JUDGMENT : MICHAEL BRINDLE QC : Commercial Court. 16th April 2002

1. This arbitration application arises out of an award dated 3 July 2001 ("the Second Award") by the Second to Fourth Respondents ("the Tribunal") constituted under the auspices of the Fifth Respondent ("the System"). The Second Award was made in favour of the First Respondent ("Mr Pharaon") against the Applicant ("Hussmann"). Hussmann disputes the substantive jurisdiction of the Tribunal to make the Second Award in favour of Mr Pharaon and seeks the following relief:-
   (1) an order under Section 67 of the Arbitration Act 1996 ("the Act") on the ground that the Tribunal lacked substantive jurisdiction to make the Second Award and/or
   (2) an order under Section 68 of the Act on the ground that the proceedings leading to the making of the Second Award were affected by serious irregularity and/or
   (3) leave to appeal and an order under Section 69 of the Act on two points of law and/or
   (4) an order under Section 28(2) of the Act that the amount of the Tribunal's and the System's fees should be adjusted.

2. At the outset of the hearing it was made clear to me that the fourth application, which does not involve Mr Pharaon, should be adjourned to be dealt with after resolution of the first three applications. Accordingly none of the Second to Fifth Respondents has appeared. During the course of the hearing I was informed that the applicant no longer pursues the third application, i.e that under Section 69 of the Act. That leaves the first two applications, which fall naturally to be considered firstly under Section 67 and thereafter under Section 68 of the Act.

3. The tangled history of this arbitration reference requires detailed analysis. In short, the Applicant's complaint is that although Mr Pharaon was a party to the original arbitration agreement giving rise to the reference, he was not a party to the reference itself, and the Tribunal had no jurisdiction to make an award in his favour, even if another tribunal could be appointed under the arbitration agreement to determine his rights and liabilities as against the Applicant. Even if Mr Pharaon was a party to the reference, it is contended that the Tribunal, having previously made an award ("the First Award") in favour of a legal entity distinct from Mr Pharaon, was thereafter functus officio and disabled from making the Second Award in favour of Mr Pharaon. A supplementary complaint is made arising out of Mr Pharaon's alleged failure to comply with the rules of the System. These are the complaints under Section 67 of the Act.

4. The complaint under Section 68 of the Act has two principal elements. Firstly, complaint is made that the Tribunal did not allow Hussmann properly to present its defence to the claim made by Mr Pharaon which led to the Second Award. Further or alternatively complaint is made that there was bias, or a real danger of bias against Hussmann exhibited by the Tribunal which provides a further ground for the intervention of the Court under Section 68 of the Act.

5. The issues which arise can therefore be itemised as follows:-
   (1) (a) was Mr Pharaon a party to the reference?
   (b) if so, was the Tribunal nevertheless functus officio so as to be disabled from making the Second Award in favour of Mr Pharaon?
   (c) Was Mr Pharaon in breach of the rules of the System and, if so, did that affect the Tribunal's jurisdiction?
   (2) (a) Were the Tribunal's proceedings affected by serious irregularity causing substantial injustice to the Applicant by virtue of the Tribunal's failure or refusal to allow Hussmann properly to present its defence to Mr Pharaon's claim?
   (b) Were the proceedings before the Tribunal affected by serious irregularity causing substantial injustice to the Applicant by virtue of bias or the real danger of bias of the Tribunal against Hussmann?

6. Issue 1(a) is the central and most difficult point requiring resolution. The history of the reference has been bedevilled by mistakes and misunderstandings by all parties and indeed by the Tribunal itself. I have wondered whether these errors and mistakes have always been made in good faith, but there is no evidence before me, nor have I been pressed with any sustained submission to the effect that any party has been guilty of deliberately misleading any other party or the Tribunal at any stage. Nonetheless, the confusions remain bewildering.

Issue 1(a)

7. It is important at the outset to distinguish between the question as to who the parties were to the original arbitration agreement, on the one hand, and who the parties were to the arbitral reference to the Tribunal, on the other. The second question does not necessarily yield the same answer as the first. It is the second question which is essential to the current dispute. I am greatly assisted in resolving it by the judgment of Thomas J given in respect of the challenge to the First Award on 19 April 2000, now reported at [2000] 2 Lloyd's Rep. 83. I shall refer to that as the Main Judgment.

8. The relevant story begins with the Sales and Service Agreement dated 5 January 1990 between Hussmann Craig Nicol limited ("HCN") and Al Ameen Development and Trading Establishment of Saudi Arabia ("Establishment"). That Agreement contained an arbitration clause referring any dispute to arbitration under the rules of the System. The Applicant is the successor in title to HCN and nothing turns on the distinction between them. However, the precise legal identity of Establishment is crucial to the dispute between the parties. It has already been held by Thomas J that Establishment, as a party to the Sales and Service Agreement, was a registered trading name of Mr Pharaon, having no legal personality distinct or separate from him. Establishment was registered by number 101007415.

