JUDGMENT : The Hon Mr Justice Colman : Commercial Court. 12th May 2006.

Introduction

1. There are before the court two applications under the Arbitration Act 1996. They arise out of an arbitration commenced on 2 December 2003. The dispute arose under an agreement made on 13 February 2002 under which the claimant in the arbitration (Norbrook Laboratories Ltd), to which I refer as "Norbrook", purchased certain pharmaceutical equipment from the respondent in the arbitration (Moulson Chemplant Ltd), to which I refer as "Moulson". The equipment in question was a methanol recovery plant to be designed, manufactured, supplied, installed and commissioned by Moulson. Its function was to remove methanol from organic waste. It is Norbrook's case that the plant as delivered does not comply with the specification in as much as it cannot discharge waste slurry at 50 per cent solids in water/methanol. Norbrook claims that it has suffered losses, including additional waste disposal costs and remedial costs, totalling £434,498.98. Moulson counterclaims £145,252.02, including the costs of additional equipment and services and delays.

2. The equipment agreement incorporated the following arbitration clause:

> *"13.1 In the event that a dispute shall arise between the parties to this contract, it is hereby agreed that the dispute shall be referred to arbitration by a single expert (the "Arbitrator") being a Chemical Engineer of at least 10 years qualification with substantial experience of equipment such as the Equipment to be appointed, upon the application of either party, to the President of the Institution of Chemical Engineers from time to time. The costs of the arbitration shall be at the discretion of the Arbitration. The award rendered by the Arbitrator shall be final and binding upon the parties hereto."*

3. The arbitration was agreed to be conducted under the Arbitration Rules of the Institution of Chemical Engineers. The Arbitrator, Mr Tank, was nominated by the President of the Institution. Mr Tank is a Chartered Engineer and Fellow of the Institution of Mechanical Engineers and the Institution of Chemical Engineers. He has been involved in management, design and construction in the process industries for over 35 years and has much experience in the technical areas involved in the dispute. He is also a member of the Chartered Institute of Arbitrators and since 1994 when he was first appointed an Arbitrator he has acted as an expert witness and presided over expert determinations under the Rules of the Institute of Chemical Engineers.

4. The Arbitrator made two decisions or awards; one on 16 June 2005 ("the First Decision") and one on 8 August 2005 ("the Second Decision").

5. In order to understand the basis of these two Decisions it is necessary to consider the provisions of the Arbitration Rules and in particular those Rules which provide for what is in substance a fast-track arbitration regime. These are Rules 15 and 16 – the Short Procedure Rules:

> *"15.1 Where the parties so agree (either of their own motion or at the invitation of the Arbitrator), the arbitration or any part thereof shall be conducted in accordance with the following Short Procedure Rules.*
>
> *15.2 Within thirty days after the Preliminary Meeting held under rule 6.1 or the parties agreeing directions under Rule 6.3, the claiming party shall set out its case in the form of a file containing:*
> *(a) a statement as to the orders or awards it seeks;*
> *(b) a statement of its reasons for being entitled to such orders or awards: and*
> *(c) copies of any documents on which it relies (including statements) identifying the origin and date of each document;*
>
> *and shall deliver copies of the said file to the other party and to the Arbitrator in such manner and within such time as the Arbitrator may direct.*
>
> *15.3 The other party shall, either at the same time or within thirty days of receipt of the claiming party's statement as the Arbitrator may direct, deliver to the claiming party and the Arbitrator its statement in the same form as in Rule 15.2.*
>
> *15.4 After reading the parties' cases the Arbitrator may at any time view the site or the Works and may in his sole discretion order, permit or require either or both parties:*
> *(a) to submit further documents or information in writing;*
> *(b) to prepare or deliver further files by way of reply or response. Such files may include witness statements or Expert Witnesses reports.*
>
> *15.5 Within thirty days of completing the foregoing steps the Arbitrator shall fix a day to meet the parties for the purpose of:*
> *(a) receiving any oral submissions which either party may wish to make; and/or*
> *(b) the Arbitrator's putting questions to the parties, their representatives or witnesses.*
>
> *For this purpose the Arbitrator shall give notice of any particular person he wishes to question but no person shall be bound to appear before him.*
>
> *5.6 The time periods in Rules 15.2, 15.3 and 15.5 may be varied as the Arbitrator may see fit.*
>
> *15.7 Alternatively with the agreement of the parties the Arbitrator may dispense with the meeting and upon receipt of the further files (if any) or any viewing of the site or Works under Rule 15.4 proceed directly to the Award in accordance with Rule 15.8.*

15.8 Within thirty days following the conclusion of the meeting under Rule 15.2, or in the absence of a meeting thirty days following receipt of the further files under Rule 15.4, or such further period as the Arbitrator may reasonably require, the Arbitrator shall make and publish his award.

16.1 Unless the parties otherwise agree the Arbitrator shall have no power to award costs to either party and the Arbitrator's own fees and charges shall be paid in equal shares by the parties. Where one party has agreed to the Arbitrator's fees the other party by agreeing to these Short Procedure Rules shall be deemed to have agreed likewise to the Arbitrator's fees.

Provided always that this Rule shall not apply to any dispute which arises after the Short Procedure Rules have been adopted or imposed by the Contract.

16.2 Either party may at any time before the Arbitrator has made his award under these Short Procedure Rules require by written notice served on the Arbitrator and the other party that the arbitration shall cease to be conducted in accordance with these Short Procedure Rules. Save only for Rule 16.3 the Short Procedure Rules shall thereupon no longer apply or bind the parties but any evidence already laid before the Arbitrator shall be admissible in further proceedings as if it have been submitted as part of those proceedings and without further proof.

16.3 The party giving written notice under Rule 16.2 shall thereupon at the Arbitrator's discretion become liable to pay:

(a) the whole of the Arbitrator's fees and charges incurred up to the date of such notice; and

(b) a sum to be assessed by the Arbitrator as reasonable compensation for the costs (including any legal costs) incurred by the other party up to the date of such notice.

Payment in full of such charges shall be a condition precedent to that party's proceeding further in the arbitration unless the Arbitrator otherwise directs. Provided that non-payment of the said charges shall not prevent the other party from proceeding in the arbitration."

6. By the First Decision the Arbitrator, stating that he saw no reason why Rules 16.2 and 16.3 should not be applied in full and that he had reviewed a schedule of costs previously provided by Moulson which he found to be "not unreasonable", ordered that Norbrook should pay the amount of that schedule, namely £47,704.85, to Moulson within 14 days. That was intended by the Arbitrator to be an exercise of his powers under Rule 16.3 to the effect that he concluded that Norbrook had given notice on 1 June 2005 terminating the short form procedure and that Norbrook should therefore pay to Moulson what the Arbitrator assessed as reasonable compensation for Moulson's costs up to that date.

7. This Decision evoked strong objections from Norbrook, whose solicitors ("TA") wrote to the Arbitrator on 1 July 2005 challenging that Decision as wrong in law, constituting a serious irregularity and failing to comply with Rule 16.3, as well as being contrary to natural justice and inviting the Arbitrator to correct it accordingly. The letter, prefaced by the implicit threat that it was written without prejudice to Norbrook rights under Section 24 of the Arbitration Act 1996, further stated:

"1. Your decision of 16 June 2005 was premature in that no decision at all had been given in respect of Rule 16.2.

2. It is our respectful submission that you have not carried out an assessment of Moulson's costs, as required by Rule 16.3.

3. Our client was never given an opportunity to comment on Moulson's costs prior to the making of your decision."

8. *The Arbitrator responded on 1 July 2005 that he was willing to suspend the matter of payment of the* £47,704.85 until he was able to give an informed opinion on Norbrook's objections.

9. Following extensive further correspondence between the Arbitrator and both parties, on 8 August 2005 he wrote to the parties a long letter in which he concluded that Norbrook had given notice under Rule 16.2 that the arbitration should cease to be conducted under the Short Procedure Rules with effect from 1 June 2005 and that in consequence of that decision he reinstated his decision of 16 June, but reserved his right to adjust payment to take account of any additional cost incurred up to the date on which Rule 16.2 notice was given plus such interest as might be due on the sums outstanding in any further decision on final costs. That was the Second Decision.

10. The first and primary application by Norbrook is for the removal of the Arbitrator under section 24 of the Arbitration Act 1996 on the grounds that (i) circumstances exist that give rise to justifiable doubts as to the impartiality of the Arbitrator and (ii) the Arbitrator failed properly to conduct the proceedings and that substantial injustice has been or will be caused to Norbrook.

11. The second application is under section 68 of the 1996 Act for an order setting aside the First Decision and the Second Decision, alternatively for a declaration that neither decision is of any effect. Norbrook alleges that certain aspects of the Arbitrators' conduct amounted to a serious irregularity which has caused and will cause substantial injustice to Norbrook.

The Course of the Arbitration

12. Before setting out in more detail those aspects of the Arbitrator's conduct of the proceedings relied upon in support of Norbrook's applications, it is necessary to state the relevant facts as to the course of the arbitration, most of which are not disputed.

13. Following the Arbitrator's appointment, he researched the financial strength of the parties and he thereby noticed that Moulson was a small privately-owned business with very limited financial resources. In the course of discussions as to the procedure to be adopted the Arbitrator decided that the arbitration should be conducted under the Short Procedure Provisions of Rule 15. On 19 January 2004 he so informed the parties and further indicated that in order to reduce costs it would be unnecessary to hold a preliminary meeting and the arbitration could precede on documents only while reserving his right to direct an oral hearing if he considered that clarification of the written submissions was required and also to enable the parties to present evidence. He laid down a timetable for the delivery of statements of case. By the same letter in response to an earlier request by Moulson to be permitted not to pay in advance any of the Arbitrator's fees, by reason of their lack of resources, he directed that the requirement for a down payment of £5,000 from Moulson should be waived.

14. Right at the outset, immediately following his acceptance of his appointment, the Arbitrator had on 8 January 2004 taken care to issue procedural instructions including that all letters issued to him should be copied to the opposite party.

15. Norbrook issued its submission of claim on 13 February 2004. Moulson responded on 12 March. With regard to the service of witness statements, Moulson stated that to minimise the costs of preparing the submission it had not obtained specific witness statements to supplement its evidence on particular topics but was prepared to do so if those should be required to assist the arbitration under clause 15.4(b). Amongst the specific topics it listed was evidence of the design basis of the plant and the history of the Contract and it indicated that if required it would be prepared to obtain witness statements from various persons no longer employed by Norbrook, including Pia Mountford (Chemist) and Bob Colussi (Chemical Engineer). Apparently the Arbitrator did invite the delivery of witness statements and on 13 April 2004 Moulson informed him that it had asked Norbrook for forwarding addresses for those witnesses but had yet to receive a reply.

16. From 15 July to 18 October 2004 the arbitration was stayed to enable the parties to engage in a mediation, but this was to prove unproductive.

17. Meanwhile, in the course of a directions meeting with the Arbitrator on 15 July 2004 Mr Forde of Norbrook had informed the Arbitrator of Norbrook's concerns about the Arbitrator's proposal that he, the Arbitrator, should contact Pia Mountford. This was because Norbrook and Mountford had been in dispute, and indeed in litigation on matters unrelated to the contract with Moulson.

18. On 16 July 2004 the Arbitrator issued directions which included that Moulson would provide contact details for Pia Mountford and the Arbitrator would: *"... contact Ms Mountford to seek a witness statement concerning the various tests and advice given by Ms Mountford and her colleagues during the pre and post contract periods. Any statement taken will be duly notarised and made available to the parties. It is noted that Norbrook Laboratories Limited reserve the right to comment on the relevance or accuracy of any such statement."*

19. Nothing was said on 15 or 16 July about contacting Rob Colussi.

20. On 22 July 2004 the Arbitrator, without further information to either party, spoke to Pia Mountford by telephone and asked whether she would be prepared to provide him with a witness statement in respect of certain of the matters in dispute. She explained to him the issues surrounding the termination of her employment by Norbrook and that she was therefore not prepared to release her home address. At about the same time he contacted Colussi, but also ultimately failed to obtain a witness statement. However, on 10 August 2004 the Arbitrator informed both parties that he would continue to attempt to obtain witness statements from Mountford to Colussi. Following its previous expression of concern, Norbrook did not expressly object to his direct contact.

