JUDGMENT : The Hon. Mr Justice Langley: Commercial Court. 29th July 2004

The Application

1. Cameroon Airlines ("Camair") seeks to challenge the Final Award dated 18 September 2003 of an Arbitral Tribunal in a claim brought by Camair against Transnet Limited ("Transnet").

2. The application is made pursuant to Section 68 of the Arbitration Act, 1996, on the grounds of *"serious irregularity"*. Camair seeks an order setting aside the Award and remitting the case to the Tribunal for further consideration.

3. It is not open to Camair to appeal to the court under Section 69 of the 1996 Act on a question of law arising out of the Award because, by agreeing to the ICC Rules, the parties agreed to exclude such an appeal.

4. It is for that reason that the application is limited to Section 68 and Camair must take on the very considerable challenge of satisfying the provisions of that Section. It is also for that reason that, in summary terms, Camair seeks to make out the plainly serious case that the Tribunal failed to conduct the arbitral proceedings fairly and in particular acted contrary to what is said to have been a "*consensus"* as to the correct approach to issues of *"valuation"* without affording the parties an opportunity to address their approach.

5. It is right to note at the outset that the Tribunal was divided and "*the motivated"* (or reasoned) partial dissent of the Arbitrator nominated by Camair lends some support to Camair's case. It is also, albeit unfortunately, my judgment that the issues which are raised are not easily disposed of and require, in accordance with the parties' submissions, detailed analysis of the progress and conduct of the arbitration in order to reach a conclusion upon them.

6. Whilst Camair's application seeks to raise substantive complaints about the Award on costs and interest, Mr Bowdery QC, for Camair, sensibly and rightly acknowledged that those matters could not be brought within Section 68 as separate points but would only be material should the matter be remitted and the Tribunal come to a conclusion which required them to be revisited also.

The Claims in the Arbitration.

7. The arbitration arose out of and under two contracts ("the maintenance contracts") made in 1994 between Camair and Transnet "*trading as South African Airways"* ("SAA"). Under the maintenance contracts, SAA was to maintain Camair's single Boeing 747 and its three Boeing 737's until January 2000 (in the case of the 747) and August 1997 (in the case of the 737s). Payment for the maintenance services was to be made substantially on a "*power by the hour"* basis, a recognised form of agreement requiring payment of a specified sum for every hour an aircraft is flown on the basis that when service and inspection is required it will be carried out at no additional charge. Work not included in the power by the hour charge was to be charged at $40 an hour.

8. The maintenance contracts were subject to the Arbitration Court of the International Chamber of Commerce (ICC) "*and the common law"*. It was common ground that the proper law of the contracts was South African law.

9. It was Camair's case in the arbitration that the maintenance contracts had been tainted by bribery and corruption. Camair alleged that Transnet had engaged a company providing agency services for aircraft contracts, Advanced Technics Trust Limited ("ATT"), to bribe various representatives of the Cameroon Government and Camair to secure the award of the maintenance contracts to SAA. The Tribunal accepted that the sums paid by Transnet to ATT as "*commission"* were to be recouped by SAA in the power by the hour charges under the maintenance contracts.

10. The claim by Camair followed the Government of Cameroon learning of proceedings between ATT and Transnet in the South African courts in which ATT sought to recover commission it said it was owed by Transnet in relation to the negotiation of the final price at which SAA was to sell its services to Camair.

11. In those proceedings Transnet denied that ATT was entitled to the sums claimed on the ground that the contract between ATT and Transnet was itself void as its purpose was to channel corrupt payments to Cameroon government officials and senior employees of Camair.

12. In July 2000 Camair made a demand on Transnet for repayment of all monies paid under the maintenance contracts. The demand was rejected. Camair's request for arbitration was lodged with the ICC on 30 November 2000. Camair claimed rescission of both contracts and sought restitution of sums it had paid under them. The claim was pleaded on 24 May 2001 as follows:

> *"11. It is common cause that the total amount paid by Claimant to Defendant pursuant to the aforementioned maintenance contracts … was the sum of US$55,553,886.03.*
>
> *12. Of the sum of US$55,553,886.03 paid by the Claimant to the Defendant the amount paid by Claimant to Defendant as represented the provision for commissions payable to ATT in excess of the Defendant's non-negotiable selling price was the sum of US$9,887,480.38.*
>
> *13. 1. In the circumstances, Claimant is entitled to repayment of the sum of US$55,553,886.03, alternatively Claimant, in the bona fide and reasonable, but mistaken, belief that the amounts were payable to the Defendant, effected payments totalling US$55,553,886.03 to Defendant and Defendant was unjustly enriched at the Claimant's expense in such amount.*
>
> *13. 2. Alternatively to paragraph 13.1, Claimant is entitled to repayment of the sum of US$9,887,430,38, alternatively Claimant, in the bona fide and reasonable, but mistaken belief, that the amounts were payable to the Defendant, effected payments totalling US$9,887,430,38 to Defendant and Defendant was unjustly enriched at the Claimant's expense in such amount.*

14. The Claimant has demanded payment of the said sums and the Defendant has refused to make payment thereof.

15. The Claimant therefore seeks an award against the Defendant as follows:

15. 1 Payment of the sum of US$55,553,886.03, alternatively US$9,887,480.38;

15. 2. Interest thereon a tempore morae."

13. In the defence dated 20 June 2001 Transnet denied that the maintenance contracts were tainted and that Camair was entitled to repayment of any sum, alleging Camair had received fair value for the services provided under the contracts. Transnet also served a conditional counterclaim in which it claimed that even if the contracts were tainted it was entitled to retain all the sums paid to it.

14. The relevant pleas were as follows:

"12. AD PARAGRAPH 11 THEREOF

The allegations herein contained are admitted.

13. AD PARAGRAPH 12 THEREOF

The Defendant denies each and every allegation herein contained as if specifically traversed and puts the Claimant to the proof thereof.

14. AD PARAGRAPH 13 THEREOF

14.1. each and every allegation herein contained is denied as if specifically traversed and the Claimant is put to the proof thereof.

14.2. Without derogating from the generality of the denial, Defendant pleads that:

14.2.1. it performed all its obligations under the maintenance contracts and gave good and proper value by way of its services thereunder to the Claimant;

14.2.2. it has not been unjustly enriched nor has the Claimant been prejudiced;

14.2.3. the Claimant has received the services it required and for which it had contracted at a fair cost.

14.3. The Defendant:

14.3.1. avers that if Claimant were to succeed in these proceedings, it would receive the full value in respect of the services rendered by the Defendant without counter-prestation and such benefit would, in all the circumstances, be inequitable and not in accordance with the law;

14.3.2 refers to the conditional counterclaim set out hereinbelow.

DEFENDANTS CONDITIONAL COUNTERCLAIM

1. In the event of it being found that the maintenance contracts entered into by the Claimant and the Defendant were tainted by bribery and/or corruption and that, as a result thereof, the Claimant is entitled to the relief sought herein, then and in that event the Defendant proceeds with the Conditional Counterclaim herein set out.

....

3. The Defendant avers that:

3.1. it performed all its obligations under the maintenance contracts and gave good and proper value by way of its services under the said maintenance contracts, in accordance with the provisions of the Claimant's approved maintenance schedule ... and further, in accordance with such instructions, as were given to the Defendant, by the Claimant, from time to time, for the rendering of technical services, in the form of, inter alia, special inspections and/or replacement of parts ....

3.2. at the time it entered into the maintenance contracts, it was not aware of the possible illegality of the maintenance contracts and/or the possible illegality of the performance thereunder.

3.3. as the Defendant has performed under the maintenance contracts and has, in terms of the maintenance contracts, received payment in respect of the maintenance services rendered and the parts replaced on the aircrafts, an award to the effect that the Defendant should repay to the Claimant the amount of US$55,553,866,03 or any part thereof would have the effect of enriching the Claimant at the expense of the Defendant in the aforesaid sum of money, the Defendant having performed under the alleged illegal maintenance contracts.

3.4. the retention by the Defendant of the aforesaid sum of money would not be contrary to public policy, and/or would not be unjust and inequitable, in the circumstances.

4. In the premises, the Defendant is entitled to a declarator to the effect that it is entitled to the retention of the aforesaid amount of money."

