Strasbourg court does not concern itself with the merits of the decision which is under attack; it is concerned to see that the procedure has been fair, see ***English v Emery Reimbold & Strick Ltd*** [2002] EWCA Civ 605, [2002] 1 WLR 2409, 2416 at para. 12 per Lord Phillips of Worth Matravers MR.

13. Secondly there is no overarching principle laid down by the Human Rights Convention that an award tainted by apparent bias must be set aside. The national courts are allowed to decide that in some cases the award must be set aside and in some cases it need not. A margin of appreciation is accorded to the domestic court.

14. In this connection it is instructive to compare three decisions of the Strasbourg court. In ***Bulut v Austria*** (1996) 24 EHRR 84 the question was whether a judge who took part in the pre-trial investigation of the appellant could be a member of the tribunal who tried the appellant for the crime of attempted bribery. The court held that it was for the national courts to decide on the basis of domestic legislation whether any legal provisions relating to the constitution of the tribunal could be validly waived or whether they were so fundamental that they could not be waived. The Strasbourg court further held it was nevertheless for the court to decide whether the tribunal was impartial in the sense that there was either actual bias ("the subjective approach") but also in the sense that there were sufficient guarantees to exclude any legitimate doubt as to the tribunal's impartiality ("the objective approach"). On the facts the applicant's fear of impartiality could not be regarded as objectively justified and the applicant had, in any event, had the right to challenge the composition of the tribunal but had refrained from doing so. This authority shows that the Strasbourg court will afford a margin of appreciation to the national courts in deciding whether waiver is possible in law but will still decide for itself in relation to a public tribunal whether the tribunal was in fact impartial on either the subjective or the objective approach and whether waiver did, in fact, take place. The difference from the present case is, of course, that the arbitration tribunal is a private not a public tribunal; even so, if the national court permits review, the Strasbourg court will be concerned to ensure that

review is conducted by an impartial tribunal. That has happened in the present case; if that review did not comply with the requirements of the Convention it may be that any statutory prohibition on a right of appeal would not prevent review by this court. But that it not the case.

15. ***Nordström-Janzon v Netherlands*** (28101/95 of 27th November 1996) was a Commission decision on admissibility and is closer to the present case since it concerned the alleged partiality of an arbitrator. Dutch law, as enunciated by the Supreme Court (Hoge Raad) drew a distinction between cases which arose before and those which arose after issue of the award. In the former case an objectively justified fear of lack of independence or impartiality would justify an application for recusal; once the award had been made and issued to the parties, however, a stricter rule applied viz. that an award could only be quashed if the arbitrator was shown to have not been independent and impartial "in fact" or if "the doubts as regards his independence of impartiality were so grave that the disadvantaged party could not be required to accept the arbitral award". The Commission declared the applicants' case inadmissible saying that:-

    (1) by choosing arbitration, the parties had renounced the requirement of a procedure before the ordinary courts which satisfied all the guarantees of Article 6 of the Convention;

    (2) nevertheless account had to be taken of any legislative framework affording a measure of control of the arbitration proceedings and whether that control had been properly exercised;

    (3) different states could legitimately afford different grounds for challenging an award and each contracting state could decide for itself what grounds should suffice for quashing an award;

    (4) neither Dutch law nor the Dutch courts had acted in breach of the Convention and the application was manifestly ill-founded.

    If Dutch law had in addition provided that there was to be no appeal unless the judge gave permission, the Commission would have likewise decided that the application was ill-founded.

16. Similarly in ***Suovaniemi v Finland*** (31737/96 of 23rd February 1999) the Strasbourg Court held that parties to an arbitration had explicitly renounced procedure before an ordinary court but that, while it was for the domestic court to decide whether the requirement of impartiality could be (and was) waived, it was nevertheless for the Strasbourg court to decide whether the right to an impartial judge could be "irreversibly waived". Following the ***Nordström-Janzon*** case, they then took account of the applicable legislative framework and the control exercised by the domestic courts, noted that the applicants had had ample opportunity to advance their argument to the national court and concluded that the decision of the national court did not disclose any appearance of a violation of Article 6 of the Convention. This case again shows that the critical question is whether the decision of the court on the bias question discloses any violation of Article 6. It is not the case that the decision of the domestic court can be regarded as made in breach of the Convention merely because it is wrong. The finding of the domestic (Finnish) court in that case was held to be neither "arbitrary or unreasonable". Although Miss Andrews fastened on the word "unreasonable" to argue that any decision of a judge would violate Article 6 if it was "unreasonable", we do not agree. It is only if it violates the Convention that it will be "unreasonable".

17. Conclusion

In the absence of any realistic argument that the decision of Morison J itself contravened the appellants' Convention rights, therefore, there is, as a matter of English law, no jurisdiction to grant permission to appeal and this application will be dismissed.

18. We add that, although there was some argument before us on the question whether the judge's decision was based on section 73 of the 1996 Act or on waiver at common law, we consider that nothing can turn on that distinction. Permission to appeal without the judge's leave is prohibited in either case.

Lord Justice Rix:

19. I agree.

The Master of the Rolls:

20. I also agree.

Miss GERALDINE ANDREWS QC (instructed by Zaiwalla & Co) for the Applicant
SIMON CROALL Esq (instructed by Waterson Hicks) for the Respondent