**JUDGMENT : Mr Justice Beatson:** Commercial Court. 3rd July 2008.

1. This application arises out of a dispute between members of the Colliers international property consulting group and the defendant, Colliers Jordan Lee Jafaar Sdn Bhd, a former member. The defendant applies to set aside an Order made without notice by Cresswell J on 18 December 2007. The order, made pursuant to section 66 of the Arbitration Act 1996, was that the final Award of an ICC arbitration in London dated [26/31] May 2006 in favour of the claimants against the defendant be entered as a judgment in the terms of the award. The grounds of the application are that the proceedings before Cresswell J were flawed because: (1) the requirements of CPR 62.18 were not satisfied, (2) the claimants did not make adequate disclosure to the judge, (3) the form of the order was defective, and (4) the Order was not properly served on the defendant in Malaysia.

2. Taking these in turn; the claim form and the witness statement in support of the claim made by Samantha Holland, a solicitor at Wragge & Co LLP, were not signed. Accordingly, it is submitted there was no evidence in support of the claimants' application as required by CPR 62.18(6), or the evidence before the judge was defective. It is also submitted that the claim form is defective because the first claimant, Colliers International Property Consultants, is not a legal entity but is an unincorporated association and because the second claimant is not a member of the Colliers Group but a company formed by members to hold trademarks for the benefit of members. Thirdly, it was submitted that the arbitration agreement was not properly before Cresswell J because only the counterpart signed by the defendant was before him and the exhibits to Ms Holland's statement were incomplete.

3. As to non-disclosure, it is submitted on behalf of the defendant that the claimants failed in their obligations of disclosure to the court when making an application without notice, in particular because Cresswell J was not told the claim form was to be served on the defendant out of the jurisdiction. This omission and the terms of the draft order provided led him to order (in paragraph 4) that the defendant was to have the right to apply to set aside the order within 14 days rather than the longer period (24 days) which would be appropriate for service out of the jurisdiction in Malaysia. It was also submitted there was incomplete disclosure because not all the arbitration agreement was before Cresswell J, the exhibits to Ms Holland's statement were incomplete.

4. As to the form of the order, it is submitted that the order is confusing. First, paragraph 2 orders that the judgment be entered within 4 weeks of the Arbitrator's Award but, since the award had been made over 18 months before Cresswell J's order, this was impossible. Secondly, the right to apply to set aside the order was stated in paragraph 4 to be "*within 14 days*" which did not make it clear that this was from the date of service as opposed to the date of the order.

5. It was finally argued that the order was not properly served on the defendant in Malaysia *inter alia* because the documents served on the defendant were incomplete.

6. The defendant also seeks two further orders. The first is that all further steps towards the enforcement of the Award be stayed pending the determination of proceedings instituted in Malaysia on 10 March 2008 against the members of the Colliers group alleging conspiracy. The second is an extension of time to make an application under section 68 of the Arbitration Act 1996 challenging the award on the grounds of serious irregularity. An application to challenge an Award on the ground of serious irregularity must be made within 28 days of the date of the Award or the date on which the applicant was notified of the result of any appeal or review; here 28 days from 31 May2006.

7. The claimants accept the claim form and witness statement were defective in not being signed but it is submitted on their behalf by Mr Collins that the order made by Cresswell J should not be set aside on this ground. He argued that the power under CPR 3.10 to remedy procedural errors should be exercised in this case, and that the appropriate remedy was to by afford the claimants 7 days within which to file and serve copies of the claim form and the witness statement verified by a statement of truth. The claimants do not accept any of the other procedural irregularities alleged. They, however, submit that if there are other irregularities, they do not justify the setting aside of the order.

8. The evidence before me consists of three witness statements by Ms Holland of Wragge & Co., on behalf of the claimants, two witness statements by Samuel Joseph, a partner of Joseph and White, the defendant's solicitors, and affidavits from Rusmah BT Jaafar, an administrative assistant employed by the defendant, and Tangga Peragasam A/L Perianayagam, concerning the time documents came into the possession of Messers Ravi Aida & Partners, the defendant's Malaysian solicitors.