21. On 8 September 2004 the Arbitrator wrote to Pia Mountford asking her specific questions about the collection by Norbrook of relevant technical data prior to the design and construction of the plant and its being passed to Moulson, as well as the testing that was carried out after Norbrook took delivery of the plant. The letter was not copied to either party.

22. On 22 September 2004 Moulson informed the Arbitrator that the mediation had not proceeded and that, while it was in the interests of both parties that the dispute be resolved as soon as possible, it did not believe that Norbrook shared that view. Against that background it stated: *"We trust that you are in a position to reach a decision, if however you do need further information we await your instruction."*

23. The letter was copied to Norbrook.

24. On the same day Norbrook wrote to the Arbitrator copied to Moulson stating that the stay ought to continue so as to give the mediation a chance of success until 15 October as originally directed. The letter stated: *"If, at the conclusion of the mediation process, the parties should require the stay in the arbitration to be lifted, then Norbrook submits that it would be premature for the Arbitrator to move immediately to a final determination of this matter (based on the evidence and submissions currently before you). Since the commencement of the arbitration proceedings, the case has expanded considerably to involve additional issues (some of which are technical and complex in nature) that are not suitable for determination by "fast track", ie. means of the IChemE arbitration under Rule 15 (Short Procedure Rules). Accordingly, in the event that the arbitration is recommenced, we hereby put you on notice that Norbrook shall be seeking to serve additional witness statements produced to the arbitration, submit final submissions and (only if it proves necessary) seek a further hearing before you."*

25. On 27 September 2004 the Arbitrator informed Moulson, copied to Norbrook, that he considered that the arbitration should recommence on 18 October to give the parties the opportunity to take the mediation *"to its fullest extent without this being an excuse for prevarication and delay"*. He added

"There are three particular issues that I seek your views, these are as follows:

1. By inference have the terms of reference for the arbitration changed and if I recommence the procedure do the parties have a clear understanding and agreement on the extent and scope of the Arbitration?

2. The question whether the "fast track" procedure is abandoned is for me to decide in the context of any new evidence or agreements on procedures that are put before me.

3. I note that Norbrook Laboratories have given notice that they wish to put forward additional witness statements, supplementary Expert's Report and final submissions. I will not consider this matter separately but it opens to Moulson Chemplant the opportunity to issue similar information should it so wish. In the event that I allow new evidence or statements to be introduced you will be given the opportunity to respond to any new information issued by the other Party."

26. On the same day the Arbitrator wrote to Norbrook, copied to Moulson, *"Concerning the question of Rule 15 (Short Procedure Rules) it is noted that you now conclude that this procedure is not suitable for the determination of this dispute. I will consider this in due course once the nature, extent and permissibility of any new evidence and statements, that you may seek to issue to me, is known. May I draw your attention to Clause 16.2 and 16.3 of the Arbitration Rules which I shall also consider once the exact extent of the issues you intend to raise is known to me."*

27. On 29 September 2004 Moulson replied inter alia that it awaited the Arbitrator's decision as to "Norbrook's notice that the 'fast track' proceedings should no longer apply if the arbitration is recommended on 18 October." It was not at that stage their intention to comment further except for "issuing a final quantum of the costs of the proceedings in the event you find in our favour."

28. It is to be observed that Norbrook did not criticise anything in those letters from the Arbitrator or Moulson relating to the Short Procedure Rules.

29. On 21 October 2004 the Arbitrator wrote to the parties stating that not having heard from the parties by 18 October as to the outcome of efforts to narrow the issues or resolve the debate and, having been informed by Moulson that the dispute remained unresolved, he intended to recommence the procedure as stated in his 27 September 2004 letter with a view to writing his decision based on the evidence in front of him at that time.

30. On 25 October 2004 Norbrook wrote to the Arbitrator, copied to Moulson, reminding him that, if the parties were unable to agree by 18 October, the arbitration was to continue and that there had been no indication in the letter of 27 September that the Arbitrator would be proceeding directly to write his award. Norbrook intended to submit additional witness statements, including a supplementary expert's report, and to respond to any additional statements produced, as well as putting forward final submissions. Norbrook also stated with regard to the Arbitrator's intention to obtain witness statements from Mountford and Colussi that it should be afforded the opportunity to review any such statements or evidence from those witnesses.

31. The Arbitrator replied in effect that he would not take any further steps until he had received the parties' joint statement of outstanding issues and defining the scope of the reference. He further stated that Colussi was unwilling to provide a statement and that Mountford would do so only after taking advice from her solicitor. He also requested Norbrook to supply further specific information about the plant and the issues on which they wished to put in evidence and the time needed for this to be done.

32. On 5 November 2004 Moulson wrote to the Arbitrator explaining that it had not proceeded with the mediation because its insurers would not agree to it, complaining about the delay in the arbitration and concluding by asking the Arbitrator to reach "a determination under the agreed Short Procedure Rules as soon as you are able". On the same date Mr Forde of Norbrook and Mr Coombs of Moulson signed a Joint Statement in which they informed the Arbitrator that the issues before him had not been narrowed in the period since 15 July 2004.

33. On 26 November 2004 the Arbitrator wrote to Moulson, copied to Norbrook, dealing with additional expert evidence yet to be adduced from Norbrook in accordance with the Arbitrator's orders and inviting Moulson's comments on Norbrook's suggestion that both parties should consolidate their pleadings into a single summary document. The letter concluded:

"Finally, whilst I acknowledge your frustration at the delay in the procedure, you will understand that it is in the interests of both parties that I have in front of me the information I need to make a fair and balanced decision. Much of the delay has been taken up by the attempt to mediate which proved to be an inconclusive task. I am intent on drawing this matter to a close and will issue a timetable as soon as I receive the data for the issue of the Experts Report on the matter of the data.

Concerning the procedure to be adopted, whilst it had originally been my intention to use the Short form of Procedure, I believe that both parties acknowledge that a more flexible approach had to be adopted given the introduction of new evidence and in this regard, I draw your attention to Rule 7 of the IChemE Arbitration Rules."

34. On 30 November 2004 the Arbitrator wrote to Norbrook, copied to Moulson, laying down a timetable for the rest of the arbitration. This involved Norbrook serving its additional expert evidence by 15 November and their further pleading by 14 January 2005 and Moulson responding within four weeks if they required it. The letter

continued: *"It is my intention to proceed to writing my decision unless there are reasons of uncertainty concerning the pleadings that require a final hearing."*

35. On 1 December 2004 Moulson wrote to the Arbitrator reviewing the events of the arbitration, complaining that the delay was adversely affecting their business because they were potentially excluded from tenders merely due to their being involved in the arbitration and stating: *"At the outset of the proceedings we asked you to consider that you order Norbrook to pay for the costs of the arbitration as the issuing party out of the beneficial production made through the operation of the plant. As Norbrook has continued to operate the plant throughout the proceedings and since Norbrook has expanded the arbitration beyond the short procedure we would again ask you to consider this request under rule 16.3 of the IChemE Arbitration Rules."*

36. Neither the Arbitrator nor Norbrook responded to this letter.

37. On about 14 January 2005 Norbrook instructed solicitors, Thomas Armstrong ("TA"), to represent it in the arbitration. The solicitor responsible for handling the case was Ms Moorhead. They sent Norbrook's consolidated case to the Arbitrator by email on the same date.

38. On 3 February 2005, in response to TA's request for a directions hearing, the Arbitrator, while agreeing to this course provided that it was not seen as an opportunity for delay, continued: *"As you quite rightly point out, the Respondent has chosen not to be legally represented. As a consequence, I would be concerned if the Claimant sought to be represented at a Hearing by more than one legally qualified party. It was my understanding that your firm has been appointed to represent the Claimant and therefore your presence at the hearing would be appropriate. I assume that the Claimant would require a suitably qualified technical representative to be present in order to advise you. At this stage I would expect no more than two people from either side to be present. I would be grateful if you could confirm your acceptance of this approach."*

39. On 23 February 2005, TA wrote to the Arbitrator reiterating its formal request for an oral directions hearing and referring to the Arbitrator's comments about legal representation in the following passage: *"We do note your views on that matter as set out in your letter of 2 February however we can only repeat our view that whilst we understand your duty to ensure an even handed approach in the case our client should not be prejudiced by Moulson's failure to avail of its right. We would respectfully point out that a considerable sum of money is involved in this dispute and out client is entitled to full legal representation. Whilst we are of course aware that an arbitration is different from a formal court hearing, the two are clearly analogous and it would be unheard of for a court to insist that one party is represented only by a solicitor rather than the full legal team and necessary experts, simply because the opposing party has chosen not to be represented. In our respectful view this is a fundamental undermining of our client's right to a fair hearing."*

    The letter concluded: *"An oral hearing would enable each of the parties to highlight those issues which they believe have been adequately dealt with to date together with areas where further information is required. In the event that you decide not to hold an oral directions hearing, we would respectfully suggest that it would be premature to move to a final decision at this time and that it would be more appropriate for you to conduct a review of the papers in the case to date and issue directions with a fixed timescale for conclusion of the arbitration."*

40. On the same date the Arbitrator replied; while noting his fundamental duty to ensure that both parties had a fair hearing and that such would be the principle by which he continued to manage the proceedings, he stated that the Rules provided him with considerable management powers. He then dealt with obtaining further factual and expert evidence and stated that once that further information had been received he would decide whether there should be a meeting of experts to narrow the issues as suggested by TA. He concluded by stating that he would start his review of the statements of case, evidence and documents in order to allow him to draft his decision at the earliest possible date. He still reserved the right to hold a further hearing should the need arise.

41. In his letter of 25 February 2005 the Arbitrator stated: *"I consider that throughout these proceedings your Client has been given every opportunity to put his case forward and at no time has it been stated or implied that any restriction on the provision of evidence has been applied by me. I note your point concerning the representation of your client at any hearing but as you rightly point out although Arbitral hearings are analogous to court procedures they are not the same. As you are aware I have a fundamental duty to ensure both parties rights to a fair hearing and this shall continue to be the principle by which I continue to manage the proceedings. I will of course continue to be bound by the IChemE Rules or Arbitration that apply to this case, which I am sure you are aware provides me with considerable powers in terms of the management of this dispute and any hearings pertaining thereto."*

42. On 18 March 2005 the Arbitrator directed that by 28 March the experts should meet and prepare a joint report dealing with certain specific topics.

43. On 6 April 2005 TA informed the Arbitrator that there had been unavoidable delay in arranging a meeting between the experts. The letter continued: *"We do have some concerns that the Respondents have not themselves engaged an independent expert and that it appears that representatives from the Respondent Company are being given the same credibility as if they were any independently appointed expert as is the case with Stopford Projects. In this regard we should be grateful if you could clarify how you envisage this issue being addressed."*

44. On 13 April 2005 the Arbitrator wrote to Norbrook, copied to Moulson, giving five days after a joint meeting for the expert's joint report. The letter then dealt with the question raised by TA about the status of an in-house witness being put forward as an expert by Moulson. He stated that there was nothing in the Rules to prevent a

party relying on an expert employed by that party and that he expected the experts to give evidence and go about their duties in a manner consistent with their role as experts. He wrote "It should not be forgotten that each party has appointed Experts in order to support its case and therefore I will consider the Expert evidence provided in this context". He continued later in the letter: "If you consider that there is any precedence regarding the appointment of Experts that are employees of a party to a dispute, I would welcome your advice on this matter. I recognise that the Claimant has decided to appoint Experts from an external company and that for reasons of economy, the Respondent has decided to use members of staff employed by them. It is my opinion that in the interests of natural justice, my duty is to ensure that either party to the dispute is not disadvantaged by their financial inability to appoint external experts. I am sure you will concur that in a dispute, the deepest pockets should not govern the result."