9. By an agreement made on 25 December 1992 Mr Pharaon incorporated the business carried on by him through Establishment into a limited liability Company known as Al Ameen Development and Trading Co Limited, with registration number 1010122156. I refer to this Company hereafter as "the Company". Mr Pharaon's family held 100% of the shares in the Company. After incorporation, the business of Establishment was transferred to it and on 14 February 1994 the Ministry of Commerce of Saudi Arabia gave approval to the transfer. A circular was sent dated April 4 1994 to all those who did business with Establishment, including HCN, which stated that Establishment had changed its name. That notification enclosed a copy of the Gazette paper dated 26 October 1993 in Arabic, which paper made clear that the business of Establishment had been transferred to the Company. HCN has consistently contended that it did not know of the transfer of the business from Establishment to the Company.

10. Hussmann, a successor to HCN, made an application for arbitration on or about 7 February 1997 against Establishment. The Application named the Respondent as "Al Ameen", which was itself defined as follows:- "*"Al Ameen" means Al Ameen Development and Trade Establishment (also known as Al Ameen Development and Trade Co.), a limited liability Company incorporated under the laws of the Kingdom of Saudi Arabia (Commercial Registration No. 7415) and having a place of business at PO Box 166, Rhyadh 11411, Saudi Arabia*;".

11. Thomas J has held in the Main Judgment that the application for arbitration was made against Establishment, i.e. Mr Pharaon under his trading name, despite the mistaken belief on the part of HCN and/or Hussmann to the effect that Establishment was a limited liability company. They were simply wrong to conclude that. They knew nothing of the transfer of the business of Establishment to the Company, and identified Establishment by reference to its true registration number, not that of the Company. I refer in particular to paragraphs 8, 9, 17(4) and 20 of the Main Judgment. There is no doubt that it was Establishment which was the respondent to the application.

12. On 22 July 1997 Dr Nadar Gangi was nominated by Pearson Lowe, solicitors instructed by Mr Pharaon and the Company, as the arbitrator for the respondent or respondents to the arbitration. As recorded by Thomas J, it is not clear whether any distinction was drawn at that stage between Establishment, the Company and Mr Pharaon, nor am I clear as to precisely what role Mr Pharaon played in the instruction of the solicitors. There is, however, nothing to suggest that Dr Gangi was not nominated by Establishment, i.e. Mr Pharaon. Paragraph 9 of the Main Judgment makes this clear. It might be possible for an arbitration request to be addressed to one party but answered by another, preventing the making of any effective reference. That is not the case here. The arbitration application was addressed to Establishment and Establishment responded, even if the Company was also involved in appointing the arbitrator. Dr Gangi was later replaced by Dr Anvari.

13. On April 10 1997 Hussmann delivered its Statement of Claim, again against Establishment, repeating the earlier definition of "Al Ameen". On 2 February 1998 a Reply and Counterclaim was delivered by Al Ameen which stated that the respondent adopted the definitions in the Statement of Claim, which clearly included the definition of "*Al Ameen*" itself. Confusion, however, was sown by paragraph 4.5 of this document which referred to the separate commercial registration of Al Ameen in a document exhibited as Appendix 3. This document was in fact the commercial registration of the Company, not of Establishment. There may have been confusion in Mr Pharaon's own mind at this point, and paragraph 17(5) of the Main Judgment supports this. This recites a statement made by Mr Pharaon in November 1998, a copy of which was shown to me in a bundle marked "Annex 9", to the effect that Mr Pharaon thought that the change from Establishment to the Company was little more than a name change. Whatever the confusion and its cause, it seems to me that the mistake in paragraph 4.5 of the Reply and Counterclaim was insufficient to render the respondent to the arbitration anyone other than Establishment.

14. Mr Kinsky, Counsel for Hussmann, also relied upon paragraph 17.1 of the Reply and Counterclaim, which makes a claim for compensation for past and future loss, which could only be claimed, argues Mr Kinsky, on behalf of the Company. Whether that is strictly legally correct, I do not think that this paragraph indicates that the respondent to the arbitration, and therefore the counterclaimant, was anyone other than the party to whom the application for arbitration had originally been addressed, i.e. Establishment. I note in particular paragraph 20 of the Main Judgment, where Thomas J rejected the suggestion that there might have been an ad hoc arbitration agreement between the Company and HCN/Hussmann because of the definitions of Al Ameen in the pleadings and their references to incorporation. Thomas J rejected this suggestion, reaffirming his earlier finding that the definition, adopted by both claimant and respondent, referred to Establishment.