15. The reference in paragraph 14.3.1 of the Defence to "*counter-prestation*" marks the beginning of an issue which I think came to bedevil the proceedings and was never expressly resolved. In simple terms the issue was whether Camair could claim restitution without giving credit for "*value*" received. The issue came to be reflected in submissions about which party bore the burden of proving *"value"* received or given and whether Camair's claim disclosed no cause of action at all if no credit was pleaded. It should also be noted that the allegation that Transnet gave *"good and proper value"* by way of its services appears both in the defence and conditional counterclaim.

16. Camair's "*Replication*" and plea to the counterclaim essentially alleged that Transnet's conduct was "*so scandalous, so morally reprehensible that this Honourable Tribunal should not give consideration in equity or law to whether Claimant received any value in respect of the services rendered.*"

17. The issue was developed in the provision of particulars of Camair's denial of paragraph 14 of the Defence and in its Replication and defence to the Counterclaim. Transnet's requests sought particulars of the respects in which Camair alleged it did not receive "*good and proper value*" under the maintenance contracts.

18. Camair's reply included the following:

"7.1. The information sought, is as a matter of law and fact, irrelevant to the issues to be determined at the hearing hereof.

7.2. Claimant contends that in consequence of it having lawfully avoided the Maintenance Agreements it is entitled to repayment of all amounts paid by it to Defendant alternatively it is entitled to repayment of all amounts paid by it under the condictio ob turpem causam.

7.3. Insofar as the Tribunal might entertain the Defendant's counterclaim, the Claimant persists in disputing the issues (of good and proper value). In relation thereto, the Claimant does not bear any onus, either true or evidential, but, nevertheless, Defendant is referred to the evidence of Schledorn, Benadé, Sama Juma and Jordan in relation to the performance by Defendant of its obligations under the maintenance agreements and the value received by Claimant.

7.4. In relation thereto, before making any allowance for the Defendant's non or defective performance of its obligations, the Claimant accepts that the cost to the Defendant of performing the power-by-the-hour services under the maintenance contracts was US$19,308,140.13. It is common cause that the sum paid by the Claimant to the Defendant pursuant to the maintenance contracts was US$55,553,886.03. From the amount must be deducted the value of the defective performance and damages suffered as a result thereof. The calculation of these figures arises from the evidence filed by Claimant's expert witnesses and in particular Annexure B to the Replying Affidavit of Schledorn read with paragraphs 36 and 37 of the Founding Affidavit of Sama Juma.

7.5. Save as aforesaid, Defendant is not entitled to the information sought nor is same necessary for the purposes of preparing for the hearing."

The Terms of Reference for the Arbitration.

19. The Terms of Reference were agreed on 14 June 2001. The Arbitral Tribunal was Alan Redfern (Chairman), John Tackaberry QC (nominated by Camair) and Mervyn E. King SC (nominated by Transnet). The place of arbitration was London.

20. The "List of Issues" included:

"(1) Were the Maintenance Agreements tainted by bribery and corruption, as alleged?

(2) If so, was this done at the instance, or with the knowledge of, the Respondent?

(3) To what remedy, if any, is the claimant entitled?

….

(6) In any event has there been unjust enrichment or has the Claimant received good and proper value by way of the Respondent's services?"

The last issue was added at the request of Transnet.

The Procedural Orders.

21. The Arbitral Tribunal made a number of Procedural Orders. On 24 May 2001 it ordered that witness statements be filed "*containing the substance of each witness's evidence*". The Order also provided that: *"The Tribunal is not bound by any strict rules of evidence. It may receive and rely upon any evidence it considers relevant and helpful and in all cases will determine the relevance, materiality and weight of the evidence before it."*

22. On 9 October 2001 the Tribunal stated, in response to an application by Camair, that it accepted that there was bribery and corruption leading to the award of the maintenance contracts to Transnet but left for determination at the hearing issues as to Transnet's knowledge, intention and responsibility for the bribery and corruption.

23. Camair sought a summary award. Directions for the hearing of that application on 5 and 6 April 2002 were given by a Second Procedural Order dated 11 January 2002. The Order also provided expressly that the procedural law of the arbitration was English law and the substantive law South African law, for a protocol in respect of expert evidence to be called, and that at the full hearing *"the common law rule that evidence not challenged is accepted"* should be replaced by *"the principle that the weight to be given to any evidence of whatever nature is wholly a matter for the discretion of the Tribunal"*.

24. On 8 April 2002 the Tribunal made its Third Procedural Order. It declined to make a Summary Award in favour of Camair because (to quote paragraph 71 of the Award) it *"considered that a decision as to the amount of any restitution to Camair was not appropriate for summary determination. Rather it should be determined in the light of all the facts and circumstances which each party might wish to put forward"*. It is the determination at the hearing of this issue which gives rise to the present application.

25. The Tribunal did, however, indicate that, in its judgment, Transnet was responsible as a matter of law for any acts of bribery committed by its servants or agents in the course of their employment. The reasons for that decision are set out in paragraphs 57-72 of the Award and need not be considered for the purposes of the present application.

26. The Tribunal also indicated that an application by Transnet for disclosure would be refused for delay unless (which it was not) good cause for the delay could be shown by 15 April 2002. The previous disclosure

applications made by both parties are of some relevance to the issues, as are the witness statements, and I will therefore go back in the chronology of the proceedings to address them so far as I think to be necessary.

Disclosure.

27. On 26 July 2001 Camair requested disclosure of SAA's Maintenance Cost Forecasts for Boeing 737s and 747s (produced on 5 March 1994) and various other documents which could be expected to provide evidence of SAA's maintenance costs and charges. By fax the next day other documents were requested including documents relating to the profit made by SAA on the maintenance contracts and invoices showing the commission paid to ATT and what further commission would have been payable had SAA not stopped payments to ATT. The response, on 10 October 2001, was to the effect that the documents could not be located or were confidential save in respect of the commission where it was said they had already been provided.

28. On 27 July 2001 Transnet sought further disclosure from Camair. The request included documents relating to charges for other maintenance work carried out on Camair's aircraft and in particular under a maintenance agreement with Air France in force for the 10 years prior to the maintenance contracts with SAA. The target of these applications was to compare the charging rates and costs under the maintenance contracts with those of other suppliers of maintenance services. The response of Camair to these requests was dated 1 October 2001. It was said no other maintenance work had been carried out on the aircraft and, in respect of the Air France contract, that it was confidential, its relevance had not been justified and *"it does not relate to any dispute between the parties"*. Other documents relating to the services of Air France were also said not to be relevant.

29. It was disclosure of Air France documents and any tenders from other suppliers for the maintenance contracts themselves which Transnet sought to pursue first by letter to the Tribunal dated 8 January 2002 and ultimately at the hearing which led to the Third Procedural Order. Nothing, therefore, came of it: see paragraph 26.

30. On 18 April Transnet's attorneys wrote to Camair's attorneys stating that it was intended to ask Mr Sama Juma at the hearing about his statements about the charges of Air France and that it would be *"helpful"* if he had the relevant documents with him when he gave evidence. Camair's attorneys declined this request referring to the fact that the Tribunal had already declined to order discovery of the documents.

Witness Statements.

31. On 16 October 2001 Camair served witness statements made by a Mr Egbe (a judge who was a member of a committee established by the Government of Cameroon to investigate the bribery allegations) and Mr Sama Juma the Director of Corporate Planning of Camair. It was Mr Sama Juma's evidence that SAA's charges for the Boeing 747 were "relatively cheaper than those of Air France" which Camair considered to be "unreasonably high". Camair had previously substantially maintained the 737s with its own maintenance team. Mr Sama Juma also made various criticisms of the quality of SAA's work under the maintenance contracts, criticisms which in the event were not pursued.

32. It had been established that the commission payable by SAA to ATT was 20.46% for the 737s and 22.35% for the 747 of the power by the hour charges (see paragraph 12 of the statement by Mr Schledorn referred to below). Mr Sama Juma, in the concluding paragraph of his witness statement, stated the amount he said had been invoiced to and paid by Camair for power by the hour charges for the 3 737s and 1 747 broken down by year and, applying the percentages stated by Mr Schledorn, calculated that ATT's commission for the 737s was US$1,725,058.77 and for the 747 US$8,129,201.43 making a total of $9,854,260.20.