9. **Defects in the claim form and witness statement:** I first deal with the absence of signatures on the claim form and Ms Holland's first witness statement. Ms Holland's second witness statement says that she recalls signing the statement of truth on both documents and can only assume that in error an unsigned copy of the documents was filed at court. Mr Collins stated it had not been possible to find the signed copies but invited me to accept Ms Holland's evidence that what had occurred was a clerical error. He accepted that it was an obvious and glaring error but submitted that, although it was not possible to explain how the error occurred, it should be regarded as accidental.

10. Mr Collins argued that, had the error been spotted by those in the Commercial Court office or by Cresswell J, the application would have been sent back and the error would have been rectified. In these circumstances he submitted it would be disproportionate to set aside Cresswell J's order. He relied on CPR 3.10. This states that, where there has been an error of procedure such as a failure to comply with a rule or practice direction, the error does not invalidate any step taken in the proceedings unless the court so orders, and that the court may make an

order to rectify the error. Mr Collins argued that in the present circumstances in which; (a) the defect in the claim form and the witness statement was accidental, (b) the claimants had offered to pay the defendant's costs in relation to this discrete issue, (c) the defendant has not suffered prejudice from the error because, subject to its submission that time should be extended to enable it to challenge the award under section 68, it is not disputed that the claimants were entitled to an order pursuant to section 66. Mr Zelin did not argue otherwise. He accepted that his objections were to the way matters had proceeded, and that the claimants would not be precluded from serving the claim form again.

11. Although Mr Zelin maintained that the totality of the procedural errors justified setting aside the order, he did not argue that the omission of Ms Holland's signature verifying her statement and the claim form in itself justified that course of action. This was a realistic stance. It would clearly be disproportionate to set aside the order on this ground. The provisions of CPR 22.2 in relation to failure of statements of case provide some assistance. The usual order, as seen from CPR 22 PD 4.2, for failure to verify a statement of case is to allow the party in default a certain time in which to file a statement of case which is verified, failing which the statement of case is to be struck out. The decision of the House of Lords in ***Philips v Symes*** [2008] UKHL 1 shows the breadth of the court's power under CPR 3.10 to remedy procedural errors. In that case, one of the defendants did not receive any of the claim documents posted to it and one was served without a translation of the claim form. Their Lordships said that, where a defendant would suffer prejudice by the exercise of the power under CPR 3.10 (for example, on the facts of that case, by altering the jurisdictional precedence under the Lugano Convention), this should be done only in the most exceptional circumstances. However, they also stated that, in that case, the defendants were not prejudiced by the failure to serve the original claim form but sought to exploit the faults of the Swiss authorities and the Swiss Post Office. Although, in the present case, the fault was that of someone in the claimant's solicitors' office, there is no prejudice to the defendant and thus no reason for adopting a very restrictive approach to the exercise of the remedying power.

12. Mr Zelin, however, relied on a number of other procedural irregularities and failings which he submitted cumulatively justify setting aside the order. The first of these is his submission that the first claimant is not properly described. Colliers International is not a legal person but an association of independent businesses which have joined together under an affiliation agreement granting the members the right to carry on business using the Colliers name. Mr Zelin submitted that, in describing the first claimant as "Colliers International Property Consultants", the application to Cresswell J did not comply with the requirements of the Civil Procedure Rules in cases where an action is brought by a member of a group or association who is acting on behalf of all the other members: see CPR 19.6. Mr Zelin submitted this was not an academic point because the defendant would need to know who the parties to the proceedings are. It would, for instance, need to know against whom it could proceed for costs if it won, and to whom it would be liable for costs if it lost. The members of the association would, in principle, be jointly liable for the costs. Moreover, he submitted that, on the true construction of the affiliation agreement, the second claimant was not a party to that agreement or one of the members, and could not be a representative claimant, because its interests in the Colliers group differed from those of the members.