15. On 30 August 1998 Mr Pharaon produced a witness statement, containing information about Al Ameen in paragraph 4. I find this a very puzzling paragraph. It refers to Al Ameen as a limited liability company initially established in 1974. It refers to 25 December 1992 as the date when four new partners joined the Company, rather than as the date when the business was transferred from the unincorporated entity to the Company. How Mr Pharaon can himself have been so confused I fail to understand, but I have no material to support a deliberate intention to mislead. What he said was wrong, and may have misled, but it does not seem to me that the contents of this witness statement can change the question as to who the parties were to the arbitral reference. It seems to me that those parties must have been Hussmann and Establishment, i.e. Mr Pharaon, even if both parties to the reference were confused as to Establishment's true identity.

16. At about this time, and prior to the commencement of the arbitration hearing, Hussmann/HCN obtained legal advice in relation to the status of Establishment from Mr Yousef Al-Jadaan, a lawyer practising in Riyadh. Mr Al-Jadaan advised that Establishment was an individual establishment which had been deleted from the commercial register on 16 February 1994 and had ceased to exist as a legal entity. It had been replaced by the Company. It was not true that Establishment had ceased to exist as a legal entity, although it was true that Mr Pharaon could

not continue to trade under the name of Establishment, since Establishment's registration ceased as from 16 February 1994. Whether by luck or judgment, Hussmann did not immediately desist from its claim against the Establishment but rather continued with it. In paragraphs 23 and 24 of the Main Judgment Thomas J analysed the decision of Hussmann's legal advisors to continue with the arbitration. He found that they were quite entitled to do so. As Thomas J found "*the Establishment did exist and, in fact, they [Hussmann] were right in their decision to continue with the arbitration*".

17. On the first day of the arbitration hearing Hussmann reaffirmed that the parties to the arbitration were themselves and Establishment. They added a footnote to the earlier definition of Al Ameen in the following terms:- "*Paragraph 1.2 of the Statement of Claim fails to distinguish between two separate legal entities: Al Ameen (as defined above) which ceased to exist on 16/2/94 (see statement of Mr Al-Jadaan) and Al Ameen Development and Trade Co Limited (Company registration n. 1010122156), which came into existence at about the same time. The Statement of Claim is wrong not to make the distinction. The latter entity will be referred to by Hussmann as "Al Ameen Company Limited" to distinguish it from the unincorporated Al Ameen.*"

18. This made it clear that Hussmann were aware of the distinction between Establishment and the Company, although they wrongly believed that Establishment had ceased to exist. Nonetheless they continued to advance a case against Al Ameen, meaning the unincorporated Al Ameen, i.e. Establishment. They did not seek to argue that the arbitration reference, as hitherto constituted, was a reference between Hussmann and the Company. They did however seek to amend their pleadings. These amendments sought to correct the original mistake made in the Statement of Claim, whereby Al Ameen was described as a limited liability company, albeit with the correct registration no. 7415. The amendment also sought to counter an argument that the counterclaim could be brought on behalf of the Company by virtue of the "assignment" of 25 December 1992, of which Hussmann alleged that they had not had notice until the second day of the arbitration hearing. The amendment strongly reasserted that the only party that could bring or succeed upon the counterclaim was Al Ameen (i.e. Mr Pharaon).

19. These amendments were opposed, and this opposition has given me some cause for concern. Mr Kinsky has posed the question as to who it could have been who opposed the amendments. Mr Bird of Counsel, representing the respondent (whoever that was) made the opposition, in order to be able to argue that the Company could indeed make the counterclaim. Surely, argues Mr Kinsky, the natural inference is that the respondent for whom Mr Bird was acting was not Mr Pharaon, but rather the Company. I see the force of this submission, but I do not think it suffices to support the conclusion that somehow or other Establishment had been supplanted by the Company as the respondent to the arbitration. Up to this point, as set out above, it is clear that Establishment, whatever misconceptions the parties may have had about it, was the respondent. It was, however, clearly the argument made against Hussmann that the Company, by virtue of the assignment, was entitled to an award. It may be said that the Company was purporting to be a party, although it never properly was one. Alternatively it may be that it was Establishment, i.e. Mr Pharaon, who was arguing in favour of an award being made to the Company. The precise legal basis of the position of Mr Bird and his clients is unclear, but I conclude that these facts do not constitute or evidence the substitution of the Company as a party to the reference for Establishment, which had certainly been the party to the reference up to this point.