33. On 18 October 2001 Transnet served 8 witness statements. The statements included a statement from a Dr Kruger, the Head of Fleet management and Operational Risk Control of SAA. In paragraph 15 and following of this statement, Dr Kruger said that, in his *"submission"* the power by the hour agreements "were financially competitively priced". As regards the 747 he said the rate allowed for a 37% profit margin on the cost of maintaining a similar aircraft in SAA's fleet of which 15% would have to be discounted for an extra corrosion risk for the Camair 747 aircraft. He also referred to *"the average maintenance cost reported to IATA for 11 international airlines"* operating 747s as a comparable. Similar points were made for the 737s save that the profit margin to SAA was said to be much lower. Paragraph 19 continued: *"I submit, on the basis of the aforegoing, that the Claimant derived value for money from these agreements in that the SAA met its obligations under the maintenance agreement at very low rates. The aircraft were maintained to the same quality as SAA aircraft of similar model and age and were kept flying subject to scheduled and unscheduled downtime enforced by normal maintenance requirements of aircraft of that type and age and further, SAA did its best to assist the Claimant to obtain spare components and engines. The contract rates for the maintenance of the aircraft were very reasonable and on the low side given the risks associated with the maintenance of these aircraft."*

34. Others of Transnet's witness statements addressed the allegations about the quality of the work done by SAA. Another statement, by Mr Erasmus, the "*Manager: Debtors Finance*" of SAA said (paragraph 9): *"I created the invoices in accordance with the flight hours and the information recorded against the job account numbers. The said invoices occur on pp. 852-1220 of Bundle 4 of the documents."*

35. Bundle 4 was one of the Bundles before the Tribunal at the hearing, albeit when it came to be referred to, Mr Redfern had understandably left it in his garage.

36. On 25 October Camair presented a witness statement from a Mr Schledorn. Mr Schledorn acted as a consultant to ATT advising on *"the costing issues which would have to be addressed in any negotiation between Camair and SAA"*. He said (paragraph 10) SAA made it clear that SAA *"would not pay any commission whatever out of its*

commercial price that it was willing to agree to for the work," and it was agreed that the commercial price at which SAA was willing to undertake the maintenance work would be stipulated by SAA and ATT would add its commission to that price and it would then be for ATT to persuade Camair to agree to the resulting price.

37. In paragraphs 15 and 18 of his statement Mr Schledorn said

"15. I have also been informed that in this arbitration SAA alleges it gave fair value for the maintenance work it undertook for Camair. This I say is not true. I attach hereto marked "A" my assessment, in my own words, of the profits which SAA made out of the maintenance contracts concluded with Camair. From such assessment it can be seen that SAA marked up its power-by-the-hour rates for Camair's Boeing 737 aircraft by over 40% and for Camair's Boeing 747 aircraft by also over 40% even before adding the commission agreed with ATT thereto. Based on market conditions prevailing at the time, SAA's mark-up should not have been more than 10%-20% exclusive of ATT's commission.

18. SAA's instruction to me was to refuse to provide any breakdown of the power-by-the-hour rates agreed for the reason that disclosure to Camair's management of the fact that SAA's power-by-the-hour rate included a substantial commission for ATT plus a profit margin which was well in excess of anything which could be considered reasonable at the time could have resulted in the maintenance contracts being set aside or terminated."

38. Exhibit A to the statement contained detailed calculations in support of the margin figures stated in paragraph 15. The figures were based on the in-house cost to SAA shown in the Maintenance Cost Forecast ("MCF") which Mr Schledorn had provided to Camair: see paragraph 27.

39. Camair served 5 reply statements on 26 November. Mr Benade (who had been head of the marketing department of the technical division of SAA until April 1994) expressed the opinion that there was no reason for a 15% increase in SAA's price for any corrosion risk; said SAA had considerable spare maintenance capacity at the time so that it incurred no additional overheads by taking on the maintenance of the Camair aircraft; and gave confirmatory evidence to support the MCF figures relied upon by Mr Schledorn expressing the opinion that he could not find any grounds to disagree with Mr Schledorn's conclusions. A further statement by Mr Schledorn was also served whch took issue with Dr Kruger's statement and in particular his reliance on the IATA average costs figures.

40. Camair also served a statement by a Mr Jordan, the President and Chairman of a company in business to provide the aviation industry with "*quality maintenance, engineering, repair and alteration services*". Mr Jordan said SAA's MCF figures were *"similar to and, in some cases, competitive to the world"*, and also expressed the opinion that the 15% uplift for corrosion risk was "*odd*" in view of a very recent major service check on Camair's 747 carried out by Air France. He concluded:

"I noticed in the evidence of Dr Theuns Kruger that he confirmed my experience that South African Airways Maintenance & Engineering was almost 100% capable and that its costs were very competitive in the industry. I say that the prices quoted in Dr Kruger's statement indicated an extraordinary profit opportunity for South African Airways from the Cameroon contracts. This is due to the obvious omission by Dr Kruger of the Line Maintenance, A & B Checks, Wheels/Brakes & Tires from his calculations for the Boeing 737-200 aircraft. I am informed that these items were not included in the contract with Cameroon Airlines and were to be performed outside of the scope of the contracted power-by-the-hour. South African Airways must have made a profit margin for the Boeing 737-200 aircraft of between 35-47% if the hourly figures quoted by Dr Kruger are correct. This profit margin was extraordinary and did not, in my opinion, represent fair value for Cameroon Airlines, considering that a substantial part of the work was done by CAMAIR and also considering the low in-house cost of SAA for this aircraft type.

The Boeing 747-200 aircraft contract was priced by Dr Kruger at $2640.00 per flight hour. Taking the direct cost which, based on my experience are those reflected in SAA's own document …., and minor additional overheads into account, South African Airways Maintenance & Engineering must have made a profit exceeding 40%. This margin too was extraordinary and did not, in my opinion, represent fair value, considering the low in-house cost of SAA for this specific type of aircraft.

I have examined the calculations on SAA profits made by Mr Peter Schledorn and can concur with them as they are very close to my own independently calculated percentages as noted previously in this affidavit."

41. A further statement by Mr Sama Juma was also served. In the final paragraph of this statement he said Camair was able at the time to maintain its 737s at a power by the hour rate of $618.00 whereas SAA's rate ($880.00) exceeded that cost by 42% even though SAA's rate excluded certain checks and wheels brakes and tyres which were to be charged separately. He "*invited*" Transnet to attempt to show that a mark-up of some 42% over Camair's in-house cost was "*fair and reasonable, having due regard to the excluded items*".

42. Transnet served two reply statements, one by Dr Kruger dated 30 November and the other by Mr Du Plessis dated 3 December. Dr Kruger took issue with Mr Schledorn's evidence about the fair value of SAA's work expressing agreement with the statement of Mr Du Plessis. He also challenged the exclusion of overheads as being "*out of line*" with industry practice.

43. Mr Du Plessis asserted that *"in the final analysis Camair received the maintenance at a fair value as both the pricing and quality of the maintenance agreements was fair and reasonable"*. As to the MCF he said although it was *"a good guide"* it was not a reflection of the actual costs which would be incurred by a particular airline nor was it an SAA document but one provided by Boeing to airlines to provide a forecast of maintenance costs based on data provided by airlines to Boeing.

The April 2002 Hearing.

44. In the course of Camair's application for a summary award which resulted in the Third Procedural Order referred to in paragraph 24 of this judgment, Camair expressly relied upon the fact that Mr Sama Juma's calculation of the "commission" was not disputed in any witness statement served by Transnet. Insofar as Transnet responded to this it was to the effect that it was an *"issue of fact"* unsuitable for a summary application.

45. Transnet also addressed the considerations it asserted underlay a claim for restitution in a bribery case. Paragraphs 10-12 of the written brief put forward the following "factors" which the court should consider:

"(i) The extent of the innocent party's possible enrichment and quantification thereof. Much of the material in the witness statements on both sides address this issue ….

(ii) The conduct of the briber ….

(iii) The conduct of the victim …

These circumstances are the primary examples of possible circumstances which may prove relevant to the judicial exercise of an equitable discretion. The extent of these depends on the material contained in the witness statements or to be extracted in cross-examination. The plea (in paragraph 14.3.1 of the Defence that for Camair to recover in full would be inequitable) invokes such equitable consideration in the light of all the circumstances of the case.

This may well be the first case in the South African law which directly invokes the equitable consideration of the relevant circumstances to define the extent of the duty of restitution in a bribery case …."

The Burden of Proof Ruling.