13. I reject Mr Zelin's submissions on this point. I observe that in the Malaysian proceedings instituted in March, the defendant has identified the claimants in the same terms as they are identified in these proceedings. Mr Zelin submitted that the position in Malaysia in relation to unincorporated associations might be different. Whether or not this is so, what is important is that the arbitration which the claimants seek to enforce was brought by the claimants in these names.

14. The way the claimants are described was raised by the defendant in the arbitration. Its submissions that they were improperly described were rejected. The arbitrator held that each member of the first claimant must be taken as having engaged in the arbitration or having authorised the first claimant's International Governing Committee to pursue the arbitration on its behalf: see paragraph 12.4 of the partial Award dated 30 January 2006.

15. Mr Zelin submits that, whatever the position in an arbitration, the position in English court proceedings is different and the rules in the CPR must be followed. The difficulty with this submission is that it is a requirement of the summary procedure under sections 66 and 101 of the Arbitration Act 1996 that it follows the arbitration. Thus, what is sought under those provisions is permission to enter a judgment in the terms of the Award. It is for that reason that the court is not empowered to enter the judgment in different terms to those of the Award: see for example *Walker v Rowe* [2000] 1 Lloyds Rep 116 in relation to post-award interest. It is clearly appropriate for the parties to be identified in the arbitration claim form in the same way as in which they are identified in the Award. It would, as Mr Collins observed, be a recipe for confusion if, in the context of international arbitrations, English courts used their own way of identifying parties and produced orders with different names to those on the Award.

16. As to the position of the second claimant, the Award ordered the defendant to pay the sums due "*to the claimants*". Whether or not the second claimant has the same interest as the members of Colliers, in relation to the Award it has the same interest as them because the Award was made to the first and second claimants jointly.

17. I turn to the submission (see paragraph 24 of Mr Zelin's skeleton argument) that the application was also defective in that the exhibits to Ms Holland's unsigned statement may have been incomplete. It is suggested, on the basis of the copy of the arbitrators "partial award" delivered to the defendant, that only odd numbered pages of exhibit SCH3 may have been included and that some paragraphs specifically referred to in Ms Holland's witness statement may have been omitted. Mr Zelin did not pursue this in the light of Ms Holland's second statement. She states that she has checked the bundle of documents filed at court which was returned to

Wragges by the court office and confirms that the exhibits filed at court were complete copies of those exhibits. She has also checked the bundle of documents sent to Shearn Delamore, the Malaysian solicitors who served the documents on the defendant, and those included complete copies. Ms Holland states that it may be that, when Shearn Delamore provided a copy of documents to the defendant, there was an error in copying double sided documents so that only one side was copied.

18. The only aspect of the complaint that the documents were incomplete pursued by Mr Zelin concerned the signatures to the arbitration agreement. He submitted that the agreement was not exhibited as required by CPR 62.18(6)(a) because only the counterpart signed by the defendant was exhibited. He argued that it was necessary for the counterparts signed by other members of the Colliers group to be exhibited. This submission is unfounded. The arbitration agreement is in clause 14 of the affiliation agreement. That was exhibited. The exhibited copy was signed by the defendant.

19. The defendant's complaint is that the claimants did not exhibit documents other than the arbitration agreement, namely the affiliation agreements signed by other firms. It is argued this was necessary to prove that the conditions of the affiliation agreements have been satisfied. There was, however, no obligation to exhibit those documents. CPR 62.18(6) is limited to the production of the arbitration agreement. It does not extend to production of other documents relevant to the question of whether or not preconditions to the contract that contained the arbitration agreement have been satisfied. Moreover, this is another issue that was raised and dealt with in the arbitration: see paragraph 3.21 of the partial award dated 27 September 2004 and paragraph 11.4 of the partial award dated 30 January 2006. Neither of these awards is challenged by the defendant. I accept Mr Collins' submission that this argument is also misconceived because it does not take into account the provisions of section 7 of the 1996 Act. Section 7 provides that an arbitration agreement which forms part of another agreement is not to be "regarded as invalid, non-existent or ineffective because that other agreement … is invalid, or did not come into existence or has become ineffective". The section provides that, for that purpose, the arbitration agreement shall be treated as a distinct agreement.