20. This is supported by the closing submissions on behalf of Hussmann. Hussmann argued that, whether or not the amendments were allowed, Mr Pharaon remained the party entitled to sue or be sued in the arbitration (paragraph 34). Those submissions concluded in paragraph 35:- "*The Tribunal cannot ignore what it now knows about the identity in capacity of the parties on the grounds that the point is not pleaded. There is no suggestion that Al Ameen Company Limited needs to adduce further evidence on the point. To purport to make an award in favour of an entity which the Tribunal knows is not a party to the arbitration would be a serious jurisdictional error.*"

21. That submission was entirely well founded. The Tribunal made an award in favour of the Company in the First Award and Thomas J held that they made a serious jurisdictional error in so doing. It is true that the essence of his reasoning was that the Company had never been a party to the arbitration agreement and did not become so by the assignment, in particular by reference to the requirements of Saudi law. The question of who was or was not a party to the arbitral reference, as opposed to the arbitration agreement, was not directly in issue before Thomas J, but it seems to me clear from the Main Judgment that the learned judge was indeed satisfied that Establishment was not only the original contracting party, but was also the party sued by Hussmann in the arbitration and the party which responded in the reference. Matters went seriously off the rails as and when it was sought to obtain an award in favour of the Company, to which temptation the Tribunal succumbed, but I do not think that the party to the reference changed or could have changed from Establishment to Company by virtue of the facts relied upon by Hussmann.

22. I have considered whether it might be argued that Establishment and Company were both parties to the reference. If that was so, it would not assist Hussmann. It is difficult, however, to see how both could have been proper parties to the reference. The correct analysis seems to me to be that Establishment was the original party to the reference and its status as such was never disturbed, despite the confusions and legal errors which ensued. The Company may have purported to behave as a party to the reference, but it was never a proper party. An award in its favour was secured, whether by its own efforts or by those of Mr Pharaon on its behalf, but there was no jurisdiction to make that award. No pleading ever clearly set out a claim by the Company to be entitled to succeed by virtue of the assignment. It may be that the Company sought to exploit the original confusion in the Reply and Counterclaim, or it may be that Establishment, i.e. Mr Pharaon, the true party to the reference, sought inadmissably but effectively to obtain an award in the Company's favour. One can see readily how it might have

appeared to have been in Mr Pharaon's interest to secure an award in favour of Company rather than accept the position as set out in Hussmann's amendments, which might have lead to a smaller award being recovered.

23. In October 1999 Hussmann issued an application notice challenging the First Award. Its Skeleton argument is replete with references to Mr Pharaon and/or Establishment as being the other party to the arbitral reference. Hussmann specifically asserted that although there were two "Al Ameen" legal personalities, it was Establishment against whom Hussmann had always proceeded, and was therefore the proper party to any counterclaim. The Main Judgment of Thomas J has already been referred to. A further hearing took place on 31 July 2000 which Thomas J declined to order that the Court should declare the First Award to be an award in favour of the Establishment. I do not think that those further proceedings cast any further light on the issue as to who was or was not a party to the arbitral reference.

24. Despite the forceful arguments advanced by Mr Kinsky on behalf of Hussmann, I hold that Mr Pharaon was not only a party to the arbitration agreement, but also to the arbitral reference to the Tribunal, despite the many confusions and misapprehensions which had bedevilled this matter. There was therefore jurisdiction of the Tribunal to make the Second Award, subject to the functus officio issue. I should note that I was invited to find that in any event Hussmann are estopped from denying that Mr Pharaon was a party to the arbitral reference. In the light of my conclusion, it is not necessary to express a view on this. Had I had to do so, I would have been disinclined to find the estoppel argued for. There was no common assumption of fact capable of giving rise to an estoppel by convention, and an estoppel by representation would be very difficult to establish where Hussmann's submissions were rejected by the Tribunal and can hardly have been relied upon by the other side. However, it is not necessary to take this point further.

Issue 1(c)

25. I do not think that issue 1(c) really adds anything, and Mr Kinsky in oral submissions seemed inclined to agree. If Mr Pharaon was not a party to the reference, that is the end of the matter and Hussmann is entitled to succeed in its application under Section 67 of the Act. Conversely, if Mr Pharaon was a party to the reference, then I see no force in the points made in paragraph 38 and 39 of Hussmann's Skeleton Argument, and I accept paragraph 30 of the Skeleton Argument adduced on behalf of Mr Pharaon. It is in any event not at all clear to me that a failure to follow the rules of the System necessarily deprived the Tribunal of jurisdiction to make the Second Award. I say nothing more about issue 1(c), but turn now to issue 1(b).