46. By letter to the Tribunal dated 15 May 2002 Camair's attorneys asserted that the only onus of proof upon Camair (in the light of Transnet's admissions) was to show it came with clean hands and that the onus in relation to all other issues was on Transnet. The attorneys sought a "*directive*" on "*the evidential burden*". Transnet's attorneys responded in effect saying such an application was too late and Camair should be left to proceed with evidence at the hearing as it saw fit. The Tribunal wrote on 22 May saying it was inappropriate to give the direction requested and *"the parties should proceed on the basis that it is for the Claimant to establish its case … and that, similarly, it is for the Respondent to establish its case".*

Experts.

47. Apart from the statement by Mr Jordan for Camair, no independent person had provided a statement/report on the "*value*" issues. The Tribunal nonetheless directed that experts were to meet to narrow the issues between them and as a result Mr Schledorn, Mr Jordan and Mr Benade met with Dr Kruger for Transnet in early June 2002. Each party had identified a number of issues to be addressed. They could not agree on the issues so they were addressed separately. The extent of agreement reached at the meeting was recorded in a document entitled "Agenda for the Meeting of experts" which was signed by those at the meeting.

48. The first set of questions were asked by Camair. In answer to the question (item 3) whether it was appropriate to use the IATA data to which Dr Kruger had referred in his statement as a comparison with Transnet's charges to Camair it was agreed (save for a newer engine type on the 747) that: *"The MCF offers the best available breakdown, in the documents presented to this Arbitration, of the various maintenance and engineering cost factors for the aircraft operations in question"*

49. Other material questions raised by Camair and answers were as follows:

"12.1 Whether, in the light of the Defendant having not discovered any relevant documentation other than part of an IATA report, the cost of maintaining the Defendant's own aircraft or of the Claimant's aircraft by Defendant can be ascertained from any source documentation other than that relied upon by the Claimant's witness. (Experts Agreed: (1) That the MCF will be relied on to the extent recorded for item 3 above);

12.2 Whether the approach adopted by the Claimant's witnesses Schledorn, Benade and Jordan in ascertaining the Defendant's maintenance cost is-

12.2.1 appropriate; (Experts Agreed: (1) MCF is appropriate to the extent recorded for item 3 above);

12.2.2 the only method by which such costs can be reasonably ascertained in the absence of any documentation from the Defendant (other than part of an IATA report) evidencing the quantum of such costs. (Experts Agreed: (1) MCF is appropriate to the extent recorded for item 3 above)

12.3 Whether, and to what extent, the Defendant's overheads should be taken into account in calculating the costs incurred in maintaining the Claimant's aircraft and what impact any such overheads have on any of such calculations. (no final agreement reached).

12.4 Whether the Maintenance Costs Forecast (MCF) relied upon by the Claimant's witnesses is an accurate alternatively reasonable reflection of the Defendant's own maintenance costs. (Experts Agreed: (1) MCF is appropriate to the extent recorded for item 3 above)

12.5 ….

12.6 Whether Dr Kruger's evidence of what it cost the Defendant to maintain its own aircraft, and the comparison of such cost to the average costs reported to IATA for a select number of airlines, to justify his opinion that the Defendant's charges to the Claimant were fair can be accepted having due regard to-

12.6.1 ….

12.6.2 what reasonable profit margin for the Defendant's maintenance services was; (Experts agreed: the reasonable profit margin should be 15%);

12.6.3 ….

12.6.4 the costs recorded in the Maintenance Cost Forecast relied upon by the Claimant's witnesses (against which the Defendant has offered no contradicting documentary evidence); (Experts Agreed: (1) MCF is appropriate to the extent recorded for item 3 above);

12.6.5 the Defendant's reports to IATA concerning its own maintenance costs; (Experts Agreed: (1) The MCF reflects SAA's costs to the extent recorded for item 3 above. Experts disagreed on Dr Kruger's use of the IATA average for comparison purposes)."

50. The questions (and answers) raised by SAA included:

"2.1 The cost to SAA of providing the services under the maintenance agreements and, if there remains disagreement in regard thereto then-

2.1.1 recordal of costs that can be agreed and how they are made up: (Experts Agreed: (1) MCF agreed to the extent recorded for item 3 above);

2.1.2 ....

2.1.3 agreement as to the impact on such cost figures if "indirect costs" are included or excluded. (Experts did not agree).

2.2 Whether the IATA costs can be used by the Tribunal as an indication of the costs which-

2.2.1 would be reasonably incurred by SAA in providing the services; or (Experts Agreed: (1) The MCF be used to the extent recorded for item 3 above);

2.2.2 would be reasonably incurred by any other service provider in supplying the services to Camair. (Experts did not agree).

2.3 The cost to Camair had the same service been rendered by another supplier. In that regard if the experts cannot reach full agreement, then they should record such costs upon which there is agreement and how those costs are made up and, in respect of any costs remaining in difference then the respective views of each side. (No final agreement reached)."

The First Hearing: Day 1

51. On 10 June 2002 the hearing began. Senior Counsel for both parties made oral opening statements. Counsel for Camair also submitted a written opening. He submitted that once bribery was found Camair was entitled to repayment in full and it was only if the Tribunal decided in its discretion to entertain the counterclaim that the question of enrichment would arise, on which, it was also submitted Transnet bore the burden of proof of showing that Camair was unduly enriched or that SAA was not. Reference was made in particular to a decision of the Supreme Court of Appeal of South Africa in ***Extel Industrial (Pty) Ltd v Crown Mills*** 1992(2) SA 719.

52. As to enrichment (should it arise) Counsel submitted there were these issues: was Transnet entitled to retain any profit; was it entitled to any contribution to overheads; was it entitled to retain the commission; whether Camair had benefited from the services and, if so, to what extent, and whether Camair's conduct was relevant. It was also pointed out that Transnet had produced no evidence of actual cost.

53. In the course of the opening by Senior Counsel for Transnet a challenge was made to Mr Sama Juma's calculations of the commission figure (paragraph 32) because the disclosed invoices in Bundle 4 could not be reconciled with his figures. Counsel produced a document ("R1") said to reflect the disclosed invoices and to show total commission payments of $8,421,765 not $9,854,260. Counsel for Camair protested that Mr Sama Juma's figures had not been challenged. An ironic consequence of the lower figure advanced by Transnet (based as it was on a lower total of power by hour charges) was that the cost to Transnet of the services accepted by Camair in paragraph 7.4 of its reply (paragraph 18) was greater than it should have been by some $4.2m. Counsel for Transnet also addressed various submissions about the cost to SAA of the maintenance services including the appropriateness of including overheads.

54. There was also a considerable debate during the oral openings on the burden of proof and whether or not Camair should have pleaded the claim in a form which acknowledged that a credit was due to Transnet for the work done under the maintenance contracts.

55. The openings were followed by the oral evidence of Mr Egbe and Mr Sama Juma. Mr Sama Juma was cross-examined about his calculations of the commission payments. He said he had meticulously gone through the invoices raised under the power by the hour agreement but because his figures had not been questioned he had not brought copies of the invoices albeit they were available in Cameroon. Bundle 4, on which document R1 was based, contained the invoices available to and disclosed by SAA and not the documents on which Mr Sama Juma had worked (which had also been disclosed). Towards the end of the day Mr Sama Juma agreed to make a limited check on the invoices in bundle 4 overnight. He was also questioned about the Air France charges for maintenance of the 747.

Day 2

56. The fruits of Mr Sama Juma's work on bundle 4 were addressed. He said the figures for one 12 month period for the 747 were very close to his figures. He produced some calculations which became document C2. It emerged that Dr Kruger was responsible for R1 and counsel for Camair objected that it was not referred to in his evidence. The Tribunal suggested that the calculations would better be left to agreement between "experts" than debated in evidence.

Day 3.

57. Evidence was given by Mr Jordan, Mr Benade and Dr Kruger. The Tribunal had been informed by counsel for Camair that Mr Schledorn was ill and would not attend the hearing and there was a debate about whether or not his witness statements should be withdrawn. In the event the Tribunal sought medical evidence on Mr Schledorn's condition and asked Camair to use its best endeavours to bring him to give evidence later in the hearing.

58. Dr Kruger expressly accepted under cross-examination that it was inappropriate to use the IATA data on which he had relied in his first statement. Counsel for Camair asked: *"I just wanted clarity, so I do understand. And please, I think it is a yes or no. And if I say it unfairly please do say so. As I understand the position, now, of your evidence, we accept the MCF to the extent that I can disregard all your prior calculations and concentrate then only on the MCF for the various reasons you have said?*

Dr Kruger replied *"Yes"*.