20. **Defects in the Order:** Mr Zelin also argues that Cresswell J's order and particularly paragraphs 2 and 4 are confusing, inappropriate and defective for two principal reasons. The first is that paragraph 2 orders judgment to be entered in terms requiring the sums of money to be paid "within 4 weeks of the award" but that was an impossibility since the award had been made over 18 months earlier. The second is that paragraph 4 of the order, which gave the defendant the right to apply to set aside the order within 14 days and prohibited the enforcement of the award until the end of that period, was confusing because as a matter of construction 14 days means 14 days from the date of the order and not 14 days from service. This submission also formed part of his argument that the claimants had misled the judge by not drawing to his attention the fact that the order would have to be served out of the jurisdiction so that a longer period than 14 days could be put into the order.

21. I reject these submissions. Paragraph 1 of the order is also the inevitable consequence of section 66 of the Arbitration Act in a case where the application to enter the judgment is made after the date of the payment of the award has passed. After that date the sum due under the award is due and, once judgment is entered in the terms of the award, the judgment becomes immediately enforceable. As far as the complaint about paragraph 4 is concerned, any ambiguity could be clarified by taking legal advice. Moreover, any ambiguity did not cause this defendant any prejudice since no steps were taken to enforce the judgment before this application and none have been taken pending its outcome.

22. **Was there non-disclosure in an application made without notice?** I turn to the submissions based on non-disclosure. Mr Zelin, on behalf of the defendant, correctly submits that a party who uses a summary process must observe the rules and must particularly do so in an application without notice: see ***Fitzgerald v Williams*** [1996] QB 657, at 667-668, ***Ghafoor v Cliff*** [2006] 1 WLR 3060, at [46] – [47]; ***Memory Corporation v Sidhu*** [2000] 1 WLR 1443, 1459. Mr Zelin submitted that observance of the requirements is particularly important where it is intended to serve and enforce an order abroad.

23. The defendant's written and oral submissions place some emphasis on the allegation that the claimant did not draw the judge's attention to the fact that the order was to be served out of the jurisdiction and, by producing a draft order containing a 14 day period, misled the judge. Mr Zelin relied on the judgment of Robert Walker LJ in ***Memory Corporation v Shidu*** ibid., at 1454, in which his Lordship referred with approval to the statement of Carnwath J, as he then was, that full disclosure must be linked to fair presentation. He also relied on the judgment of Mummery LJ who, at 1460, stated that there is a special responsibility on those preparing draft orders in an application made without notice to the other party.

24. I do not consider that there was material non-disclosure in this case. Paragraph 3 of the claim form and paragraph 24 of Ms Holland's first statement state that if the court is not prepared to grant the order sought summarily, permission should be given to serve the defendant out of the jurisdiction in Malaysia. Where an application without notice is made to enforce an award under section 66 and the application is granted, CPR 62.18(8) provides that the order may be served out of the jurisdiction without permission. What was done in this case is standard practice in cases in this court involving international arbitration. The claim form and the witness statement sought to deal with the position if the application to grant the order summarily was refused. Had that occurred, and the court required the claim form to be served to serve the claim form out of the jurisdiction, the court's permission would be required under CPR 62.18(4) and CPR 6.20(9). In this case the request made to serve outside the jurisdiction if a summary order was not made, was for permission to serve in Malaysia. The

defendant's address on the claim form was an address in Malaysia. In these circumstances I reject the submission that the omission of express words that in all probability the order would be served on the defendant in Malaysia was a material non-disclosure. With regard to the 24 day period for an application to set aside the order which is relevant where a claim is to be served in Malaysia, again, no prejudice has been suffered because no steps have been taken to enforce the judgment in Malaysia.