Issue 1(b)

26. Hussmann's simple submission is that the Tribunal had exhausted its jurisdiction in making the First Award, despite its defects, and that it was not open to it to pick up the reference again and make a Second Award, this time in favour of Mr Pharaon rather than the Company. This argument was outlined at the hearing before Thomas J on 31 July 2000, but not then developed. Thomas J's approach seems to have been to leave the matter of any further award to the decision of the arbitrators, a point relied upon by Mr Siberry QC on behalf of Mr Pharaon. I accept, however, that the Judge expressly left it open to Hussmann to run the functus officio argument in relation to any further award.

27. Hussmann relies upon the fact that Thomas J did not remit the award back to the arbitrators, and indeed decided on 31 July 2000 that he had no power to remit pursuant to Section 67 of the Act. To permit a Second Award in favour of Mr Pharaon would amount in effect to the same as the result of a remission. It is argued that the jurisdiction of the Tribunal cannot revive in this way.

28. In support of its position, Hussmann relies upon authorities predating the 1996 Act relating to the setting aside of arbitration awards. Mustill and Boyd *Commercial Arbitration* (Second Edition) 1989 at 565 states as follows:- "*As regards setting-aside, it is clear that the effect of an order is to deprive the award of all effect, so that the position is the same as if the award had never been made. It is much less clear what happens to the arbitration after the award has been set aside. Logically, the consequence should be that the arbitration reverts to the position in which it stood immediately before the arbitrator published his award; i.e. that he is not yet functus officio and remains seized of the reference. We have not been able to find any reported cases in which this result (which has the same practical effect as remission) has been contemplated, and it would be entirely inconsistent with the assumption in the more recent cases that setting-aside should in the main be reserved for instances where the conduct of the arbitrator has made it undesirable to entrust him with the further conduct of the reference. …It appears that so far as the Courts had given any consideration to the consequences of setting aside, they have assumed that the Order not only annuls the award, but also desseizes the arbitrator of the reference, so that the whole of the arbitral process has to be recommenced. The dispute is, however, still susceptible of arbitration, albeit with a freshly constituted tribunal*."

29. This is the position adopted by Mr Kinsky on behalf of Hussmann. Rhidian Thomas *Appeals from Arbitration Awards* [1994] 217-218 is to similar effect. He states as follows:- "*When an appeal is allowed the gravest response open to the Court is to set aside the award. The practical affect of the setting-aside is to render the arbitral reference wholly ineffectual and wasteful, for the arbitration will have failed to produce a valid and binding award. For this reason it may be anticipated that the Court will exercise the power cautiously and only in appropriate circumstances. …The precise effect in law of a setting-aside order is surprisingly a matter about which there continues to exist much uncertainty. Certain matters are however clear. The order deprives an award of all legal and factual effect. The order vacates the award: accordingly there is no award and no award ever existed or it is difficult to apprehend that the order operates otherwise than retroactively. …There is however uncertainty as to the precise effect of a setting-aside order on the reference. In point of principle it is arguable that the effect of setting aside an award is to revive the*

jurisdiction of the arbitrator and in consequence, if the parties so desire, the dispute may be returned to the arbitrator for resolution, in the light of the judgment of the Court. Following the judicial order it cannot be said that there has been a final decision, and it is equally difficult to suggest that the arbitrator is functus officio. …That principle and authority may not in harmony is suggested by the way a setting-aside order appears to be understood in the context of the statutory and common law jurisdiction to review awards. In the sphere of non-appellate review a setting-aside order appears to have the effect of not only annulling the award but also removing the arbitrator from his superintendence of the reference. The jurisdiction of the arbitrator can only be protected if the award is also remitted to his reconsideration. Otherwise, if the parties remain intent on arbitrating the dispute, the dispute must be revived before a new arbitrator or tribunal."

30. Both authors rely upon the decision in ***Stockport Metropolitan Borough Council v O'Reilly*** [1983] 2 Lloyd's Rep 70. This authority seems to me to be inconclusive. I appreciate the common law position, set out in ***Mordue v Palmer*** LR 6 Ch. App. 22, that an arbitrator having signed his award is functus officio, which common law position has been mitigated by the statutory power to remit, fully considered by Mr Justice Rix in the ***Avala*** [1996] 2 Lloyd's Rep. 311. Nevertheless, I am not convinced that in all cases of setting-aside the arbitral reference is wholly destroyed. Of course, where a setting-aside order has been made in circumstances where it is undesirable to entrust the existing arbitrators with the further conduct of the reference, it may well be the intention of the Court that the reference should not be resumed. But in such cases, the power to remove an arbitrator, now contained in Section 24 of the Act, will be available.