Day 4.

59. Dr Kruger's evidence continued on Day 4, followed by the evidence of Mr Du Plessis.

60. Dr Kruger confirmed that R1 was his work. Again, when the matter became contentious, the Tribunal left it on the basis that the parties would continue to work together on the figures.

61. There was medical evidence on Mr Schledorn's condition from which it was apparent that he could not give evidence at the present hearing and a later date was to be established for his evidence to be given.

The Second Hearing.

62. There was a substantial time gap between the last day of the first hearing (13 June) and Mr Schledorn being available to give evidence which he did on 6 December. Both parties were given the opportunity of cross-examining him. Questions were asked about the Air France charges and also about R1. No further evidence or agreement was, however, offered or produced by way of reconciling the commission figures of Mr Sama Juma and Dr Kruger.

63. The hearing concluded with an order for post-hearing briefs to be exchanged and submitted by 31 January 2003 and reply briefs to be exchanged and submitted by 24 February.

Closing Submissions.

Camair.

64. Camair repeated its submission that the onus was on Transnet to establish an entitlement to equitable relief. On the question of quantum the issue was expressed to be: *"... to what extent would Claimant be unjustly enriched if all payments received by the Defendant are restored to the Claimant or, put differently, to what extent has Defendant not been enriched by the payments made by the Claimant to it."*

65. Camair therefore addressed quantum issues only in the context of the counter-claim, but on the basis that the answer was the same whether the question looked to what Camair should restore or Transnet recover. The submission was that the commission of $9,854,260.20 (Mr Sama Juma's figure) must be repaid as "*there can be no suggestion that the Claimant was enriched thereby"* and that Transnet was *"not entitled to profit out of its turpitude"* and was entitled only to the direct costs incurred in performing the maintenance services. It was submitted that the amount Camair would have paid to another provider was irrelevant, that in any event the evidence was that SAA's rates offered no significant advantage over the rates of Air France and that better rates were available with Air Ethiopia. The criticisms of the use of R1 were repeated as was the submission that Transnet had *"refrained from adducing any reliable evidence as to the costs incurred and the profit made"* by it. Figures were put forward for direct cost, direct cost plus a 15% margin (as agreed by the "experts" to be reasonable: paragraph 49 at 12.6.2), and direct costs plus overheads plus a 15% margin. These were based on the MCF.

Transnet.

66. Transnet's closing submissions were divided into three Chapters. Chapter 1 submitted that without a tender to restore the benefits it had received Camair's claim for restitution must fail because it "makes out no claim in law". Chapter 2 submitted, in the event the Tribunal found Camair had properly made out a cause of action, that Transnet was "*not precluded by reason of supposed turpis attributable to it from establishing either its defence or its conditional claim-in-reconvention"*. Chapter 3 contained *"our submissions in regard to the quantification of the claim-in-reconvention"*.

67. In Section 7 of Chapter 1 of the submission the heading asked the question "C*an the claim be rescued*". It was submitted that it could not because the effect of Camair not offering to restore the benefits it received had caused "the true issue" not to be ventilated at all. The submission continued:

"What the Claimant was required to tender was the value of the benefit or enjoyment derived which must be restored to its original owner. Where, as here, the benefits consisted of work, labour and parts, the appropriate measure is its value to the Claimant or the lesser amount it would have paid another contractor.

Presumably had the issue been canvassed in the light of the value of the benefit to the Claimant, the relevant considerations would have included:

(i) the contract price set

(ii) whether and at what cost the services were available to Claimant from other suppliers and on what conditions – Air France and Aer Lingus;

(iii) whether Claimant could have done some part of the job itself and more cheaply;

(iv) the value of the services measured at going rates in the market place.

Discovery, affidavits, evidence and cross-examination would have been totally different. It is simply impossible to know what the outcome would then have been. The consequence is that the claim is irremediable, and in the event no amendment has been sought."

68. Chapter 2 then addressed the availability of the defences pleaded in paragraph 14 of Transnet's defence (paragraph 14) stating that *"the extent to which the evidence led supports that defence or, in the event of it failing, the conditional claim-in-reconvention is dealt with later in Chapter 3".*

69. Chapter 2 itself addressed what might be described as the relative culpability of Camair and Transnet for the bribery in order to submit that "this is not a case to bar the Defendant, as Claimant in reconvention, from proceeding with its counterclaim" because its conduct was not so bad as to justify such a conclusion.

70. Chapter 3 addressed quantum. The submission was that *"the quantum of Defendant's conditional counterclaim is the amount by which it has been impoverished or the amount by which the Claimant has been enriched, whichever is the lesser* (my emphasis)". "*The true measure*" was submitted to be "*the actual cost to the Plaintiff (wrongdoer) on an expenditure basis made up of the costs of labour, costs of spares, costs of sub-contracting work and sundry disbursements, if any, to the exclusion of profit*", (again my emphasis). There followed some detailed submissions on what those costs were said to have been. The calculations put forward produced a loss of some $3.4m or, if "*indirect costs*" were apportioned equally a profit of only $3.7m even on the basis that Transnet was entitled to retain the "*commission*". It is perhaps worth noting that if Camair had been able to establish that another supplier would have charged less that Transnet's "*actual costs on an expenditure basis*" this formulation would have resulted in the lower figure being the amount of Camair's *"enrichment*".

Reply Submissions

Camair.

71. The response to Chapter 1 and the submission that the claim disclosed no cause of action included a reference to Transnet's request for the inclusion of item 6 in the Terms of Reference (paragraph 20) as an unequivocal reference to "*questions of value*" being for the Tribunal to determine. The point was made that there was no logic in attempts to distinguish the situation where the innocent party sues for restitution from that where the wrongdoer seeks relief and it was submitted that the authority of Extel excluded such a distinction. Emphasis was also placed on the concession in Chapter 3 of Transnet's submissions that the counterclaim was restricted to the costs incurred by Transnet in performing the services thus, so it was submitted, making comparisons with the charges of Air France and others "*wholly irrelevant*". It was said the parties had "*canvassed the whole question of enrichment/value extensively"*, that "*the discovery and evidence would have been no different nor would there have been any different cross-examination"* and that the Tribunal was in a position finally to determine the issues regardless of how the parties defined them or which of them bore the onus of proof.

72. It was pointed out that Transnet had itself alleged in the ATT proceedings that ATT had provided no value for the commission and "*therefore the full commission of US$9,887,480.38 included in the payment received …represents profit in the hands of the Defendant and at least that sum must be restored to the Claimant".*

73. In response to Chapter 3 it was stated that: *"If the Defendant is entitled, in law, to any relief, it appears that the Defendant has accepted that the good and proper value it claims it gave is restricted to the costs incurred by it and that the Defendant cannot retain any profit".*

74. Some fairly trenchant criticisms of R1 were made and the detailed submissions by Transnet on the costs of the service were addressed where this had not already been canvassed in the closing submissions.

Transnet.

75. Transnet's reply submissions were divided into two Chapters: Chapter 1 "*Legal issues concerning the Claimant's remedies and the permissibility of defendant's reconventional claim in law";* and Chapter 2 "Quantification of the reconventional claim".

76. Emphasis was placed in Chapter 1 on a statement of South African law (which was not in issue) taken from the judgment of Nienaber JA in ***Extel,*** at page 732: *"That a tender of restitution, or the explanation and excuse for its failure, is a requirement in proceedings for restitution is indeed trite. A contracting party who demands restitution consequent upon a purported rescission of the contract must tender the return of what he himself has received under the contract or its equivalent in money …."*

77. But Nienaber JA added that a tender did not have to be an integral part of the act of rescission but "*rather a consequence which must necessarily follow from it"* pointing out the nature and extent of any restitution and its possible quantification could be matters of considerable factual and legal complexity.

78. On questions of quantification, in Chapter 2, Transnet repeated the principles it had enunciated in Chapter 3 of its Closing Submissions, acknowledging the agreement that the MCF offered the best available breakdown of the costs incurred by SAA and submitting that it should be used accordingly. In none of Transnet's submissions was it submitted that the test of "*value"* was simply what it had charged Camair (with or without "commission"). Nor were any submissions made as to how value was to be calculated or assessed if it was not by way of cost inclusive or exclusive of overheads. Document R1 was again relied upon as "*founded upon Bundle 4 which stands uncontroverted before this Tribunal".*

THE AWARD

79. The Tribunal did not seek any further submissions from the parties, either orally or in writing, before proceeding to its Award.