25. **Were there defects in the service of the order on the defendant?** Finally, I turn to the service of Creswell J's order on the defendant in Malaysia. The application and Mr Zelin's written submissions complain that there was incomplete service. Reliance was placed on Order 42 and Order 45 rule 7 of the Rules of the High Court of Malaysia (the need for an original document to be produced for comparison where photocopies are served). Mr Joseph's second statement (made on 20 May 2008) states that Ms Chua Hui Fen had acknowledged the covering letter enclosing the application at the defendant's registered office but suggests she had not been shown originals for comparison when service was being effected. He stated that he would use his best endeavours to obtain a statement from Ms Chua, but no such statement was before the court at the hearing on 25 June. Rosmah Bte Jaafar's earlier affidavit (dated 17 April 2008) states she received a sealed envelope from Shearn Delamore's process server, was not shown the original order, and asked Shaharina Bte Shaharin to stamp the covering letter. Someone in the defendant's office stamped and signed the back of the original order. Mr Joseph's second statement suggests this was Ms Chua. Rosmah Bte Jaafar's affidavit suggests it was Shaharina Bte Shaharin. There is no direct evidence from Ms Chua that originals were not shown for comparison.

26. For the reasons set out in paragraphs 23 and 24 of Mr Collins' written submissions, I do not consider that there was improper service in Malaysia. The Rules of the High Court of Malaysia provide that service may be effected against a corporation by leaving a copy of the writ at its registered office: Order 62 Rule 49(1). Rule 4 (3) provides that, where service is effected, the person served shall be entitled on demand to inspect the original writ. The affidavit of service states that the order and the claim form were produced to enable comparison with the copy served. There is no direct evidence from Ms Chua or Shaharina Bte Shaharin that originals were not shown for comparison. Someone in the defendant's office stamped and signed the back of the original order: see paragraph 19 of Ms Holland's second statement. In these circumstances the conflict of evidence cannot be resolved in the defendant's favour.

27. The absence of photocopies of the exhibits to the statement does not, moreover, invalidate service because CPR 62.18(8) provides that service must be effected "as if the order were an arbitration claim form". All that is required is that the order be served. The defendant did not ask the claimants for complete copies of the exhibits. No prejudice has been suffered by the defendant because of the missing pages. Had there been a defect in service, this would not, in my judgment, justify setting the order aside. At most, the defendant could have asked that service be set aside or declared invalid. No such application has been made.

28. I have considered each of the defendant's complaints individually but I bear in mind Mr Zelin's submission that what has to be done is to look at the totality of the procedural irregularities in deciding what remedy to grant. Apart from the absence of signature on the claim form and witness statement, the only irregularity (if it is) is the omission of some pages from the exhibits served on the defendant in Malaysia. The proper remedy is to afford the claimants 7 days to serve the claim form and statement duly verified by a statement of truth.

29. **The application for an extension of time to enable an application under section 68 of the 1996 Act to be made:** I turn to the matters giving rise to the application for an extension of time in which to challenge the Award under section 68 of the Arbitration Act 1996.

30. The defendant has not put before this court evidence which would justify extending time. Such evidence would include the grounds upon which the application under section 68 is sought to be made so that the court can assess the merits of those grounds. All that is said here, is that proceedings have been started in Malaysia alleging a conspiracy involving the claimants and that the way the arbitration was conducted was part of the conspiracy. Mr Zelin relied on the summary of the conspiracy in Mr Joseph's statements. Those stated that the whole arbitration process arose out of the situation engineered by Mr Lee which put the defendant in a position where it could not win the arbitration. Tangga Peragasam A/L Perianayagam's affidavit dated 17 April 2008 states that the vital documents were only obtained and came into the possession of Messers Ravi Aida & Partners, the defendant's Malaysian solicitors during the arbitration and during the Malaysian Court proceedings to stay the arbitration. He states the defendant had no records of correspondence between the claimants and Colliers International Property Consultants (M) Sdn Bhd, one of the defendants to the conspiracy action, in which Mr Lee was involved. He gives no particulars of what documents have been sought or what evidence the defendant has.