45. TA replied expressing concern at the Arbitrator's observation that each party had appointed experts in order to support its case and drawing attention to the decision in ***The Ikarian Reefer*** [1993] 2 Lloyd's Rep 68 as to the independent role of an expert in litigation. They also referred to the decision of the Court of Appeal in ***Field v. Leeds City Council*** [1999] CPLR 833 which acknowledged that an employee could act as expert for this employer but there might be cases where this would be inappropriate. In the present case in which Moulson had already advised that its survival depended on its success in the arbitration, it was hard to see how an employee's evidence could be other than subjective. That being so, minimal weight should be attached to it and yet Norbrook had still to go to the time and expense of refuting such evidence. It was unreasonable to allow evidence from Moulson's employees the same weight as a wholly independent expert. The letter also referred to a decision of Park J. in ***In re Continental Assurance Company*** [2001] BPIR 733 in which he had held that an employed member of a party's professional team, although honest, was partisan and should not act as an expert.

46. The Arbitrator replied on 5 May 2005. He stated that, having considered the authorities to which TA had referred,

"When weighing evidence I will consider a number of issues that may include but not be limited to the following:
1. The independence and objectivity of those giving evidence.
2. The acceptability of evidence given by those that receive payment for their services whether it be by direct employment or by appointment.
3. Whether the evidence given is capable of being tested.
4. Whether evidence should be classed as expert evidence or evidence in fact."

He further stated: *"You have again returned to the issue of the Respondents financial position. It would clearly be contrary to the laws of natural justice if I debarred the Respondent from putting up any defence because of his inability to pay for external expertise and legal advice. He must be allowed to put whatever expertise he can muster in the field, but clearly evidence, such as it is, will be viewed by me in the context of the influences that may play upon such evidence put forward."*

47. He concluded by stating that he had now received the joint experts report and that he believed he was now in possession of enough information to allow him to draft his decision. He hoped to issue his decision by 30 June 2005.

48. On 1 June 2005 TA – Ms Nevin having replaced Ms Moorhead as case handler at TA – wrote in reply to the Arbitrator's letter of 5 May, referring back to Norbrook's letter of 22 September 2004 (see paragraph 24 above) in which it had been stated that the arbitration involved additional technical and complex issues which were not suitable for the fast track, and continuing:

"We would respectfully suggest that this constitutes notice under Paragraph 16.2 of the IChemE Arbitration Rules that the arbitration should cease to be conducted in accordance with the Short Procedure Rules. Should you disagree with that interpretation of Mr Forde's letter and without prejudice to our position in relation to it, we hereby notify you that our client requires, pursuant to paragraph 16.2 of the IChemE Arbitration Rules, that the Arbitration shall cease to be conducted in accordance with the Short Procedure Rules.

In the circumstances therefore, an oral hearing is required, and we look forward to hearing from you with your directions."

49. The Arbitrator replied on 7 June 2005 noting that Norbrook considered that the letter of 27 September 2004 had given notice under Rule 16.2. He gave leave to Moulson to comment on that before he ruled on it.

50. Moulson responded on the following day – 8 June 2005 – stating that Norbrook was using termination of the fast track procedure to delay the making of an award. It requested an immediate ruling under rule 16.3 as to its costs to date. These amounted to £47,704.85. Further, a second oral hearing was not necessary because the parties had already dealt with the issues.

51. On 10 June the Arbitrator wrote to TA stating that he would rule on TA's Rule 16.2 notice as well as the question of further hearings by 16 June.

52. On 13 June Moulson provided a schedule showing the breakdown of its costs totalling £47,704.85.

53. On 15 June TA wrote to the Arbitrator objecting to his making direct telephone calls to the parties: unless such calls were three–way calls, all future communication should be by way of written correspondence.

54. On 16 June 2005 the Arbitrator wrote to Norbrook, copied to Moulson:

"I note that you offer no comment on the question of Rules 16.2 and 16.3 of the Arbitration Rules. I can see no reason why the rules should not be applied in full since you have put forward no arguments to the contrary. I have reviewed the schedule of costs provided by the Respondent and find them to be not unreasonable. I therefore order that the Claimant shall pay the amount in full, being the sum of £47,704.85 to the Respondent within 14 days of this order, as stated in the Respondent letter date 14 June 2005 (ref 0019/SWC/arb044).

I draw your attention to the final paragraph of Rule 16.3, in particular the impact of the condition precedent which I shall apply in the event that the charge remains unpaid."

55. This was his First Decision.

56. On 17 June 2005 TA wrote to the Arbitrator stating that they took exception to the comments in his letter of the previous day and that at no time in his previous correspondence had he asked them to offer any comment on the question of costs under rule 16.2 and 16.3. They were taking counsels' advice.

57. On the same day the Arbitrator wrote to the parties directing that all further contact with him be in writing. He wrote separately to TA explaining that he had used the telephone to save time in confirming the receipt of letters, but agreeing that it ought to be avoided for the purpose of substantive discussions. His letter ended: *"For the avoidance of doubt and to ensure that either party do not feel disadvantaged, I shall respect your wishes with regard to contact between the parties and myself. I shall also instruct the Respondent in this matter. This will of course add time and cost to the procedure but I would not want a simple administrative expedient to be used as a basis for any appeal against any decision I may make in the future."*

58. On 29 June 2005 the Arbitrator drew attention to his letter of 10 June which indicated his intention to rule on rules 16.2 and 16.3 on 16 June, stating that he had given all concerned more than adequate time to consider and comment on the matter.

59. On 1 July 2005 TA wrote to the Arbitrator stating that his First Decision was wrong in law, constituted a serious irregularity, failed to comply with Rule 16.3 and was contrary to natural justice. They therefore invited him to correct it. The grounds for this assertion, quoted at paragraph 7 above, were that no decision had been given on the application of rule 16.2, that the Arbitrator had not carried out an assessment of Moulson's costs as required by Rule 16.3 and that Norbrook was never given an opportunity to comment prior to making the decision. The letter was prefaced by the words: *"This letter is written without prejudice to our Client's rights under section 24 of the Arbitration Act 1996, all of which are hereby specifically reserved."*

60. On 1 July 2005 the Arbitrator wrote that he was willing to suspend the matter of payment by Norbrook of the sum of £47,704.85 until he was able to give an informed opinion on its objections. For this purpose he asked specific questions by way of explanation for those objections. He referred back to TA's letter of 1 June 2005 and to the notification in it (given without prejudice to Norbrook's assertion that a Rule 16.2 notice had been given on 22 September 2004) that Norbrook required that the arbitration should cease to be conducted in accordance with the Short Procedure Rules. He asked *"Am I to understand from your statements that you did not in fact give notice in your letter of 1 June 2005 and that you expected a decision from me? May I remind you that neither I or the Respondent raised this matter. If you wish to withdraw your notice perhaps you would advise me of your intention immediately."*

He further stated: *"My reading of Rule 16.3 does not require me, nor does it infer, that I need to seek your comment on costs. The application of this rule is at my discretion."*

61. Later in the letter he wrote: *"Subject to the issue of the condition precedent in Rule 16.3 on which I am yet to make a decision I consider that unless the parties have new evidence to bring and subject to any ruling I may make on the question of a performance test in accordance with the Contract, I should be in a position to determine the issues in this dispute. In the event that the procedure continues or that you can demonstrate clearly that the Claimant intends to bring new and substantive information to the table, I consider it likely that I will need to hold a procedural hearing at which both parties will be expected to raise <u>all</u> issues that will have a bearing on the dispute. Thereafter, depending on whether I am able to dispose of any outstanding procedural issues on the spot, I will decide on whether a full hearing is to take place within 10 days of the procedural hearing."*

62. On 4 July 2005 TA replied, repeating the reference to section 24 of the Arbitration Act, alleging that the Arbitrator's interpretation of Rule 16.3 was a breach of natural justice and reminding the Arbitrator of what they had written about requiring termination of the Short Procedure in their letter of 1 June 2005 and stating that that letter required a ruling on what constituted notice under Rule 16.2 which significantly affected any ruling on costs. The letter went on to state that TA had seen no evidence that the Arbitrator had carried out an assessment of reasonable compensation for costs taking into account all the circumstances that had taken place and that such an assessment could not possibly have taken place within such a short time frame.

63. On 28 July 2005 TA wrote to the Arbitrator "respectfully" suggesting that there had been ample time for him to reach a decision on the Rule 16.2 and 16.3 issues such that they must "insist" on receiving a decision by 5pm on Wednesday 10 August. They trusted that he would give this matter his "urgent attention" on his return.

64. On 29 July 2005 the Arbitrator replied that he was now in a position to issue his decision by no later than the date stated in TA's letter.

65. On 2 August 2005 the Arbitrator again wrote to TA about their letter of 28 July 05. He stated: *"Addressing the second paragraph of your letter, your comments concerning the delay in my decision are unreasonable particularly since I have been attempting to deal with a serious of correspondence between you and the Correspondent, the most recent of which arrived in my possession as recently as 28 July 2005. May I remind you that in my letter dated 11 July 2005 (ref NLL-0080) I specifically requested a clear answer to a straightforward question concerning Rule 16.2. Did you or did you not give notice that you required the short procedure to be terminated? I have decided to contact Mr Forde, Norbrook Laboratories, to ensure that there is no misunderstanding concerning the matter of how or whether notice or a decision had been given concerning Rule 16.2 at an earlier date."*

66. The letter of 11 July 2005 referred to by the Arbitrator was received neither by Norbrook nor by Moulson. I infer that it was never sent.

67. On 2 August 2005, consistently with what he had written to TA, the Arbitrator telephoned Mr Forde of Norbrook. He explained that he was contacting Mr Forde direct, although there were solicitors on the record, because he could not get any clear response from them as to Norbrook's position with regard to notice given under Rule 16.2 and that it would assist him if Mr Forde could identify the correspondence on which Norbrook relied as notice under rule 16.2. Mr Forde told the Arbitrator that he could not help, not then having the file in front of him, and that he would need to speak to Norbrook's solicitors but he understood that clear notice had been given in September 2004 and that it had been accepted by all concerned for some time that they were no longer using the short form. The Arbitrator followed up that conversation with a letter of the same date in which he wrote: *"I refer to our brief telephone discussion held in connection with Rule 16 of the IChemE Arbitration Rules. As I explained there appears to be a misunderstanding concerning this matter and it is clear that you believe I have given direction concerning Rule 16 at some stage in the procedure. I would be grateful if you could direct me to the particular correspondence which you base your view."*

    This was copied to Moulson.

68. This conversation was followed on 3 August 2005 by a letter from TA to the Arbitrator objecting in strong terms to his having made direct contact with Norbrook when they were on the record and to his having communicated direct with a party by telephone in the absence of the other party in spite of his ruling on 17 June 2005. They further objected to the Arbitrator's statement to Mr Forde that he might not have been aware of the action taken by TA. They required him to retract that suggestion "forthwith". Any action taken had been with Norbrook's full authorisation. As to clarification of Norbrook's case on Rule 16.2, TA's letter clearly set out that Norbrook's opinion was that notice was given on 22 September 2004. The Arbitrator's letter of 27 September had accepted that Norbrook had given notice. Rule 16.2 gave him no discretion to decide whether the short form procedure ended. A valid notice operated automatically. The letter of 1 June merely informed the Arbitrator that, if he disagreed with that, the letter of 1 June 2005 could be a valid notice although Norbrook's position was reserved.

69. On 8 August 2005 the Arbitrator wrote to the parties to the following effect. The letter of 22 September 2004 from Norbrook was insufficiently clear to amount to an effective notice under Rule 16.2. His letter of 27 September 2004 did not amount to an acceptance of the validity of that notice. To the extent that he had since September 2004 allowed additional evidence to be adduced and statements of case to be submitted, he had done so under this discretionary powers under Rule 15.4 and he had extended the time-scales under the Short Procedure in the exercise of his powers under Rule 15.6. Norbrook had not thereby been disadvantaged by the continuation of the Short Procedure for it had been enabled to put forward its case to the fullest extent. He concluded that notice had been duly given by Norbrook on 1 June 2005, as a result of which Rule 16.3 came into play. He therefore reinstated his decision of 16 June 2005 but reserved his right to adjust payment to take account of any additional cost incurred up to the date on which notice was given plus any interest due on the sums outstanding in any decision he might give in the matter of final costs. Payment of £47,704.85 was to be made by 15 August 2005.