80. The Tribunal (unanimously) held that:

i) Where an innocent party to a contract tainted by bribery seeks restitution of that which he has performed South African law requires that it must make or tender restitution of that which it has received or if this is not possible tender a monetary substitution of such benefits instead (paragraph 123);

ii) The issue as to the value to be attached to the services rendered under the maintenance contracts had been properly before the Tribunal as shown by the Terms of Reference (paragraph 142) and much of the evidence had been concerned with endeavouring to establish the proper costs of the maintenance contracts so as to put a monetary value on the benefits received by Camair under the contracts (paragraph 144). The Tribunal was therefore entitled to address the issues and to reject the submission by Transnet that the claim should in effect be struck out, because the issues fell within the Terms of Reference and the parties had had a proper opportunity of dealing with them (paragraph 145).

81. The Tribunal (it seems by the majority) also held that:

i) By South African law Camair was correct in arguing that if Transnet had to claim on the basis of Camair's unjust enrichment, Transnet could only claim its cost and not its profit (paragraph 158) whereas what had to be tendered by Camair was "the value to Camair" of the work done and materials supplied under the maintenance contracts or the lesser amount which Camair would have had to pay another contractor (paragraph 161).

ii) "In practice, this means the Tribunal must do the best it can in order to determine the value of the benefits received by Camair or the lower price it would have paid to another contractor"(paragraph 163).

82. Those decisions, as decisions of law, are not and cannot be impugned on an application under Section 68. What they do not address, or at least address directly, however, is how "value" is to be assessed, or why, if that was intended to be said, "value" or the approach to its assessment, should differ according to whether it came to be addressed in the context of a tender by an innocent claimant seeking restitution or a claim by the guilty party seeking recovery from the innocent party. In both cases, as the Tribunal acknowledged, the target is to avoid "unjust enrichment" and I cannot see, nor could counsel offer, any sensible explanation let alone principle for why the result should differ dependent on the fortuity of the nature of the claim. Indeed earlier in the Award (paragraph 119) the Tribunal had quoted with approval from another decision of the South African courts to the effect that the calculations would produce the same result.

The majority Award

83. The majority decided, on the basis of the principles the Tribunal had determined that:

i) Transnet had identified the commercial price at which it was willing to undertake the work and added the "commission" on top. "In the absence of any persuasive evidence to the contrary, the Tribunal takes this 'commercial price' – that is to say the contract price less the so-called commission – as representing the value of the work to Camair". This conclusion (see paragraphs 189-190 of the Award) was expressly based on Mr Schledorn's evidence (see paragraph 36 of this judgment) of which the Tribunal was otherwise critical (see paragraph 175 of the Award).

ii) Camair had failed to establish the amount paid to ATT as commission (paragraph 209) and would be awarded only the amount shown as paid and payable in R1 which amounted to an admission by Transnet that the total amount of commission was at least $8,421,765 (paragraph 207).

84. The first of these decisions ("the fair value" decision) is criticised by Camair on the basis that:

i) It conflicted with "the common understanding" of the parties that quantum was to be determined by reference to unjust enrichment including the principle that no man should profit from his own wrongdoing; and

ii) It conflicted with the "common approach" of the parties to the quantification of "value" that it was to be determined by reference to the cost to Transnet of carrying out the services it provided pursuant to the maintenance contracts.

85. In making the second of these criticisms Camair understandably pointed to Paragraphs 168 to 187 of the Award in which the majority stated that:

i) The Tribunal had read and heard a considerable number of arguments and submissions as to the cost to Transnet of the work Transnet carried out under the maintenance contracts (paragraph 168).

ii) "the parties experts" looked at the "costs" incurred by Transnet in carrying out work on the Camair aircraft (paragraphs 182-3) and agreed a reasonable profit margin but "the work suffered from two major defects …. First their approach appeared to be partisan, rather than objective; and, secondly, their focus was on costs rather than on price or value." (paragraph 184).

iii) "185. On the basis of South African law, as already explained, the Tribunal's task is to do the best that it can to establish the value to Camair of the work carried out by Transnet during the five years or so that Transnet was responsible for the maintenance and airworthiness of Camair's aircraft. It would have been helpful to know what airlines other than Transnet would have been likely to charge. However, it would appear from the evidence before the Tribunal that very few airlines were in fact interested in carrying out maintenance of Camair's aircraft. One of these airlines was, of course, Transnet and another was Air France – but beyond this, there seem to have been very few, if any, contenders for the work. It will be remembered that Mr Sama Juma in his first witness statement

complained that Air France's charges were "unreasonably high"; and Mr Schledorn, in his letter of 16 March 1999 refers to a quote from Air France, which the Tribunal has not seen, as being "very costly".

186. As already stated, it seems to the Tribunal that the emphasis on cost, which has taken up a considerable amount of time and paper during the course of this arbitration, is in fact misplaced. What the Tribunal has to assess, as best it can on the material before it, is the value to Camair of the work carried out by Transnet under the Maintenance Agreements.

187. Another way of putting this is to ask what price Camair would have paid for the work to be carried out by another airline? The Tribunal might have been in a position to answer this question if the Tribunal had been supplied, for instance, with quotations from Air France for comparable work. But there is no such evidence before the Tribunal – only statements to the effect that their charges were "unreasonably high". The only evidence that the Tribunal has as to the value of the work done by Transnet is the price that Transnet charged and was paid. After deduction of the "commission", this amounts to approximately US $46 million."

86. I find Paragraph 186 to be of some importance. There is no indication that the Tribunal raised the concerns expressed during the arbitration. Nor that it indicated that it thought "value" and "cost" involved a substantive difference of approach. Nor that it raised its view of "value" or sought submissions upon it. Moreover, as I think the words make clear, "the emphasis on cost" was mutual and not confined to Camair.

87. On the "fair value" aspect of the dispute, in his dissenting opinion, Mr Tackaberry QC said:

"4. In approaching quantum, the majority has rejected the costs basis upon which the case was argued and the evidence presented and instead used the concept of the "alternative quotation" (if I may so summarise it) as a principle to be applied in this sort of case. This seems to me to be an objectionable approach. First, on the ground that there is no reason for the tribunal to decide the case on a basis other than that on which it was put forward by both sides. Second, while accepting that the alternative quotation was the basis of the decision in one case, it is clear that that case did not establish the alternative quotation as a principle and it should not be so used. The approach to be used in any particular case will depend on the facts of the case and on the evidence led by the parties.

5. If the alternative quotation approach is rejected, as I think that it should be, then one must ask what the correct approach is. In my view it is essentially a matter of enrichment – what outcome comes closest to avoiding either party having an unjust enrichment. I say "comes closest" because there are likely to be difficulties in achieving a result that all would consider as delivering an wholly just result. I agree with my colleagues that the Extel case provides key guidance in this matter. ….

6. In this context and on the facts of this case, it does not seem to me that utilisation of, or reliance on, the sums actually paid (less commission) is appropriate, particularly as no evidence was led of the actual cost to Transnet of doing the work. The whole of the evidence was directed to determining cost (and not value, as that expression is used by the majority) on an hypothetical basis. Accordingly, among other disadvantages, the Tribunal had no possibility of comparing the actual costs incurred by Transnet in doing the work that it undoubtedly did with the sums that it was paid.

PROFIT

7. If enrichment is the appropriate principle, then I do not expect anyone to challenge the proposition that not only the commission but also any profit made must be surrendered by Transnet."

88. The decision on the amount of the commission is criticised by Camair on the basis that Mr Tackaberry criticised it in paragraph 13 of his dissenting opinion:

"13. The majority has reached the conclusion that the amount of the commission is US$8,585,620. In my view the correct figure is US$9,854,260. My figure is based on Mr Sama Juma's evidence in his founding statement. It is sufficient to note that Mr Sama Juma's evidence was not challenged by Transnet in either of the rounds of written evidence; and he was not (in any meaningful sense) cross examined on them. Nor was Dr Kruger cross examined on Exhibit R1 or the basis for Exhibit R1. However, the majority has reached its conclusion on the basis of documentation that is summarised in Exhibit R1. Exhibit R1 was the subject of objection and comment on a number of occasions throughout the hearing as is apparent from the transcripts. In my view, the way in which it was introduced to the arbitration makes it unsafe to rely upon; and any approach to the documents it purports to summarise must start by noting that, effectively, and so far as the Tribunal was concerned, there was no forensic analysis of them by either side."