31. In the most recent case drawn to my attention on this issue, the decision of Colman J in ***Pacol Limited v Rossakhar*** [2000] 1 Lloyd's Rep. 109 an application was made to set aside an award on the basis of serious irregularity within Section 68 of the Act, to which Colman J acceded. As a postscript to his judgment he considered whether the case before him was one where he should exercise his jurisdiction to set the award aside or merely to remit the award to the Tribunal for reconsideration (both remedies being available in respect of Section 68). He said this:- "*I have come to the conclusion, however, that notwithstanding the provisions of Section 68(3) [permitting remission], this is a case where it would be inappropriate to remit the matters in question to the Tribunal for reconsideration. In practice, the whole arbitration is going to have to be reopened and probably re-pleaded. There is probably going to have to be further evidence and a whole new series of submissions and orders made for the purpose of arriving at a conclusion on the question of liability. In those circumstances it seems to me it would be quite wrong for the arbitrators to build anything on the structure of the award which they have already made and I have no doubt whatsoever that this is a paradigm of a case where the award ought to be set aside.*"

32. It seems from this that Colman J envisaged that the effect of his setting-aside order would not be to tear up the reference, but that the matter would go back to the same arbitrators, even though it would be quite wrong for them to build anything on the structure of the award which they had already made. This authority does not support Mr Kinsky's argument, although again it is inconclusive.

33. If the matter remained there, it might be difficult to determine whether or not the effect of the order of Thomas J, had he set aside the First Award, would have permitted the arbitrators to start again. However, Mr Siberry's prime submission is that whatever the position with setting-aside, where the Court under Section 67 makes a declaration that an award is of no effect, it means just that. The award is a nullity and the position reverts to where it was before it was uttered. I accept that submission. It is hard to see how the Tribunal can be functus officio where its award is declared a nullity. The considerations adverted to by Mustill and Boyd and by Thomas to the effect that in cases amounting to effective misconduct it is undesirable for matters to be referred back to the same arbitrators have no relevance at all in respect of Section 67, which deals with jurisdictional problems only. If there has been no misconduct or serious irregularity under Section 68, it is hard to see any good reason why the arbitrators whose award has been declared a nullity for jurisdictional reasons should not, if they still possess jurisdiction in relation to matters referred to them, make a further award within their jurisdiction.

34. Mr Siberry relies on Merkin *Arbitration Law* (1991-2000) paragraph 18.25, where it is stated as follows:- "*Under a new provision, the Arbitration Act 1996, s. 68(3)(c) the Court may additionally declare that the award is, in whole or in part, of no effect. The point of this new provision is that where the arbitrators lack jurisdiction to act in a particular way, the award is a nullity rather than valid but liable to be set aside, and s.68(3)(c) of the 1996 Act removes any doubt as the ability of the Court to provide the appropriate remedy in these circumstances.*"

35. The present case is specifically concerned with Section 67(1)(b). The Tribunal's purported decision on the merits has been declared to be of no effect by reason of the Tribunal's lack of substantive jurisdiction. It is simply a nullity. It seems to me that, whatever the position in relation to setting-aside, there is in principle nothing in the declaration made by Thomas J in the present case which deprived the Tribunal of jurisdiction to make a proper award between the two parties to the arbitration agreement and the reference.

36. It therefore seems to me that the Tribunal was not functus officio when it came to consider making the Second Award and that the Second Award does not suffer from any lack of substantive jurisdiction such that it can be challenged under Section 67 of the Act. I hold that Hussmann fails in relation to each of issues 1(a), (b) and (c) and that its application based on Section 67 of the Act must be dismissed.

Issue 2(a)

37. Hussmann complains that a serious irregularity occurred, in that when the matter returned to the Tribunal for consideration of Mr Pharaon's demand for an award in his favour on the counterclaim, the Tribunal denied

Hussmann the opportunity properly to present its case. It is important to point out straightaway that the complaint here is under Section 68, procedural irregularity, and not on a point of law as to whether or not the Tribunal was right or wrong in ruling against Hussmann on the merits. If it were the case that the Tribunal had simply refused to hear Hussmann as to whether there might be defences available to them against Mr Pharaon which were not available to them against the Company, that would be one thing. If, however, the Tribunal considered the submissions of Hussmann as to what differences there were, then procedural irregularity is hard to discern. There might then be an error of law and a possible appeal under Section 69, subject to all the difficulties there entailed. An error of simple fact would simply not be challengeable at all.

38. The procedural irregularity relied upon is essentially the failure by the Tribunal to comply with Section 33 of the Act, namely the duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case in dealing with that of his opponent. That section must of course be read alongside Section 34 of the Act, which provides that it shall be for an arbitral tribunal itself to decide all procedural and evidential matters. Hussmann accepts that the Tribunal "purported to consider the further points raised by Hussmann" but submits somewhat boldly that all that the Tribunal actually did was to follow Mr Pharaon's invitation to substitute his name for that of the Company without more.