70. The Arbitrator concluded with the following comment with regard to Norbrook's objection to his direct telephone contact with Mr Forde:

    "Concerning your comments regarding the telephone call made to Mr Forde, I have explained in detail my reasons for doing so. I would not have chosen to make contact in this manner unless I had deep concerns that there may have been a misunderstanding over the question of the notice and the implications that flow therefrom and that your client could have been disadvantaged under these circumstances.

    I am now satisfied that the Claimant has been given every opportunity to reconsider his position on this matter.

    As to whether I have contacted the Respondent by means other than in writing since I ruled on the matter, I confirm I have not."

71. That was the Arbitrator's Second Decision.

72. On 11 August 2005 TA wrote informing the Arbitrator that as Norbrook would shortly be issuing proceedings appealing his award of 8 August 2005, it would not be complying with his decision pending the outcome of the appeal.

Removal under Section 24: Submissions

73. Section 24 of the Arbitration Act 1996 provides, to the extent material, as follows:

"(1) A party to arbitral proceedings may (upon notice to the other parties, to the Arbitrator concerned and to any other Arbitrator) apply to the court to remove an Arbitrator on any of the following grounds:
(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;
(d) that he has refused or failed;
(i) properly to conduct the proceedings …
and that substantial injustice has been or will be caused to the applicant."

74. It is submitted that (i) circumstances exist that give rise to justifiable doubts as to impartiality of the Arbitrator, (ii) he has failed properly to conduct the proceedings, including in particular a failure to act in accordance with section 33(1)(a) of the 1996 Act and conduct of the proceedings in such a manner as to amount to a serious irregularity under Section 68(2) of the Act. It is further submitted that substantial injustice has been or will be caused by such failure properly to conduct the proceedings.

75. The conduct of the Arbitrator relied upon is as follows:

76. (1) Up to 15 June 2005 he had on occasion made direct contact with both sides by telephone without the other party's knowledge or access to the telephone call. Two such telephone calls – one to Moulson and one to TA – are referred to in TA's letter to the Arbitrator dated 15 June 2005 which protested that such unilateral contact was unacceptable (see paragraph 53 above). In his letter of 17 June 2005 (see paragraph 57 above) the Arbitrator described this direct contact as a "simple administrative expedient" to ensure that correspondence was being transmitted in a timely fashion in accordance with his orders. In that letter he agreed to discontinue unilateral contact for that purpose and accepted TA's view that direct unilateral contact was not appropriate for discussions of a substantive nature.

77. (2) In spite of TA's objection and in spite of his concurrence with that objection in his letter of 17 June 2005, the Arbitrator on 2 August 2005 telephoned Mr Forde direct (see paragraph 67 above). In so doing he was under the mistaken impression that he had sent a letter dated 11 July 2005 asking for a "clear answer to a straightforward question": did Norbrook give notice terminating the short procedure? Norbrook drew attention to the fact that its case on this point had clearly been put in TA's letter of 1 June 2005 (see paragraph 48 above).

78. (3) In relation to this telephone call Norbrook draws attention to the Arbitrator's own evidence upon this application. In his first witness statement, paragraph 19, he stated: *"I wanted to be certain that Norbrook were content to give notice that the Short Procedure should cease, particularly as it gave me a discretion to decide where the costs to date should lie."*

At paragraph 20 he stated: *"Thomas Armstrong subsequently said that they were "appalled" that I chose to contact their client directly but since I had held a number of telephone conversations with Mr Forde in the past and because I was deeply concerned that there may have been a misunderstanding on this matter that could unwittingly lead to the stopping of the procedure due to the non-payment of costs by Norbrook, I considered it imperative to bring Mr Forde's attention to the situation. I based my conduct of the proceedings on my reading of Rule 7 of the Rules – in particular 7.4 "The Arbitrator shall have power to decide all procedural and evidential matters including, but not limited to … (e) whether and to what extent the Arbitrator should himself take the initiative and ascertaining the fact and the law, and to rely upon his own knowledge and expertise to such extent as he thinks fit" I interpreted this to give me wide powers to ascertain the facts by speaking to witnesses including in this case, Matthew Forde, particularly as I considered that non-payment would lead to the arbitration coming to a close if Moulson Chemplant so chose and this could potentially disadvantage Norbrook."*

79. I interpose that later in his first witness statement the Arbitrator said this: *"I decided that the exchange of letters with Thomas Armstrong was problematic and I was by no means convinced that Norbrook were fully aware of the nature of the discussions and implications. I particularly wanted to give Mr Forde every opportunity to clarify or withdraw the notice due to the implication there of Norbrook if they believed that the 22 September 2004 date counted as notice could have made a counter argument to pay costs to that date but there were silent in this regard and have remained so."*

80. Norbrook also draws attention to the Arbitrator's response to Norbrook's evidence that he had shown an apparent dislike for TA. At paragraph 15 of his second witness statement he observed: *"Concerning the Claimant's solicitors, given their persistent unwillingness to follow my instructions at the simplest of levels whilst criticising me at every turn, I believe my correspondence has been firm, patient and courteous."*

81. Mr Steven Berry QC on behalf of Norbrook submits that given that there is no substance in this description of the solicitors' conduct, which I accept, the Arbitrator's contemporaneous conduct and his explanations for it indicate an intention on his part to drive a wedge between Norbrook and TA by suggesting that the solicitor might be taking dangerous points without authority from her clients. Mr Berry further submits that the Arbitrator's conduct resulted from his own negligent lack of attention to the previous correspondence. In particular, TA's letter of 1 June 2005 (see paragraph 48 above) had made it very clear that Norbrook's case on the Rule 16.2 short procedure termination point was based on the letter of 22 September 2004. It is submitted that the fact that the Arbitrator has persisted in his criticism of TA now that all the relevant facts are available to him supports the perception that he harboured an entrenched low opinion and dislike of TA and in particular of Ms Nevin of that firm. That mind cast suggested an objectively perceptible real risk of bias against Norbrook and that he will at least unconsciously be biased against further applications and arguments presented by TA on behalf of Norbrook.

82. Alternatively, Mr Berry submits that the Arbitrator's conduct set out above constituted a failure to conduct the proceedings fairly and properly and that therefore it amounted to a serious irregularity which in itself would justify removal under section 24(1)(d) of the 1996 Act.

83. (4) Norbrook further submits that the Arbitrator's fax of 17 June 2005 (see paragraph 57 above) amounted to objective pre-judgment or bias against Norbrook. By his reference to not wanting a "simple administrative procedure" (unilateral telephone calls) to be used as a basis for any appeal against a future award he was impliedly demonstrating that the award was likely to be unfavourable to Norbrook and therefore the subject of an appeal.

84. (5) The Arbitrator made direct contact with three potential witnesses, namely Ms Mountford and Mr Colussi, formerly of Norbrook, and Mr Hendrix of Syngenta. All three were potentially able to speak to the operation of the plant by Norbrook and its performance, issues which went directly to Norbrook's claim. Moulson had indicated that it might wish to call the first two but could not trace them. The Arbitrator told the parties that he proposed to approach them for statements and did so as described in paragraphs 20 above. He subsequently had two private telephone conversations with Ms Mountford and wrote to her on 8 September 2004, one private telephone conversation with Mr Colussi and one with Mr Hendrix. Norbrook was not informed of those contacts. The Arbitrator was unsuccessful in obtaining statements from any of those witnesses. However, it is submitted by Mr Berry on behalf of the Norbrook that it is to be inferred that all of them, or at least Ms Mountford, were hostile to and critical of Norbrook and had said things prejudicial things to the Arbitrator, although whether directly material to issues in the arbitration is impossible to say. These conversations were not disclosed by the Arbitrator. However, in his first witness statement, paragraph 24, the Arbitrator stated:

"One of Norbrook's claims in the arbitration is that Moulson did not satisfy themselves sufficiently that the material which had to be processed in the recovery plan, could be successfully processed and that Moulson should not have entered into the contract without satisfying themselves of this. However, it appeared that Moulson's process design in relation to pre-evaporator stage of the plant, had been put forward on the basis of tests undertaken by Norbrook chemists carrying out development work in their laboratories at Norbrook's site. It was therefore essential that I knew what tests had been undertaken and could satisfy myself that the results of these tests were available to enable Moulson to design the plant but Norbrook were not able to put forward evidence on this point as the relevant chemists and all the project team members had all since left their employ and therefore no witness statements of fact were available to me from Norbrook. I contacted two former Norbrook employees: I wrote to Pia Mountford on 8 September 2004 (page 149 of "JGC1") and contacted Mr Robert Colussi by telephone. I explained that I was particularly interested in the manner in which technical data on waste had been collected by Norbrook, analysed, collated and then passed to Moulson to enable them to design an appropriate – pre-evaporator and distillation system for the recovery plant.

Both Pia Mountfound and Robert Colussi stated that they were not willing to assist or to provide witness statements and so I decided to disregard any comments that they had made to me. I would only have taken account of evidence put forward by them in form of a witness statement therefore do not agree that my contacting them, was in anyway improper and again I refer to Rule 7. They had both left Norbrook under difficult circumstances but I did not allow this to bias my view of Norbrook. The more concerning issue was the complete lack of detailed technically based evidence concerning the feed to the plant. I did not contact Pia Mountford and Robert Colussi after they had stated they would not give evidence. I also decided to contact Stephen Hendrix of Sygenta Ltd in order to discuss the operation of a plant constructed by Moulson at their Grangemouth Works and received confirmation that as a matter of company policy, Sygenta do not give statements on the performance of the plant. Shortly after this matter had been raised, I held a telephone conversation with Moulson dealing with some technical issues which I confirmed in writing and copied both parties. This was followed by a further letter to Moulson, also copies to Norbrook, advising that I would be seeking a statement from Mr Hendrix. Since no statement from Mr Hendrix was forthcoming. I allowed the matter to lapse and my intention would have been to have referred to this in my decision but to have dismissed any inference or conclusion that might attach to my contact with the three individuals."

85. Mr Berry argues that the fact that the Arbitrator did not intend to disclose these conversations until referring to them in his final award as well as his current unwillingness to disclose exactly what was said indicated a real objective risk of bias in as much as he was prepared to continue with the reference even though he might have been given information which could have poisoned his mind against Norbrook. The Arbitrator's assertion that in preparing his award he intended to disregard any comments the witnesses had made to him, that he would not allow this to bias his view of Norbrook and that he would put these comments out of his mind did not cure the defect in his conduct. In this connection Mr Berry draws attention to the position which arose in **Porter v. Magill** [2002] 2 AC 357 in which one issue falling for determination was whether the auditor of the City Council should have recused himself on the grounds of bias following his announcement of provisional conclusions in a high profile press conference. Having at page 494 concluded that the test to be applied in deciding whether to set aside a decision on the grounds of apparent bias should be that proposed in ***In re Medicaments and Related Classes of Goods (No.2)*** [2001] WLR 700 rather than that adopted in ***R v. Gough*** [1993] AC 646 (a real danger of bias), namely whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased, Lord Hope, at page 495, observed that assertions by the auditor that he had an open mind, which were in substance assertions that he was not biased, were unlikely to

be helpful and should be accorded no evidential weight. Having examined the auditor's overall conduct, including his convening of the press conference and the words of his announcement in all the circumstances of the case, Lord Hope concluded that there was no real possibility of bias.