89. Camair submits that in so acting the Tribunal failed in its duty to act fairly and impartially. It also submits that the overall result achieved by the Award is "nothing short of startling" namely that Transnet, awarded the maintenance contracts through bribery, is to retain the profits and contribution to overhead made from them and, indeed, if successful in the ATT proceedings, would recover the commission as well.

90. It is Transnet's submission that there was no consensus or common understanding such as Camair advances and Mr Tackaberry was wrong in what he wrote. Transnet also submits that Section 68 has no application to Camair's complaints and it is to that section that I now turn.

SECTION 68

91. Section 68 provides (so far as material) as follows:

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

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

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

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed between the parties;

(d) failure by the tribunal to deal with all the issues that were put to it; ….

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may –

(a) remit the award to the tribunal, in whole or in part, for reconsideration."

92. Section 33 provides:

"(1) The tribunal shall-

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case … so as to provide a fair means for the resolution of the matters falling to be determined."

93. Camair accepted (rightly) in its written submissions that:

i) The Award cannot be challenged on the grounds that the Tribunal had come to an erroneous decision whether of fact or (South African) law.

ii) The Award cannot be challenged on the ground that findings of fact were unsupported by the evidence.

iii) A failure to comply with Section 33 and so Section 68(2)(a) is not established by the existence of errors in the Award which are unfair to one party.

iv) Not all irregularities require the Court to intervene. Any irregularities must cause substantial injustice to Camair.

94. Camair also (and also rightly) accepted the views expressed in paragraph 280 of the Report of the Departmental Advisory Committee which led to the enactment of the 1996 Act, namely that: *"The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action … In short, [section 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls out for it to be corrected."*

95. The consequence of these submissions (or concessions) by Camair can, I think, be illustrated by reference to paragraph 4 of Mr Tackaberry's dissenting opinion (see paragraph 87 of this judgment). The first ground on which he described the approach of the majority as "*objectionable*" (deciding the case on a basis other than that on which it was put forward by both sides) is capable of being a serious irregularity within section 68 but the second (a supposedly erroneous view of South African law) is plainly not. Hence the concentration in submissions on the first ground. Mr Tackaberry's criticism of the majority approach to the amount of the commission (paragraph 88 of this judgment) also does not readily fall within Section 68. The criticism expressed is directed at matters of evidence and its assessment.

96. I was also referred to a number of authorities on what may be termed "*procedural unfairness*", which, although they ante-date the Act it is agreed reflect the principles which it enshrines.

97. In ***Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*** [1985] 2 EGLR 14, at 15; Bingham J said: *"If an arbitrator is impressed by a point that has never been raised by either side, then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him."*

98. In ***Interbulk Ltd v Aidan Shipping Co Ltd, The "Vimeira"*** [1984] 2 Lloyd's Rep 60, paragraph (3) of the findings in the headnote reads: *"Here the award was made on the basis of a point which was never raised as an issue or argued before the arbitrators. The arbitrators failed to give the charterers the opportunity of dealing with the issue that the turning space at the entrance of the dock was insufficiently wide, there was technical misconduct on the part of the arbotrators and in the result unfairness to the charterers."*

99. Robert Goff LJ said at page 74:

"… an analysis of the whole course of the arbitration, coupled with standing back from it and looking at it as a whole, makes it plain, in my judgment, that the point never became an issue in the arbitration ….

We are concerned with a case where the arbitrators appear mistakenly to have thought that the issue of the width of the turning place was one which had been raised before them and upon which they were entitled to decide the case, without drawing the point to the attention of the charterers. With great respect to the very experienced arbitrators who presided at the hearing, on this they were mistaken. I wish to stress that we in this Court have had the advantage of looking at the matter very clearly on a full transcript with the assistance of leading Counsel and having the benefit of full argument directed towards this very point, which has, no doubt, made it easier for us to assess the position; but the fact remains that the award was made on the basis of a point which was never raised as an issue or argued before the arbitrators. There is plain authority that for arbitrators so to decide a case, without giving a party any warning

that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted."

100. At page 75 Robert Goff LJ also said: *"In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal."*

101. At page 76 Ackner LJ said: *"The essential function of an arbitrator or, indeed, a Judge is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it."*

102. The requirement that the serious irregularity *"has caused or will cause substantial injustice*" to the applicant has most recently been addressed by the Court of Appeal in the rent review case ***Warborough Investments v S. Robinson & Sons*** EWCA [2003] Civ 751 in which previous statements of principle were reviewed. I take from that two matters. First it is the procedural irregularity, the denial of a fair hearing, if such there be, which must be shown to have caused a substantial injustice. Second what is required to satisfy the test is indeed an extreme case "where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected". On the other hand, in agreement with the submissions made by both parties, I do not think it needs to be shown that the outcome of a remission will necessarily or even probably be different but it does need to be established that the applicant has been unfairly deprived of an opportunity to present its case or make a case which had that not occurred might realistically have led to a significantly different outcome.

103. If it be the case that an applicant had an opportunity to deal with any procedural unfairness and did not avail itself of that opportunity by way of further submissions or evidence, as Colman J pointed out in ***Kalmneft v Glencore*** [2002] 1 Lloyd's Rep 128 at page 141 it will fail to establish "substantial injustice".

SUMMARY

104. I will address the submissions under the two headings of "fair value" and the amount of the commission.

"Fair Value"

105. I think the matters which I have sought to set out earlier in this judgment justify the following (references unless otherwise stated are to paragraphs of this judgment):

i) The claim was based on unjust enrichment of Transnet: paragraph 12;

ii) The defence and conditional counterclaim referred to both unjust enrichment of Transnet and Camair. It averred that Camair received the maintenance services "at a fair cost", and that Transnet gave "good and proper value" by way of the services: paragraphs 14 and 15;

iii) The focus of Camair's approach to quantification was throughout on the cost to Transnet of supplying the services;

iv) Transnet maintained throughout the stance that the claim disclosed no cause of action unless Camair gave credit for "value received";

v) There was no focus on whether or why "*cost to Transnet*" should differ from "*value to Camair*". The two were apparently used interchangeably: paragraphs 14,15 and 45.

vi) Camair pursued Transnet's "costs" documents but was told they could not be located and appears to have accepted that. Certainly the matter was not pursued further. Transnet sought documents from Camair which would have shown the charges of Air France and perhaps others to Camair. But the application came late and although persisted in was rejected by the Tribunal: paragraphs 27 to 29. That is a matter of concern when it is seen how the majority of the Tribunal subsequently approached the Award: paragraph 85 of this judgment and the reference there to paragraph 186 of the Award. The charges of Air France could, I think, have relevance both to the commercial cost to Camair of the services and to the fair cost to Transnet of providing the services but more readily to the former;

vii) The opening round of witness statements (so far as relevant) was focused on the cost to Transnet (SAA) of providing the services and the profit margins in Transnet's pricing to Camair: paragraphs 36 to 38 (Mr Schledorn) and 33 (Dr Kruger);

viii) The reply statements reflected the same focus: paragraphs 39 to 41 (Mr Benade, Mr Jordan and Mr Sama Juma) and paragraphs 42 and 43 (Dr Kruger and Mr Du Plessis);

ix) The thrust of the Experts "Report" (paragraphs 47 to 50) was also on the cost to Transnet and a reasonable profit margin. But Transnet also raised the question of "the cost to Camair had the same service been rendered by another supplier" on which there was "no final agreement";

x) Transnet's case was that the extent of restitution required by law raised novel questions but would depend on equitable considerations in the light of the evidence: paragraph 45;

xi) At the time of the first hearing the focus of the evidence can fairly be said to have been on Transnet's costs but also on reasonable profit margins for maintenance services of the type in question;

xii) Each party had adopted an extreme position. Camair that upon proof of bribery it was entitled to recover every dollar paid under the maintenance contracts. Transnet that if Camair did not offer a credit it had no claim. Each also contended that the burden of proving the "value" of the services lay upon the other. But they went into the hearing none the wiser as to how that might be resolved: paragraph 46. At the hearing it became even more contentious: paragraph 54;