31. The irregularities alleged are that the Award was obtained by fraud or contrary to public policy and thus that the case falls within section 68(2)(g) of the 1996 Act. The evidence before me does not, however, identify any fraud on the tribunal or any other conduct which misled the tribunal. It is not shown that anything the claimants said in the course of the arbitration to the arbitrator was arguably inconsistent with the true states of affairs. In these circumstances the strict requirements for a section 68 challenge set out in the authorities, including ***Lesotho Highlands Development Authority v Impregilo SPA*** [2005] 2 Lloyds Rep 310, and ***Elektrim SA v Vivendi SA*** [2007] 1 Lloyds Rep 693 at [76], [80] and [82] are not satisfied. In the former case Lord Steyn stated (at [28]) that "*a high threshold must be satisfied*". In the latter case, Aikens J stated that, unlike the previous legislation, the 1996 Act gives the court no power to remit an Award in cases where fresh evidence comes to light if the new evidence

might have affected the decision of the arbitrator. He concluded that the words "obtained by fraud" must refer to an Award being obtained by the fraud of a party to the arbitration or of another to which a party was privy.

32. Having regard to the guidelines set out in ***AOOT Kalmneft v Glencore Internaltional AG*** [2001] Lloyds Rep 128 by Colman J and approved in *Nagusinina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147 at [38], this is not a case in which an extension of time should be granted. There is a strong policy in favour of finality in arbitrations. Two years have passed since the final award. It was only after enforcement proceedings were commenced that the matter of a section 68 application was raised. Five months have passed since the defendant's application for an extension of time but no application under section 68 has been made or is available to the court in draft form. The claimant has not contributed to the delay. Nether has the arbitrator. The grounds upon which a challenge under section 68 would be made have not been particularised, nor has it been shown that the matters which the defendant wishes to rely on could not have been discovered at the time of the arbitration.

33. There is also a statutory reason for not extending time. The matters relied on in Mr Joseph's statement concern whether the claimants lawfully terminated the affiliation agreement. That was determined in the partial award made on 30 January 2006. The defendant continued to participate in the arbitration after that partial award. Under section 73 of the 1996 Act it is the defendant who has to demonstrate that it *"does not know and could not with reasonable diligence have discovered the grounds for the objection"* when it continued to take part in the arbitration. I have stated that the material put before the court on behalf of the defendant does not arguably support a challenge under section 68(2)(g) or even indicate exactly what that challenge is. It cannot therefore satisfy the requirements of section 73.

34. Finally, it is alleged that the arbitrator exceeded his powers so as to bring the defendants within section 68(2)(b). The terms of reference did not limit the powers of the arbitrator to loss-based damages: see paragraph 2.11 and paragraph 2.14. The issue whether a gain-based remedy as opposed to a loss-based remedy was appropriate was considered and determined in the partial Award. That partial Award is not challenged. Moreover, the right to challenge the partial award on this basis has also been lost by virtue of section 73 of the 1996 Act.

35. For these reasons the defendant's application is dismissed. The claimants are to be given 7 days within which to file and serve copies of the claim form and first witness statement of Samantha Holland verified by a statement of truth. The claimants are to bear the costs occasioned by the irregularity in the claim form and first witness statement. The defendant must bear the remainder of the costs.

MR GEOFFREY ZELIN (instructed by Joseph & White) for the Claimants
MR JAMES COLLINS (instructed by Wragge & Co) for the Defendant