86. Mr Berry QC further relies on the recent decision of Morison J. in ***ASM Shipping Ltd of India v. TTMI Ltd*** [2005] EWHC 2238 (Comm) in which this court was concerned with an application under section 68 advanced on the basis that a QC appointed as third Arbitrator should have recused himself in the face of an objection advanced by the shipowners in a maritime arbitration that there was apparent bias. The basis for the objection was that some seven months before the hearing of the arbitration, the same QC had appeared as an advocate on an interlocutory application for disclosure of documents in an earlier arbitration involving the same shipowners and in particular their principal witness, and that he had on that occasion been instructed by the same firm of solicitors (acting for a third party) who represented the charterers in the instant arbitration. The key circumstances affecting both arbitrations were that the solicitors had on both occasions made serious allegations against that witness with regard not only to his failure to comply with the shipowners' duty of disclosure but as to the authenticity of documents which he had put forward on behalf of the shipowners. The QC had only been involved in that single application in the earlier arbitration. Morison J. found that amongst those matters which would have been known to the independent observer would have been:

"The extent of X QC's knowledge of these allegations in the B is not entirely clear and would ultimately depend upon seeing the instructions [which have not been made available] which were given to him in connection with the application for disclosure which he made to the court. The observer would know that X QC said in his prepared statement to the Tribunal that he did not "recall" [and that the note for his oral submissions did not refer to] making, or Waterson Hicks or their clients making, any allegation or producing fraudulent and fabricated documents and threatening forensic investigation 'but I have no bias for thinking that any such allegation, even if made, was ever substantiated'."

87. In concluding that the independent observer would have considered that there was a real possibility that the tribunal was biased, Morison J. observed: *"In this case there was a pattern of complaint amounting to dishonesty in relation to disclosure being made by the same solicitors in each case; and X QC had played a part in the B disclosure exercise 7 months before the arbitration. The nature of the allegations; the pattern of them; the involvement of the same solicitors; X QC's involvement in the disclosure process a short time before sitting as an arbitration in judgment on the alleged dishonest party persuades me, for the reasons I have given that X QC should have recused himself after objection was taken."*

88. It is submitted that in as much as the real objection to the QC as a member of the tribunal was that in the earlier arbitration he had or might have acquired information, the substance of which was unknown, which there was reason to believe would have been prejudicial to the shipowners, so in the present case there is a similar objection to the self-exposure of the Arbitrator to witnesses who both could speak to pre-contract laboratory test results obtained by Norbrook and to the commissioning and operation of the plant and, in the case at least of Ms Mountford, might well have made disparaging remarks about Norbrook which the Arbitrator had declined to disclose. It was thus the impact of those circumstances on the mind of the Arbitrator which would have given rise to fear of a real possibility of bias in the mind of a fair-minded, independent observer.

89. (6) The Arbitrator's original award – the First Decision – and the Second – were the result of conduct by the Arbitrator which represented serious irregularity under Section 68(2)(d) – failure to deal with all the issues put to it – but was also grounds for his removal under Section 24 for failure properly to conduct the proceedings whereby substantial injustice has been caused to Norbrook. He also failed to comply with Section 33(1)(a) by not giving Norbrook a reasonable opportunity to deal with the relevant issues. That submission may be summarised as follows.

90. Following Norbrook's 22 September 2004 letter quoted at paragraph 24 above, the Arbitrator had informed the parties by his letter of 27 September 2004 that he would decide whether the Short Procedure was no longer suitable once the nature, extent and permissibility of any new evidence and statements that Norbrook wished to adduce were known. He could also then consider the effect of clause 16.2 and 16.3 (see paragraph 5 above). He also stated (see paragraph 24 above) that the abandonment of the "fast track" procedure was for him to decide. On 29 September 2004 Moulson had told him that they did not propose to comment on Norbrook's notice that the fast track procedure should no longer apply except that they would issue a final schedule of costs "if you find in our favour". Thereafter, the Arbitrator did not decide whether the Short Procedure had come to an end. Nor did he decide whether Moulson should be awarded its costs. On 5 November 2004 Moulson had requested him to reach a determination of the whole dispute under the Short Procedure (see paragraph 32 above). The Arbitrator's letter of 26 November 2004 gave no express decision on the termination of the Short Procedure but merely stated that he understood that a more flexible approach (implicitly then under the Short Procedure) was called for and referred to Rule 7. This provides inter alia:

"7.1 The Arbitrator may exercise any or all of the powers set out or necessarily to be implied in these Rules on such terms as he thinks fit, and the parties shall not deny that the Arbitrator has such powers."

and

"7.4 The Arbitrator shall have power to decide all procedural and evidential matters including, but not limited to:
(f) whether and what extent there should be oral or written evidence or submissions;
(g) whether and to what extent Expert Witnesses' evidence should be adduced;"

91. On 1 December 2004 Moulson requested him to make an order for costs in its favour under Rule 16.3. The Arbitrator did not reply. It was only as a result of the Arbitrator's 5 May 2005 letter that the issue of the Short Procedure was reopened (see paragraph 46 above) in TA's letter of 1 June 2005, in which TA raised the point that Norbrook's letter of 22 September constituted notice under Rule 16.2. This was followed by the Arbitrator's letter of 7 June stating that before ruling on TA's Rule 16.2 point he would give leave to Moulson to comment and by Moulson's response of 8 June 2005 asking for an immediate ruling as to its costs to date – amounting to £47,704.85. The Arbitrator, having told the parties on 10 June 2005 that he would rule on the application of rules 16.2 and 16.3 and having on 13 June received from Moulson a breakdown of their costs to date, then, on 16 June 2005, issued his First Decision.

92. Norbrook submit that in so doing the Arbitrator failed to deal with the following issues:

i) whether the 22 September letter was an effective notice under Rule 16.2 terminating the Short Procedure;

ii) if so, whether his lack of response to Moulson's request of 1 December 2004 for an award of costs was an exercise of his discretion under Rule 16.3 against an order for Moulson's costs;

iii) in his First Decision, the Arbitrator did not state expressly that the letter from TA was a valid notice under Rule 16.2 but having implicitly done so by ordering that Norbrook should pay Moulson's costs to date, could not have exercised a discretion or assessed what was reasonable compensation for the costs incurred by Moulson when all he had for that purpose was the sparse information contained in the schedule enclosed with Moulson's letter of 13 June 2005 in which the time period in respect of each part of the work was not explicitly broken down.

93. Norbrook further submits that after TA's protests in their letter of 1 July and the Arbitrator's suspension of payment pursuant to his First Decision on 1 July 2005 and TA's further letter of 4 July 2005 explaining Norbrook's case on why the First Decision could not stand, the Arbitrator's reinstatement of the costs order in his Second Decision was also defective and the result of serious irregularity and possibly bias against Norbrook. In particular Norbrook relies on the following.

i) The Arbitrator's decision that the letter of 22 September 2004 was not a valid notice under Rule 16.2 when it clearly was;

ii) The Arbitrator's statement in his 8 August 2005 Decision that "it was the inconclusive and somewhat evasive nature of your replies to my request for clarification that led me to take the extraordinary step of contacting your client to ensure that this matter was understood beyond doubt" (emphasis added).

iii) The Arbitrator having explained that he considered that the letter from Norbrook of 22 September 2004 was not an effective Rule 16.2 notice, but that the letter from TA of 1 June 2005 was an effective notice went on to state that this brought into play rule 16.3 to conclude without any further explanation that he reinstated his First Decision.

94. Mr Berry criticises this Second Decision, not only because, as he submits, it misapplied Rule 16.2, but because, as to (b), the Arbitrator's statement that Norbrook's replies were inconclusive and somewhat evasive was wrong having regard to the contents of the letter from TA of 1 June 2005 and, after the First Decision, of the letters of 30 June and 4 July 2005, which clearly made the point that Norbrook's primary case was that an effective notice had been given under rule 16.2 on 22 September 2004 and that its alternative case was that such a notice had been given on 1 June 2005. As to (c) the Arbitrator had simply failed to accept or consider Norbrook's submissions on the exercise of his discretion as to costs under Rule 16.3; in particular he had not apparently considered whether his discretion should be exercised to make any costs award and, if so, what the amount of "reasonable compensation" ought to be and, as to that he had failed to give Norbrook any chance of making submissions on the exercise of his discretion or the assessment of reasonable compensation. It is submitted that he thereby failed to deal with an issue put to him and failed to give Norbrook a reasonable opportunity to make representations on these issues, inconsistently with section 33(1)(a) of the 1996 Act. This conduct emerged, it is submitted, from his failure to understand the effect of rule 16.3 as shown by his evidence and in his letter of 1 July 2005, quoted at paragraph 60 above, where he states that Rule 16.3 does not require him to obtain Norbrook's comments on costs for the application of that Rule was in his discretion.

95. (7) Norbrook further submits that the Arbitrator demonstrated apparent bias by his attitude to legal representation, as exemplified in his letter of 3 February 2005 (see paragraphs 38 and 40 above). Although the Arbitrator has not so far issued any order with regard to legal representation, it is submitted that this continuing threat emanates from the Arbitrator's untenable attempt to redress the financial strength and financial weakness of Norbrook and Moulson respectively by curtailing Norbrook's reasonable legal representation by solicitor and counsel. Mr Berry refers to the words of section 36 of the 1996 Act – ("Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.") and argues that in an English arbitration the selection of representation by counsel necessarily involves the instruction and presence of a solicitor so that an Arbitrator's ruling confining representation to one person would exclude representation by counsel. That would be unfair.

96. (8) It is further submitted that the Arbitrator's fax letters of 13 April 2005 (see paragraph 44 above) and 5 May 2005 (see paragraph 46 above) strongly suggest that here again the Arbitrator demonstrates that he is trying to redress the balance of the parties having unequal resources by displaying an inclination to diminish

the weight to be attached to the evidence of an independent expert witness (in this case Stopford Projects) by comparison with an in-house technical employee proposed to be relied upon by Moulson. He thereby demonstrated objective apparent bias in favour of an under-resourced party.

97. (9) Finally, it is submitted on behalf of Norbrook that by reason of his apparent inability to recall directions and submissions the Arbitrator has shown an inability properly to conduct the arbitration. This is to be derived from his apparent inability to recall or failure to review the earlier correspondence, notably that in September-December 2004 with regard to the termination of the Short Procedure and a similar failure when making his 16 June 2005 Decision to take into account the letter from TA of 1 June 2005. This led in turn to the unsatisfactory direct contact by telephone with Mr Forde of Norbrook and the suggestion that TA were acting without instructions. There was also the omission to send the letter of 11 July 2005 and his subsequent failure on 2 August to recall that this had happened as well as his accusation as to TA's "inconclusive and somewhat evasive nature" of their replies to his requests for clarification which appears in his Second Decision of 8 August 2005.

98. It is submitted by Mr Berry QC that each of these grounds, taken alone, is sufficient to justify removal of the Arbitrator under section 24 of the 1996 Act, but that, if that were not so, in respect anyone or more of them, when taken together, they amount to objective apparent bias coupled with failure properly to conduct the arbitration which has given rise to substantial injustice attributable to the two Decisions and/or will give rise to substantial injustice if the arbitration proceeds under this Arbitrator. As regards objective apparent bias the Arbitrator has demonstrated a propensity to favour the under-resourced party, namely Moulson, and has demonstrated prejudice against TA. In addition he has adopted unacceptable procedures by his direct contact with material witnesses and his failure to disclose exactly what the witnesses told him.

Section 69: Submissions

99. The grounds for setting aside the Second Decision relied on by Norbrook cover matters already identified in the submissions as to removal of the Arbitrator.

100. Norbrook relies on the Arbitrator's failure to deal with issues put to him in relation to both Decisions – see paragraphs 7 and 11 above. It also relies on the Arbitrator's failure to allow Norbrook a reasonable opportunity to deal with Moulson's case on costs both prior to the First Decision and prior to the Second Decision. These are said to be were serious irregularities under Section 68 and they have caused substantial injustice to Norbrook in as much as it is obliged to make payment under the Second Decision.