39. Hussmann complains that the agenda for the hearing on 16 May 2001 was set by the Tribunal itself. This is a strange complaint. I see nothing wrong with the letter of 6 February 2001 in which the Tribunal Chairman stated that the Tribunal proposed to proceed with the Arbitration in order to decide two issues, namely (1) whether they had jurisdiction to proceed or were functus officio and (2) whether, if they had jurisdiction, they should proceed with the publication of a new award as suggested by Mr Pharaon's solicitors or whether they should adopt any other procedure. Having received extensive written submissions from the parties, the Chairman wrote again on 30 March 2001 inviting further submissions on the second issue in advance of the proposed oral hearing.

40. On 1 May 2001 Hussmann's solicitors sought to prevent any consideration by the Tribunal of issues that there might be between Hussmann and Mr Pharaon in the event that the Tribunal should decide (a) that it had jurisdiction but (b) that it would not be right simply to substitute Mr Pharaon's name in the award for that of the Company. Hussmann's solicitors made it clear that it would wish to adduce further submissions and evidence. It was against this background that the matter returned to the Tribunal, who heard submissions from the parties prior to making the Second Award dated 3 July 2001.

41. The Second Award is a fully reasoned one. The Tribunal considered the effect of the Main Judgment of Thomas J and rehearsed fully the arguments to the effect that the Tribunal was already functus officio, as well as the question as to whether or not Mr Pharaon had ever been a party to the reference. The Tribunal also considered the effect of the Order of Thomas J of 31 July 2000 and then came, in paragraph 53ff, to consider Hussmann's arguments as to why, even if the Tribunal were to hold that Mr Pharaon did have standing in the reference and that their authority was not spent, they should nevertheless decline to publish a fresh award in Mr Pharaon's favour.

42. The Tribunal recited the three reasons put forward by Hussmann, namely (1) limitation of Mr Pharaon's claim for commission on direct sales, (2) the argument that Mr Pharaon's entitlement to damages was not the same as the Company's entitlement and (3) the argument that there was a real danger of bias on their part. Each of these was then considered in paragraphs 54 to 62. It is difficult to see how it can be said that the Tribunal did not consider Hussmann's arguments. It is true that the Tribunal did not accede to the argument that further evidence should be admitted, but the Tribunal did consider whether or not further evidence should be submitted and rejected Hussmann's submissions to that effect. It seems to me that this was a decision which fell within the legitimate exercise of the Tribunal's powers under Section 34 of the Act, and did not involve a breach of the Tribunal's fundamental duties under Section 33.

43. As to limitation, once it had been decided that Mr Pharaon had always been a party to the reference, it is difficult to see what merit there could be in the limitation objection to Mr Pharaon's claim. The Tribunal said as much in paragraph 55 of the Second Award. It was at least open to the Tribunal to find as they did that the suggested limitation argument did not provide a reason for declining to make an award in favour of Mr Pharaon. I see no trace of any procedural irregularity, still less a serious irregularity here.

44. The second point concerned the difference in the measure of damages recoverable by Mr Pharaon and that recoverable by the Company. Hussmann's submission is fully recorded in paragraph 56. In particular it is recorded that evidence on Saudi law was submitted to be necessary. The submission is then dealt with in paragraphs 57 to 60. The reasoning in those paragraphs might be open to challenge if Hussmann had an unrestricted right of appeal on fact and law, which they do not. The issue here is a procedural one. Did the Tribunal deny to Hussmann the right fairly to present its case and was the refusal to admit further evidence a breach of the principles reflected in Section 33 of the Act?

45. I think the answer to that question must be no. The only legitimate complaint could be that the reasons given by the Tribunal for ruling against Hussmann and in particular for declining to accept further evidence of Saudi law were not good ones. Serious irregularity requires more than this. It is no doubt for this reason that Hussmann have felt constrained to submit that the Tribunal, whilst purporting to consider the further points raised by Hussmann, did not really do so. If that was the case, then that might well be serious irregularity, but there is no basis in the material before me for concluding that the Tribunal did other than to consider the submissions made by Hussmann, including the argument that further evidence was needed, and in good faith reject them. I do not decide this point

on the basis of the absence of serious injustice to Hussmann. If there was a serious irregularity, it was not a trivial or minor matter. The simple fact is that there was no serious irregularity.