xiii) Camair's submissions at the hearing were consistent with its evidence and approach throughout namely that quantification of any sum to be restored to Transnet whether by reason of the defence or conditional counterclaim should be examined on the basis of cost to Transnet with particular issues as to whether overheads and/or profit were to be added to cost. In the course of the evidence and in the light of the "experts" agreement the evidence on the approach to cost, overhead and profit became substantially uncontentious in the sense that the MCF and levels of overhead and profit were established or debated: paragraphs 49, 50 and 58;

xiv) Camair's closing submissions proceeded on the basis of an examination of the costs to Transnet and a submission that what other airlines would have charged was irrelevant: paragraph 65;

xv) Transnet's closing submissions did expressly make the point that Camair was obliged to give credit for the value to Camair of Transnet's services on what may be called a commercial basis: paragraph 67. But it did so not only, I think, for the first time or at least the first time with any clarity, but also in the context that as a result "the true issue" had not been ventilated at all, was impossible to resolve, and so the matter was "irremediable" and the claim should therefore be, in effect, struck out. That submission included an express acknowledgement that the evidence, discovery and conduct of the hearing would otherwise have been "totally different": paragraph 67;

xvi) However in Chapter 2 (assuming the Tribunal found there was a proper cause of action: paragraph 66) and Chapter 3 Transnet's submissions on quantification were, like Camair's, made on the same basis whether the matter were looked at in terms of Transnet's defence or conditional counterclaim: paragraphs 66 and 68;

xvii) There was no issue, indeed a "consensus", that quantification on that basis looked to the reasonable cost to Transnet based on the MCF (unless Camair was enriched in a lesser amount) to the exclusion of profit: paragraphs 70,71,74,78 and 86. Despite Camair's assertion at various times of some earlier consensus or common understanding I think this is the first occasion on which such a description is appropriate;

xviii) The Award rejected the "no cause of action" submission by Transnet and also rejected (by the majority) the approach to quantification put forward as apposite by both parties in that event. It concluded that Transnet's "commercial price" (price less "commission") represented the value of the services to Camair. That was an approach not advanced by either party. On any view of the evidence such a price contained a profit to Transnet and was based on a cost derived other than by way of the MCF: paragraphs 78, 83(i) and 85;

xix) The approach of the majority was not raised with the parties nor were they given an opportunity to address it: paragraphs 79 and 86. Mr Tackaberry was right to make the criticism that the majority had decided the case "on a basis other than that on which it was put forward by both sides": paragraph 87.

The Amount of Commission

106. I think the matters set out earlier in this judgment justify the following, (references are again to paragraphs in this judgment unless otherwise stated):

i) The Pleadings in the Arbitration put Camair to proof of the amount of commission: paragraphs 13 and 14 of the defence (paragraph 14) No positive case as to amount was put forward by Transnet;

ii) The only witness statement to address the amount of commission was the statement by Mr Sama Juma: paragraph 32. Mr Erasmus simply produced the invoices which became Bundle 4;

iii) The "experts" did not address the issue;

iv) The position remained unchanged at the start of the First Hearing;

v) On the first day of the hearing a direct challenge was made by Transnet to Mr Sama Juma's calculations and R1 was produced based on Bundle 4 which showed the figure ultimately accepted by the majority of the Tribunal: paragraph 53;

vi) Thereafter the use of R1 remained contentious but the (understandable) approach of the Tribunal was to try to encourage the parties to reconcile the figures: paragraphs 56 and 60;

vii) There is no evidence before this Court as to what, if anything, ensued by way of reconciliation of the figures. It is not known whether Mr Sama Juma or anyone else on behalf of Camair sought to check Camair's disclosed invoices with Bundle 4. It is clear, however, that nothing further was offered to the Tribunal by Camair save criticisms of R1 itself: paragraphs 62 and 74;

viii) Whilst Mr Tackaberry's criticisms of the evidential value of R1 and the manner of its introduction into the hearing have force (paragraph 88) the Tribunal had left it to the parties to seek to reconcile the two and had encouraged them to do so. There was, in the event, ample opportunity to do that, or to make further submissions, before the end of the proceedings either at the second hearing or in closing submissions.

SERIOUS IRREGULARITY

Fair Value

107. In my judgment, whilst I find the matter far from easy, and I am conscious that the Tribunal was both very experienced and, I think, placed in an unenviable position by the extreme positions adopted by both parties, Camair has shown that applying the principles to which I have referred there was serious irregularity within the meaning of Section 68(2)(a) by reason of a failure to act fairly as between the parties and to give Camair a reasonable opportunity of putting its case and/or by reason of a failure to provide a fair means for the resolution of the matters falling to be determined.

108. I think the departure by the majority from the way the case was presented through the evidence and submissions without warning or giving Camair an opportunity to address the way the majority were thinking or came to think was unfair. It falls, I think, in particular, within the passages I have quoted in the judgments of Bingham J in ***Zeimalt Holdings*** (paragraph 97) and of Ackner LJ in ***The Vimeira*** (paragraph 101).

109. I accept that it cannot be said by Camair in this case that "*the point was never raised*" in the sense that in the course of Transnet's closing submissions the approach subsequently followed by the majority was referred to. But it was there referred to expressly in the context of supporting the strike out case and indeed on the basis that there was no evidence on which the Tribunal could address the issue which in the event it did address (paragraph 67).

110. I also accept that any "consensus" on the approach to quantification only emerged in the course of closing submissions which, perhaps unfortunately, were not followed by any oral hearing. It can also be said, as Sir Sydney Kentridge QC submitted for Transnet, that the consensus was in the immediate context of the conditional counterclaim. But it was also expressly put forward as the correct approach to the defence to Camair's claim should the Tribunal not strike it out: paragraph 68.

111. Nonetheless, as the majority really acknowledged, the Tribunal went its own way to a conclusion which neither Camair nor Transnet had contended for and did so unheralded. That, in my judgment, was fundamentally unfair.

Commission.

112. In contrast, I am not persuaded, despite some well-directed criticisms of the approach of the majority, that Camair has established any serious irregularity in respect of the Award determining the amount of commission to be repaid. At the conclusion of the first hearing the Tribunal had left the matter in the hands of the parties. Mr Sama Juma and Camair had ample time to compare the invoices held in Cameroon with those in Bundle 4 which were the basis of R1. For unknown reasons that was either not done, or, if done, the results were not placed before the Tribunal. Nor, it seems, were attempts at agreement pursued. In those circumstances I do not think it can be said that Camair was not given a fair opportunity to consider and address R1 and it was a matter for the Tribunal what "*evidence*" it chose to rely upon and what conclusions it would draw from it. It had very wide powers in that regard: paragraphs 21 and 23.

SUBSTANTIAL INJUSTICE

Fair Value.

113. I think there is likely to be a real risk of substantial injustice in the sense to which I have referred in circumstances where a court concludes that a party has not been given a fair opportunity to address a key issue (as the approach to quantification undoubtedly was) on the basis which was to find favour with the Tribunal and has reasonably conducted its case on that issue on a different and apparently common basis. In this case I think the risk is manifest. Mr Tackaberry's dissenting opinion demonstrates how the outcome might differ. Of course whether it will do so is a matter for the Tribunal not for me but in my judgment it is right that the Award be remitted to the Tribunal for reconsideration on the issue of quantification of the value of the services under the maintenance contracts.

Commission.

114. Even had I determined that there was a serious irregularity in relation to the amount of commission, I would not have found that it had caused a substantial injustice to Camair. There was ample opportunity to address any unfairness in the use of R1 or lack of opportunity to compare it with Mr Sama Juma's calculations. Indeed Mr Schledorn did give some evidence about R1 at the Second Hearing (paragraph 62). I think therefore substantially the same reasoning as leads to the rejection of "*serious irregularity*" also leads to the rejection of "substantial *injustice*" following Colman J in ***Kalmneft*** (paragraph 103).

ORDER

115. I shall expect the parties to prepare a draft order to reflect the terms of this judgment and will consider any points that arise upon it and any other ancillary matters which arise when the judgment is handed down.

Mr M. Bowdery QC and Ms F. Parkin (instructed by Speechly Bircham) for the Claimant
Sir Sydney Kentridge QC, Mr M. Tselentis QC and Mr C. Kimmins (instructed by Linklaters) for the Defendant