Removal under Section 24 and Application of Section 68: Discussion

101. In this case the Arbitrator has availed himself of the facility provided to him under Section 24(5) of the 1996 Act, to appear and be heard by the court before it makes any order. The court has had the benefit both of two witness statements provided by the Arbitrator and by written and oral submissions on his behalf made by Mr Jonathan Turley, in-house Legal Advisor to Mott MacDonald Ltd, the Arbitrator being Executive Chairman of GRC, Mott MacDonald, a division of Mott MacDonald Ltd. I have not set out a detailed account of Mr Turley's helpful submissions, but I shall deal with them in the course of this section of the judgment.

102. Before considering the specific submissions advanced on behalf of Norbrook, it is necessary to keep in mind that this arbitration was conducted under the Rules.

103. Section 4 of the 1996 Act provides:

"(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the 'non-mandatory provisions') allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided."

104. Rule 1.1 provides: *"The objective of arbitration is to obtain the fair, economic and binding resolution of disputes by an impartial Arbitrator. The Arbitrator shall give each party a reasonable opportunity of putting its case and dealing with that of its opponent. These Rules shall be interpreted and the proceedings shall be conducted in a manner conducive to achieving these objectives."*

105. By Rule 1.3 it is further provided: *"Where the Arbitration Act 1996 (the Act) applies, these rules shall be institutional rules for the purposes of s.4(3) thereof. Should the Rules appear to be inconsistent with the provisions of the Act (other than those made mandatory under the Act), these Rules shall prevail."*

106. By Schedule 1 of the 1996 Act, sections 24 and 68 are designated as mandatory provisions in the sense that it is not open to the parties to contract out of them by agreeing to procedural rules which are expressed to displace them.

107. That said, the application of relevant mandatory provisions clearly has to take account of the operation of the Rules and, as Rule 1.3 provides, in case of inconsistency between the Rules and the non-mandatory provisions of the Arbitration Act, the Rules are to prevail. Amongst the mandatory provisions is section 33 (set out at paragraph 74 above). It is against this legislative background that it is necessary to read Rules 7.1, 7.4 and 7.7 and Rules 15 and 16 – the Short Procedure rules.

108. There can be no doubt that the purpose of the Short Procedure Rules is directed to the achievement of dispute resolution by an economical and speedy procedure. Thus, under rule 15.1 applicability of those Rules is consensual, they are to apply only if both parties propose them or both accede to the Arbitrator's suggestion. Under Rule 15.2 to 15.8 there is laid down the procedural timetable structured on the presentation of files containing the argument and documents in support of each party's case followed by the fixing of a day on which there is a meeting between the Arbitrator and the parties for the purpose of the Arbitrator hearing oral submissions and putting questions to the parties, their representatives or witnesses. Alternatively the parties can agree to dispense with a hearing and allow the Arbitrator to proceed to his award on the basis of the documents. Thus, although the Short Procedure Rules do provide for a brief hearing, they do not provide for procedures analogous to heavier arbitrations or court proceedings by requiring disclosure of relevant documents or exchange of factual witness statements or experts' reports. Nor is there any provision for the parties to call oral evidence in the manner of a court action so as to provide an opponent with an opportunity for cross-examination, although there is provision for the Arbitrator to put questions to witnesses.

109. By Rule 16.1 the Arbitrator has no power to make an award as to costs, as he could do in favour of a successful party in a normal arbitration. His own fees and charges are to be shared equally between the parties. This provision is, however, subject to the unusual procedural regime set out in Rules 16.2 and 16.3 which is at the heart of these applications.

110. Rule 16.2 enables either party unilaterally to put a stop to the Short Procedure by serving written notice on the Arbitrator and the other party that "the arbitration shall cease to be conducted in accordance with" the Short procedure. That notice having been given, these Short Procedure Rules thereupon no longer apply or bind the parties except for the provisions of Rule 16.3 and the reception and proof of evidence already put in by either side. Rule 16.3 gives the Arbitrator an unusual discretion. He can order the party giving notice of termination of the Short Procedure to pay the whole of the Arbitrator's fees and charges up to the date of such notice and also a sum "*to be assessed as reasonable compensation for the costs … incurred by the other party up to the date of such notice*". Payment in full of those amounts is then made a condition precedent to the party giving notice continuing with the arbitration unless the arbitration otherwise directs, albeit the other party can continue with the arbitration.

111. It will at once be apparent that the effect of these rules is to provide for a discretionary penal sanction aimed at deterring either party from abandoning the Short Procedure. There is no indication as to the criteria by reference to which the Arbitrator is to exercise his discretion. Nor is there any provision for the process of assessment of reasonable compensation for the costs incurred by the other party. In particular there is no indication as to whether he is to be compensated on a net loss basis for costs thrown away by having participated in the Short Procedure, that is costs that would not otherwise have been incurred had the Short Procedure not been in operation or on an indemnity basis thereby giving the other party costs which he would have incurred in any event in preparing for or participating in the arbitration, even if the Short Procedure had not been operating.

112. Further, the structure and wording of Rule 16.3 make it reasonably clear that the date upon which the notice is given is the point by reference to which the Arbitrator's fees and charges under (a), as well as the other party's costs, are to be calculated. It follows that, in order to qualify as an effective notice, that which is served on the Arbitrator must unequivocally identify a specific date as that on which the notice is given. It further follows that in order to operate the procedural regime set out in Rules 16.2 and 16.3 the Arbitrator must

    i) conclude that an effective notice has been given with reference to a particular date;

    ii) consider whether he should exercise his discretion with regard to the making of an order under Rule 16.3, which exercise would necessarily include the identification of the relevant criteria;

    iii) upon concluding that by reference to those criteria he should exercise his discretion by making a costs order against the party giving notice, to ascertain what other costs the other party has incurred up to the date of the notice;

    iv) assess what compensation to the other party in respect of such other costs would be reasonable.

113. In this list of steps to be taken by the Arbitrator it is important to note that the exercise involved in step (i) does not have the effect of rendering a notice valid if it is not intrinsically so; it merely informs the Arbitrator whether he has jurisdiction to conduct the arbitration by a procedure other than the Short Procedure and whether he can exercise any of the discretionary powers under Rule 16.3. If, therefore, he wrongly assumes that a valid notice under Rule 16.2 has been given and proceeds to make an order under the latter rule, he will have acted in excess of his powers and the consequence will normally be a serious irregularity within section 68 of the 1996 Act.

114. I must now consider the Arbitrator's operation of Rules 16.2 and 16.3 in the present case.

115. The letter from Norbrook to the Arbitrator of 22 September 2004, having expressed the view that the dispute should be resolved as soon as possible, went on to request that the stay of the proceedings previously granted to enable the dispute to be referred to mediation should continue until 15 October 2004. If at that point the case had not been settled and the parties required the stay to be lifted, it was Norbrook's submission that the Arbitrator should not move immediately to an award based on the evidence so far put before him because, the case having expanded into new technical and complex issues, they were not suitable for determination by the "fast track" under Rule 15. Accordingly, if the arbitration were recommenced Norbrook gave notice that it would

be seeking to serve new factual and expert evidence and to respond to any additional statements produced by Moulson and to submit final submissions. It would only seek a further hearing if it proved necessary.

116. In my judgment, this was not a valid notice under Rule 16.2. Firstly, although Norbrook stated that the new issues were unsustainable for resolution under the Short Procedure, those issues might never arise for determination if the mediation were successful on or before 15 October. As at 22 September 2004 it was therefore impossible to know for certain whether and, if so, when the Short Procedure was to terminate. It might be that the stay would be lifted before 15 October if all hope of a mediation were abandoned in the meantime. Secondly, it was open to the Arbitrator in the exercise of his powers under Rule 7 and Rule 15 to admit additional evidence in future without there being a formal termination of the Short Procedure. Since Norbrook had indicated that it might not be necessary to have a further hearing, the letter is at least equally capable of being understood as a suggestion that the additional complex issues were unsuitable for an unmodified form of the Short Procedure, albeit they might be suitable for a modified form.

117. For these reasons I hold that the letter of 22 September 2004 did not qualify as a valid notice under Rule 16.2. The Arbitrator was thus entitled to proceed with the arbitration without any formal determination one way or the other.

118. However, although Norbrook did not press the termination issue, Moulson by its letters of 5 November 2004 and 1 December 2004 pressed for the Arbitrator to determine the issue. But again, the Arbitrator made no decision on the issue. The absence of a decision may have left the parties in doubt as to the Arbitrator's view, but since the only correct view was that the notice was ineffective, he and they were entitled to proceed on the basis of the continuing application of the Short Procedure, subject always to the Arbitrator being empowered to modify that procedure.

119. The fax from the Arbitrator on 5 May 2005 then caused TA for the first time since September 2004 to press the point in their 1 June 2005 letter that the 22 September 2004 letter was a valid notice under Rule 16.2 and therefore the Short Procedure was no longer in operation. No doubt in order to attempt to preserve Norbrook's entitlement to a further hearing, TA notified the Arbitrator that, if he disagreed with their assertion that the 22 September 2004 letter was a valid notice, while reserving its position as to that, Norbrook required pursuant to Rule 16.2 that the arbitration should there and then cease to be conducted under the Short Procedure Rules (see paragraph 48 above).

120. There can be no doubt, in my judgment, that, given that no previous notice had been given, Norbrook thereby gave an unequivocal and valid termination notice under Rule 16.2 effective as from 2 June 2005 when the Arbitrator received it.

121. The effect was to trigger the Arbitrator's powers under rule 16.3.

122. For this purpose he would have to have regard to those steps which I have identified in paragraph 112 above. On 7 June 2005 he informed Norbrook that before ruling on termination he would give Moulson the opportunity to comment.

123. On 8 June 2005 Moulson asked for costs under Rule 16.3 totalling £47,704.85, copied to Norbrook.

124. On 10 June 2005 the Arbitrator told both parties that he would rule on the Rule 16.2 and 16.3 issue on 16 June and he also asked Moulson for a breakdown of their costs total. This Moulson provided by means of a schedule enclosed with their reply of 13 June 2005, copied to TA. However, TA did not make any submissions about whether the Arbitrator should exercise his discretion in favour of a costs order or about the quantification of reasonable compensation with regard to Moulson's schedule should he decide to do so. I assume that they received Moulson's letter of 13 June on the following day.

125. Although the Arbitrator had on Sunday 10 June informed both parties that he would rule on the issues of termination on 16 June and asked Moulson for a breakdown of their costs, TA failed either to put forward any submissions with regard to the exercise of his discretion under Rule 16.3 or as to the appropriate approach to reasonable compensation under that Rule. In her witness statement, paragraph 21, Clare Nevin, the solicitor handling the case at TA, states that she was concerned at the course of correspondence. However, for some unexplained reason she made no attempt to communicate with the Arbitrator before 16 June for the purpose of putting forward submissions or asking for an extension of time to do so. Whereas it was true that TA would not have received Moulson's costs breakdown until 14 June, there was no obvious reason why TA could not have asked the Arbitrator for time to consider that schedule so as to make further submissions if it chose to do so. However, for the Arbitrator to issue what was in effect an award but two days after the provision of Moulson's schedule did not give Norbrook any sufficient opportunity to consider and deal with the costs issue as a whole. Whereas the Arbitrator no doubt wished to avoid any further unnecessary delay following the failed mediation, he should, in all fairness to Norbrook have allowed further time for a response to Moulson's application for Rule 16.3 costs.

126. The Arbitrator's letter of 16 June 2005 (see paragraph 54 above) containing the First Decision is not a satisfactory expression of the Arbitrator's conclusion on the Rule 16.2 issue. It does not expressly state whether the termination notice had been given in September 2004 or June 2005 or that the Arbitrator had exercised his discretion in favour of a costs order or on what grounds. Nor does it state that the Arbitrator had concluded that the whole amount of Moulson's costs schedule was reasonable compensation.