Issue 2(b)

46. The allegation here is extremely thin. It is pointed out correctly that the history of this reference has been turbulent. The First Award of the Tribunal was set aside, and although this was principally on grounds relating to jurisdiction, the conduct of the reference by the Tribunal did not escape criticism by the Court. However, that criticism was not strongly stated, and I see no basis for an argument that the Tribunal had so conducted itself that a reasonable doubt would arise in the mind of a reasonable man as to the impartiality of the Tribunal in considering the matter when it returned to them after the Main Judgment of Thomas J.

47. The further matter relied upon is the fact that the fees charged by the Tribunal members were adjusted by Thomas J. The adjustment was, however, a small one, even though the learned judge did describe the fees charged as "quite extraordinarily high". It is true that the members of the Tribunal incurred legal costs of some £22,000 in resisting the attack on their fees and disbursements, which costs they were unable to recover from Hussmann. At the time of the hearing on 16 May 2001 the Tribunal had not revealed to Hussmann the fact that they had been indemnified as to legal costs by the Lord Chancellor's Department, a fact revealed in the joint Witness Statement of the Arbitrators herein dated 2 October 2001.

48. I am unable to see how any of these matters could be said to give rise to a real possibility or a real danger of bias, whether applying the test in ***R v. Gough*** [1993] AC 646 or that in ***Re Medicaments and Related Classes of Goods (No. 2)*** [2001] 1 WLR 700 or that in the decision of the House of Lords in ***Porter v. McGill*** [2002] 2 WLR 37. No fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Tribunal, when the matter returned to them for consideration of the making of a further award, was or might be biased.

49. A further point arises out of an observation made by the Tribunal itself in paragraph 62 of the Second Award. The Tribunal noted that Hussmann had not sought to remove them either under Section 24 of the Act or under Article 22.3 of the Rules of the System. It seems to me that if an objection were to be made on the basis of the real possibility, or the apprehension of a real possibility of bias on the part of the Tribunal, then either Article 22.3 of the Rules or Section 24 of the Act should have been deployed. It should be noted that Section 24 of the Act specifies as a ground for removal of an arbitrator that "… circumstances exist that give rise to justifiable doubts as to his impartiality". Hussmann did not use that section nor employ their rights under the Rules.

50. What they did instead was to invoke Section 68 of the Act which deals with serious irregularity. In order for this section to be invoked the complainant must show that a serious irregularity has in fact occurred. It seems to me that merely to invoke an apprehension of the possibility of bias is not to establish serious irregularity. In order for Section 68 to be invoked it seems to me that Hussmann would have to show actual bias on the part of the Tribunal. No such attempt has been made or could be made. It seems to me that, as stated by Cresswell J in the ***Petro Ranger*** [2001] 2 Lloyds Rep 348:- "*Section 68 is designed as a long stop, only available in extreme cases, where the Tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in Section 68 that justice calls out for it to be corrected.*"

51. Even if I was otherwise satisfied that the allegation of bias or the apprehension of bias could bring Section 68 into play, I should add that I would not have been satisfied that on this part of Hussmann's argument, i.e. issue 2(b) serious injustice had been established. Again, to quote Cresswell J in the ***Petro Ranger***:- "… *it is only in those cases where it can be said that what has happened is so far removed from what can reasonably be expected of the arbitral process, that the Court will take action.*"

52. Mr Siberry had a final argument based upon Section 73 of the Act. He argued that Hussmann had in any event lost any right to object on the grounds of bias. He argued that Hussmann could and should have taken any objection at the latest in November 2000. By that time they knew all of the criticisms which Thomas J had made and the costs orders relating thereto. I was referred to the Order drawn up recording those matters dated 23 June 2000. Nonetheless, the allegation of bias or the apprehension of bias was not made until Hussmann's submissions dated 6 April 2001. They had known since November 2000 that Mr Pharaon was seeking a second award and kept quiet for more than four months on the issue of bias. Between 14 November 2000 and 6 April 2001 Hussmann's solicitors had written a number of letters to the Tribunal and to Mr Pharaon's solicitors and had never taken the point about bias.

53. Section 73 of the Act is a stringent provision. It may seem somewhat harsh for it to apply here, when the point relating to bias was raised in the course of written submissions and well before the oral hearing on 16 May 2001. Nevertheless, it seems to me that Mr Siberry's submission is well founded and that Section 73 does indeed preclude the attempt to invoke Section 68 to found a case of either actual or perceived bias. For reasons I have already given, this finding is in my judgment not necessary, since in any event Hussmann's application on this ground would have failed.

Conclusion

54. For the reasons set out above I reject all of Hussmann's objections to the Second Award. I will consider what further directions should be given as to the adjourned application relating to the Second to Fifth Respondents and will hear the parties as to the appropriate form of order I should make to reflect this Judgment and as to costs.