127. However, the lack of a reasonable opportunity for Norbrook to put forward submissions was then cured by the Arbitrator's suspension of payment direction on 1 July 2005 (see paragraph 60 above) followed by TA's letter of 4 July 2005 in which TA set out Norbrook's case on Rules 16.2 and 16.3. The Second Decision made in the Arbitrator's letter of 8 August 2005, in which he re-instated his decision on costs under Rule 16.3, explained at some length what had led him to conclude (quite correctly, as I have held) that a valid notice of termination of the Short Procedure had not been given until the 1 June 2005 letter from TA. However, in relation to the costs order under rule 16.3, he maintained his earlier decision, again without indicating the basis for the exercise of his discretion or why he concluded that the whole sum claimed by Moulson represented reasonable compensation. His omission to give reasons for his decision on costs under Rule 16.3 was a failure to comply with Rule 20.1 for there had been no agreement to dispense with reasons. This was a failure to comply with one of the requirements as to the form of the award but it has not been relied upon by Norbrook as a distinct ground of serious irregularity under Section 68(2)(h) of the 1996 Act. Nor is it suggested on behalf of Norbrook that the Second Decision should be remitted to the Arbitrator for further reasons under section 70(4) of the 1996 Act. Norbrook's case rests on the submission that the Arbitrator arrived at his Second Decision without addressing his mind to the need to exercise his discretion as to whether to award Moulson any costs and, if so, as to what amounted to reasonable compensation. This is in substance an attack on the intrinsic validity of the Arbitrator's reasoning. As such it does not fall within the area of serious irregularity in the conduct of the arbitration. In effect what he appears to have done is to decide on grounds not disclosed, that he would exercise his discretionary power under Rule 16.3 in favour of a costs order and that 100 per cent of the costs included in Moulson's schedule represented reasonable compensation. The fact that he may have had no more evidence upon which to base this decision than the schedule itself is a matter going to the weight to be attached to such evidence as he had. As this court has repeatedly emphasised, an Arbitrator's defective evaluation of evidence in the course of arriving at an award is not normally capable of amounting to a serious irregularity.

128. Accordingly, such reasons as might be forthcoming were the award on costs to be remitted under Section 70(4) would go to matters which might have formed the basis of an application for leave to appeal under section 69 of the 1996 Act, but could not go to matters relevant to the application under section 68 and the facility under Section 70(4) for ordering further reasons does not extend to applications under Section 24. It follows that there is no purpose in making an order for remission under Section 70(4).

129. It further follows that the circumstances giving rise to the Arbitrators' two Decisions and the contents of those Decisions cannot be relied upon as an independent ground for removing the Arbitrator. The Arbitrator's conclusion that a valid notice had not been given under Rule 16.2 on 22 September 2004 was, as I have held, clearly correct and his conclusion that such a notice had been given on 1 June 2005 was also obviously correct. The lack of reasons in his Second Decision for his ordering 100 per cent of Moulson's costs to be paid by way of reasonable compensation under Rule 16.3 is an irregularity within section 68(1) of the 1996 Act. As such it could have formed the basis of an application ancillary to an application under Section 69 that the court should exercise its powers to order reasons to be given under Section 70(4) but no such application has been made.

130. In these circumstances I am not persuaded that, taking as a whole the train of events from 22 September 2004 leading up to the Second Decision, the Arbitrator failed ultimately to deal with the issues put to him in relation to Rules 16.2 and 16.3. Apart from the lack of reasons for his costs order there was no serious irregularity and as regards that omission the appropriate remedy is not removal under Section 24.

131. I turn now to those other respects in which it is submitted that the Arbitrator has failed properly to conduct the proceedings.

132. The making of direct unilateral telephone contact by the Arbitrator with the parties is generally to be deprecated for it inevitably gives rise to the risk that evidence or submissions will be put before the Arbitrator in circumstances where no record is kept of what has been said and without the opposing party's awareness and therefore of an opportunity of challenging it. That is why Arbitrators invariably communicate with the parties in writing on even the most trivial matters of administration and do so by copying in the opposite party. In this case the Arbitrator appears to have supposed that on matters going only to administrative matters it was acceptable for him to make unilateral telephone calls. In this he was wrong. TA's protest against this practice in their letter of 15 June 2005 (see paragraph 53 above) thus reflected normal appropriate procedure.

133. Following that protest the Arbitrator by his letter of 17 June 2005 agreed to adopt a system of written communication with both parties. His response to TA's protest – *"this will of course add time and cost to the procedure, but I would not want a simple administrative expedient to be used as the basis for any appeal against any decision I may make in the future*" suggests that he does not fully understand the underlying reason for the need for scrupulous adherence by Arbitrators to the principle of avoiding unilateral communication and further that he regards TA as having taken an excessively legalistic point. In this he was also wrong. Although he was correct to have regard to the need for the economical disposal of the reference and therefore to the need to save costs, he appears to have overlooked the very firmly established need to avoid unilateral communications.

134. That he lacked appreciation of the importance of this principle is further demonstrated by the fact that in spite of his agreement to accede to TA's request for open written communication in future, he took the extremely unorthodox step of communicating directly by telephone with Mr Forde of Norbrook on 2 August 2005 (see paragraph 65 above). This demonstrated three things. First, he still did not appreciate the purpose of the need to avoid unilateral telephone communications. This contact went beyond mere administrative details and dealt with

the substance of the case advanced by Norbrook. It was therefore a more serious departure from the proper procedure than the earlier direct telephone contacts which, according to the Arbitrator's evidence, which I accept, were confined to administrative minutiae. In this instance, no harm was caused to Moulson because the matter and content of the call came into the open almost as soon as it was made. Secondly, the Arbitrator departed from the normal procedural convention in English arbitrations, where one party is legally represented, of the Arbitrator communicating with that party solely through its solicitors. Thirdly, the question as to which he appears to have thought it necessary to contact Mr Forde had already been very clearly answered by the contents of the letter of 1 June 2005 from TA: Norbrook's primary case on Rule 16.2 was that it had been engaged on 22 September 2004 and, if that were wrong, its alternative case was that it gave notice there and then. Further, his explanation for pressing Mr Forde for this answer, namely failure of TA to answer the "straightforward question" (in his letter of 11 July 2005) which had never been put to TA, was wrong for the simple reason that such letter had never been sent – a fact which the Arbitrator carelessly overlooked.

135. In his first witness statement, quoted at paragraph 78 above, the Arbitrator put forward as an explanation for his conduct his concern that Norbrook fully appreciated that TA were apparently giving notice under Rule 16.2 and, in view of the discretion under Rule 16.3 to make an order for costs against Norbrook with the consequence that, if Norbrook failed to pay this, the arbitration would cease if Moulson so chose, he wanted to be sure that Norbrook was aware of those implications which might disadvantage it. The Arbitrator supported this explanation by reliance on his powers under Rule 7.4(e). He states that he interpreted this as giving him wide powers to ascertain the facts by speaking to witnesses, including Mr Forde.

136. In my judgment, this provision did not entitle him to make direct telephone contact with Mr Forde. His purpose in doing so was not to ascertain the facts relevant to determination of the substantive issues but, according to his account, to confirm that TA were acting with Norbrook's knowledge and authority in writing their letter of 1 June. There was no reason for him to believe that TA did not have Norbrook's authority to give notice under Rule 16.2 and it was therefore his duty to assume that they had.

137. These instances of direct unilateral telephone contact with the parties represent, in my judgment, a failure properly to conduct the proceedings. However, that failure has not caused substantial injustice to either party. The contact with Mr Forde was immediately brought into the open and led to no decision adverse to Norbrook which the Arbitrator would not otherwise have reached.

138. There is however a further matter of procedural management which is of a more serious nature. That began to occur before 22 September 2004. It involved the Arbitrator making direct unilateral contact with three witnesses as described in paragraph 84 above. The Arbitrator explained his contact with Ms Mountford, Mr Colussi and Mr Hendrix in the passages in his first witness statement quoted at paragraph 78 above. His reference to Rule 7 is clearly to 7(e). That Rule provides: *"whether and to what extent the Arbitrator should himself take the initiative in ascertaining the facts and the law, and to rely upon his own knowledge and expertise to such extent as he thinks fit. I interpreted this to give me wide powers to ascertain the facts by speaking to witnesses including in this case, Matthew Forde, particularly as I considered that non-payment would lead to the arbitration coming to a close if Moulson Chemplant so chose and this could potentially disadvantage Norbrook."*

139. That rule certainly provides a power to the Arbitrator to ascertain by his own initiative primary facts relevant to the substantive issues. That is to say he can cause to be injected into the arbitration evidence of facts from witnesses whom neither party is able or willing to call. However, this power is clearly subject to the component of fairness expressed as an objective of arbitration in Rule 1.1 in reflection of section 1(a) of the 1996 Act. Rule 7(e) therefore has to be operated with great care if an Arbitrator makes direct contact with a potential witness in the absence of either or both parties. Each party must be given the opportunity of questioning the witness. If the Arbitrator decides not to make use of the witness's evidence, or if the witness declines to give evidence at the hearing, the Arbitrator ought still to make an accurate record of the witness's remarks which he should then show to both parties. In this connection, it should be clearly appreciated by any competent Arbitrator operating these rules that fairness under rule 1 demands transparency under Rule 7(e). The reason for this is very clear. An Arbitrator in contact with a factual witness in the absence of one or both parties may be exposed to information which consciously or unconsciously influences his judgment on a matter in dispute. It is therefore absolutely axiomatic that the parties should at the very least have the opportunity of access to what the witness or potential witness has said to the Arbitrator so as to enable that party to refute any statement adverse to its case or to rely upon any statement supportive of its case. Whereas, it would in theory be possible for both parties to waive that requirement by an agreement to that effect, Rule 7(e) is not such an agreement. Nor does the reference to the "economic" resolution of disputes in Rule 1 have the effect of causing the component of fairness to yield to economic expediency.

140. The need for this principled construction of Rule 7.4(e) could be no better illustrated than by two sentences in the Arbitrator's first witness statement quoted earlier in this judgment which I repeat here for convenience: *"Both Pia Mountford and Robert Colussi stated that they were not willing to assist or to provide witness statements and so I decided to disregard any comments that they had made to me … . They had both left Norbrook under difficult circumstances but I did not allow this to bias my view of Norbrook".*

141. This statement obviously raises the question what comments did they make and what was said which might have led the Arbitrator to be biased against Norbrook such that he needed to put it out of his mind. No record of these conversations has been provided to the parties and it must be inferred that no such record exists. The reference to

the risk of bias, however, strongly suggests that whatever was said, if not put out of the mind of the Arbitrator, might influence his judgment on matters relevant to his decision.

142. The Arbitrator having directly contacted the witnesses, but having failed to make any exact record of what they said or to disclose such record to the parties, has thus both failed to conduct the proceedings fairly in accordance with section 33(1)(a) and (2) and therefore "properly" within section 24(1)(d) and has, in this respect, therefore also created a procedural irregularity within section 68.

143. Has that failure caused substantial injustice or will it do so?

144. In this connection I return to the decision of Morison J. in ***ASM Shipping Ltd of India v. TTMI Ltd,*** supra. At paragraph 39(3) of that judgment he observed: *"In my judgment, if the properly informed independent observer concluded that there was a real possibility of bias, then I would regard that as a species of 'serious irregularity' which has caused substantial injustice to the applicant. I do not accept Mr Croall's submission that even if that conclusion was reached the court must then inquire as to whether substantial injustice has been caused. In my judgment there can be no more serious or substantial injustice than having a tribunal which was not, ex hypothesi, impartial, determine parties' rights. The right to a fair hearing by an impartial tribunal is fundamental; the Act is founded upon that principle and the Act must be construed accordingly. In these circumstances, upon a proper construction of sections 1, 33 and 68(1) & (2), if the tribunal were not impartial, then the requirements of section 68(1) & (2) are satisfied. I profoundly disagree with paragraphs 33 and 34 of HHJ Bowsher's judgment in the* ***Groundshire*** *case. It is contrary to fundamental principles to hold that an arbitral award made by a tribunal which was not impartial is to be enforced unless it can be shown that the bias has caused prejudice. The problem with unconscious bias is that it is inherently difficult to prove and the statements made about it by the judges themselves cannot be tested. Nor can the court known whether the bias actually made any difference or not."*

145. With those observations I entirely agree. I would also add this. Where there is a sole Arbitrator whose impartiality is shown to have been impaired to the effect that a fair minded and properly informed independent observer would perceive that there existed a real possibility of bias in any award already made, substantial injustice will normally be inferred and where an award has yet to be made substantial injustice will normally be anticipated. In the former case the award would normally be set aside under section 68 and in the latter case the Arbitrator would normally be removed before he could make an award, under section 24.

146. In the present case the only award made (the Second Decision) was confined to compensation for Moulson's costs under rule 16.3 and on the face of it had nothing to do with those technical aspects of the operation of Norbrook's plant which were in issue in the arbitration and as to which the three witnesses were thought to be able to speak. It could therefore be said that, even if there were impairment of the Arbitrator's impartiality on technical issues, such impairment could have no impact on the Arbitrator's judgment with regard to whether to order Norbrook to compensate Moulson in respect of its costs up to June 2005.

147. Such an argument would, in my view, be unsustainable. It would be quite unrealistic to proceed on the assumption that the Arbitrator's decision on the Rule 16.3 issues would necessarily be unaffected by his view of the technical evidence and of the merits generally. A fair minded and informed independent observer would, I feel sure, have found distinctly disturbing the Arbitrator's exercise of his discretion under section 16.3 for the Arbitrator might well have had regard to the merits of Norbrook's claim and could well have taken account of information about the pre-contract tests and the plant provided to him by one or more of the three witnesses in question.

148. Finally, I come to Norbrook's general case on bias. This has been constructed on a multiple foundation basis, commencing with the Arbitrator's conduct in relation to the three witnesses and then referring to

i) Direct unilateral telephone contact with the parties, culminating in the 2 August 2005 telephone conversation with Mr Forde;

ii) The Arbitrator's overt antagonism towards TA as demonstrated by his letter of 17 June 2005 (last paragraph – see paragraph 57 above), and his letters of 2 and 8 August 2005 where he sought to explain his direct contact with Mr Forde;

iii) The manner in which he made his First and Second Decisions and his failure to explain how be exercised his discretion or arrived at a reasonable assessment of Moulson's costs;

iv) His attempt to curtail Norbrook's legal representation at any hearing by implicitly restricting it to one lawyer as in his letter of 3 February 2005 (see paragraph 38 above)

v) his pre-judgmental expressions as to the value of independent expert evidence by comparison with in-house expert evidence (see paragraph 44 above), as expressed in his letter of 13 April 2005.

149. There can be no doubt, in my judgment, that in the course of the period since about April 2005 there has developed a distinctly antagonistic relationship between the Arbitrator and TA. This has been attributable on the one hand to the Arbitrator's emphasis on the minimising of costs, having regard to the relative lack of resources of Moulson and the need to get to an award as speedily as possible and without the interference of procedural disputes and on the other hand to TA's insistence on scrupulous adherence to procedural principles. This has engendered an atmosphere of mutual lack of respect which is not conducive to the smooth running of the arbitration. Some of the Arbitrator's letters create the distinct impression that he believes that TA and Norbrook are between them endeavouring to spin out the arbitration to the point where Moulson will be forced to capitulate due to lack of resources.

150. These circumstances, however, would not in the ordinary way in themselves justify an order removing the Arbitrator under section 24 of the 1996 Act unless the case clearly fell within at least one of the grounds listed in sub-section (1). In this connection it is necessary to make the following observations.

i) The Arbitrator's provisional view in the letter of 3 February 2005 that two persons should represent each party was not a procedural ruling and does not appear to have been pursued by the Arbitrator following his letters of 3 and 25 February. Had it been pursued and an order made, that might well have involved an improper conduct of the proceedings, for, as Norbrook submit its effect would be to strike out representation by solicitor and counsel if a lay representative were also to be present, which usually would be the case. Moreover, the Rules contain an express remedy for excessive representation, namely Rule 7.7(b).

"The Arbitrator shall have power to give orders and directions in respect of:

(b) recognising or disallowing any level of representation in the determination of costs;"

If the Arbitrator takes the view that representation has been excessive, he may make an adverse costs order to that extent. This suggests that the Rules do not contemplate his having power to prohibit representation or to restrict it save to the extent that he is of the view that it involves repetition or, for some other reason, prolongation of the hearing.

ii) As to the comments made in the Arbitrator's letters of 13 April 2005 and 5 May 2005 in respect of expert witnesses, the Arbitrator took the view that because Moulson was under-resourced it should be permitted to adduce opinion evidence of a technical nature from a Mr Pontefract, a Moulson employee, well acquainted with the plant. Although that decision was doubtless influenced by the fact that Moulson said that it could not afford an independent expert, it does not, in my judgment lead to an inference of general bias in favour of Moulson in order to redress the in balance of resources between the parties. The Arbitrator was entitled to permit an employee to give expert evidence, provided that he took into account the fact that diminished objectively could reduce the weight properly to be attached to that evidence. Indeed, if he took the view that lack of objectivity was such that no weight should be attached to it, the evidence should not be admitted. No doubt the issue of objectivity could be tested in the course of the hearing. For these reasons I do not consider that the Arbitrator can be criticised or bias inferred from his permitting Moulson to rely on Mr Pontefract's evidence simply because he was an employee. It may well be that further investigation of his evidence, possibly in cross-examination, would disclose lack of objectivity so great as to justify the Arbitrator in wholly discounting the witness's technical opinions. That, however, would be a matter to be tested in the future course of the arbitration.

iii) In ***Fletamentos Maritimos SA v. Effjohn International BV (No.2)*** [1997] 2 Lloyd's Rep 302 the Court of Appeal had considered allegations of bias against a well known and experienced London maritime Arbitrator by the client of a London maritime solicitor on the grounds that the Arbitrator had expressed views adverse to the professional standards of the solicitor. In the course of the judgments of both Waller LJ. at page 307 and Morritt LJ at page 310 the point was made that a distinction is to be drawn between the fact that a judge may hold an uncomplimentary view of an advocate's professional ability and the fact that he is biased against the advocate's client. The first does not lead to an inference as to the second. At page 310R Morritt LJ observed: *"It is inevitable that Judges and Arbitrators will form opinions as to the professional skills and integrity of those who appear before them; they are bound to find some advocates easier to listen to, and likely, therefore, to be more persuasive, than others. But the existence of such views, whether held privately or, as in this case made known to others, cannot, without more, be sufficient to constitute bias against that advocate's client."*

151. Any suggestion that merely because the Arbitrator was antagonistic towards TA it should be inferred that he was biased towards Norbrook cannot therefore stand. There has to be something more. In the present case Mr Berry QC has strongly urged that the Arbitrator's conduct showed that he was trying unduly to favour Moulson because of the imbalance of resources and thereby demonstrated bias against Norbrook.

152. It is submitted that, whatever may be said about each ground of bias taken alone, when one aggregates all of them, there emerges a pattern of bias against Norbrook, the Arbitrator having been unduly influenced by the need to redress the financial imbalance between the parties. Further, there is a pattern of improper conduct of the arbitration which may also found removal of the Arbitrator because it has caused or will cause substantial injustice. In connection with this latter group of grounds for removal it is helpful to have regard to paragraphs 105 and 106 of the DAC Report:

"105 We have included, as grounds for removal, the refusal or failure of an Arbitrator properly to conduct the proceedings, as well as failing to use all reasonable despatch in conducting the proceedings or making an award, where the result has caused or will cause substantial injustice to the applicant. We trust that the Courts will not allow the first or these matters to be abused by those intent on disrupting the arbitral process. To this end we have included a provision allowing the tribunal to continue while an application is made. There is also Clause 73 which effectively requires a party to 'put up or shut up' if a challenge is to be made.

106 We have every confidence that the Courts will carry through the intent of this part of the Bill, which is that it should only be available where the conduct of the Arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute it own view as to how the arbitral proceedings should be conducted. Thus the choice by an Arbitrator of a particular procedure, unless it breaches the duty laid on Arbitrators by Clause 33, should on no

view justify the removal of an Arbitrator, even if the Court would not itself have adopted that procedure. In short, this ground only exists to cover what we hope will be the very rare case where an Arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the Bill, he is in effect frustrating that object. Only if the Court confines itself in this way can this power of removal be justified as a measure supporting rather than subverting the arbitral process."

Conclusions as to Removal of the Arbitrator

153. I am not persuaded that the Arbitrator has by his conduct demonstrated any all-pervading bias or want of impartiality against Norbrook on the grounds relied upon. He has been attempting to impose an orderly and economical procedure on the parties in an effort to achieve a relatively speedy award. However, his perception that this was generally desirable by reason in particular of Moulson's more limited resources has not been an inappropriate consideration. His palpable annoyance with TA has on analysis been in large measure entirely misplaced, due in part to his lack of understanding of relevant documents such as TA's 1 June 2005 letter and his wrong assumption that he had sent the 11 July 2005 letter when he had not done so. Further, with one exception, those procedural irregularities in the course of the reference to which I have referred have not caused substantial injustice to either party by reference to the relatively high threshold identified in the DAC Report quoted in paragraph 152 above. Although I am satisfied that a more experienced Arbitrator would probably have avoided some, if not all, of those irregularities, it is important to keep firmly in mind that, particularly where, as here, the parties have agreed to the appointment of a sole Arbitrator because of his technical skill and knowledge, his procedural responses to a case involving relatively complicated evidence might not necessarily reflect the kind of management regime that would be imposed by a Queen's Counsel fulfilling that function.

154. However, I take a very different view of the Arbitrator's direct contact with the witnesses. For the reasons given at paragraphs 138 to 147 above I have come to the conclusion that by the Arbitrator's conduct in that respect he has or may have been exposed to information about the operation of the plant or the pre-contract laboratory testing which consciously or unconsciously could have influenced him in his decision under Rule 16.3 and which might well influence him in his future conduct of the reference and in particular his final award.

155. To this risk his stated determination to put matters "out of his mind" is, as ***Porter v. McGill,*** supra, shows, no answer. The essential attribute of objective impartiality is not to be achieved by subjective self-discipline.

156. In the event, I have no doubt that the fair minded and informed observed, having considered all the facts in this case relating to contact with the three witnesses would conclude that there was a real possibility that the tribunal was biased. The consequence of this conclusion is that the Second Decision cannot stand and must be set aside under section 68, there having been a serious irregularity which has caused substantial injustice. Further, although I am quite sure that the Arbitrator is admirably qualified to resolve the technical issues between the parties, the fact remains that his impartiality has been apparently impaired. The fair-minded and informed observer would entertain great reservations as to whether the Arbitrator's judgment had been affected by what he had been told by at least one of the potential witnesses. Accordingly, although the removal of the Arbitrator at this stage in the proceedings would involve the parties in considerable additional expense in the further prosecution of this arbitration, I have reluctantly come to the conclusion that this is the correct course. Consequently, an order will be made under section 24 of the 1996 Act that the Arbitrator be removed. I shall hear such representations as the parties may wish to advance ancillary to section 24, in particular with regard to section 24(4) of the 1996 Act.

Conclusion as to Setting Aside the Second Decision

157. For the reasons stated with regard to the removal of the Arbitrator set out in paragraphs 153 to 156 above the Arbitrator's award represented by the Second Decision must be set aside under Section 68 on the grounds of serious irregularity. In arriving at this conclusion I would emphasise that the only basis on which the award ought, in my judgment, to be set is the Arbitrator's direct contact with potential witnesses and the absence of a record of what they told him about Norbrook and its plant. I do not consider that any other matter amounting to serious irregularity as defined by Section 68 has been established. Accordingly, to that extent only can I accept the submissions advanced on behalf of the Arbitrator.

Mr Steven Berry QC and Ms M Anaydike-Danes (instructed by Cartmell Shepherd) for the Claimant
Mr Jonathan Turley solicitor advocate of Mott MacDonald for 1st Defendant
Mr Stephen Coombs, MD of Moulson Chemplant Ltd, for Second Defendant