

JUDGMENT : MR JUSTICE JACKSON: TCC. 19<sup>th</sup> April 2005

1. I thank both the parties for withdrawing for half an hour at the end of the submissions and argument. I have considered matters during that half hour, I have considered the documents which Mrs. Jayson handed up to me, and I am now in a position to give judgment.
2. This judgment will be in four parts, Part 1 – Introduction, Part 2 – The facts, Part 3 – The present proceedings, and Part 4 – Decision.

**Part 1 – Introduction:**

3. In these proceedings the claimant, Claire & Co. Limited, seeks to challenge an arbitrator's award on a number of grounds. The respondent in the arbitration, and the defendant in the present proceedings, is Thames Water Utilities Limited. The defendant is a limited company which is engaged in the business of supplying water and maintaining the drainage system in the London area.
4. Two statutes are relevant to the present proceedings. These are the Water Industry Act 1991, which I shall refer to as 'The 1991 Act', and the Arbitration Act 1996, which I shall refer to as 'The 1996 Act'.
5. Section 158 of the 1991 Act gives the defendant the power to lay pipes in streets. Section 161 of the 1991 Act gives the defendant the power to deal with foul water. Section 162 of the 1991 Act gives the defendant the power to carry out works in connection with metering.
6. Section 180 of the 1991 provides "*Schedule 12 to this Act shall have effect for making provision for imposing obligations for the purpose of minimising the damage caused in the exercise of certain powers conferred on the undertakers and for imposing obligations as to the payment of compensation*".
7. Paragraph 1 of Schedule 12 to the 1991 Act provides: "(1) This paragraph applies in relation to a relevant undertaker to the powers conferred on it in relation to streets by Section 158, 161 and 162 of this Act. (2) It shall be the duty of every relevant undertaker (a) to do as little damage as possible in the exercise of the powers to which this paragraph applies and (b) to pay compensation for any loss caused or damage done in the exercise of those powers. (3) Any dispute as to whether compensation should be paid under sub-paragraph 2 above or as to the amount of any such compensation shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or in default of agreement by the director".
8. Let me now turn to the 1996 Act. Section 33 of the 1996 Act 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 avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters falling to be determined. (2) The Tribunal shall comply with that general duty in conducting the arbitral proceedings in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it*".
9. Section 34 of the 1996 Act provides: "*(1) It shall be for the Tribunal to decide all procedural and evidential matters subject to the right of the parties to agree any matter. (2) Procedural and evidential matters include... (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any matter (oral, written or other) sought to be tendered on any matters of fact or opinion and the time, manner and form in which such material should be exchanged and presented*".
10. Section 67 of the 1996 Act enables any party to arbitral proceedings to challenge an award made by an arbitral tribunal concerning its substantive jurisdiction.
11. Section 68 of the 1996 provides: "*(1) A party to arbitral proceedings may (upon notice to the other parties and to the Tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the Tribunal, the proceedings, or the award. A party may lose the right to object (see Section 73) and the right to apply is subject to the restrictions in Section 70(2) and (3). (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 by the Tribunal to comply with Section 33 (General Duty of Tribunal)... (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers... (g) the award being obtained by fraud or the way in which it was procured being contrary to public policy...*".

12. Section 69 of the 1996 Act enables any party if given leave to appeal on a point of law against an arbitral award.
13. Section 70 of the 1996 Act requires any application or appeal under Sections 67, 68 or 69 to be brought within 28 days. The court has power under Section 85 to extend that time limit.
14. That is a sufficient outline of the statutory framework. It is now time to turn to the facts.

**Part 2 – The Facts:**

15. From 1989 to 1999 Mrs. Jayson carried on business as an estate agent under the style Claire & Co. She carried on this business from Surrey Quays in London SE8.
16. In about 1996 Mrs. Jayson decided to embark upon an expansion of the business. The expansion was to be by means of the sequential establishment of new sales offices with administration handled from a single central administration office, such that the administration costs would be shared among an increasing number of offices. It was intended that each subsequent sales office would be run by the claimant and that shortly after the second sales office had started producing income the whole business (including the Surrey Quays office) would be run through the claimant.
17. In late 1996 the claimant set about looking for premises in the London SE6 area in which it could open the second sales office. In January 1997 it located potential premises at 187 Torridon Road, London SE6. By a lease dated 4<sup>th</sup> July 1997 the premises were demised to the claimant for a term of 15 years. The premises were in a poor state of repair and during the summer of 1997 the claimant refurbished them with a view to opening a new office in September 1997. The claimant made a number of other preparations with a view to opening its new office on 8<sup>th</sup> September 1997.
18. Unfortunately, at the same time, in September 1997, the defendant commenced construction works in Torridon Road, outside the claimant's new office. The works involved laying new sewers as part of a flood release scheme. The works were extensive, they involved tunnelling, as Mrs. Jayson has explained today, and they were extremely noisy. The defendant carried out these works in the exercise of powers conferred upon it by Sections 158, 161, and 162 of the 1991 Act. The disruption and disturbance caused by these works made it impossible for the claimant's new office to function.
19. The defendant's works continued, with one period of intermission, from September 1997 until July 1998. These works had a devastating effect on the claimant's business at the new office. Prospective clients were deterred from coming to the offices, conditions were made intolerable for staff, certain members of staff resigned or were made redundant. The claimant's new business venture at Torridon Road failed, and this failure was caused by the construction works of the defendant. In due course, the claimant's lease of the premises at Torridon Road was forfeited for non payment of rent.
20. By paragraph 1(2)(b) of Schedule 12 to the 1991 Act the defendant became liable to pay compensation to the claimant for any loss or damage which the defendant had caused through the exercise of its statutory powers. In October 1997 the defendant duly admitted its liability to pay compensation to the claimant. The parties were unable to reach agreement as to the amount of compensation. Accordingly, pursuant to paragraph 1 (3) of Schedule 12 to the 1991 Act that issue was required to be referred to arbitration.
21. In mid 2000 Mr. Arthur Haverd, a chartered accountant and chartered arbitrator of long experience, was approached by the parties and asked if he was willing to act as arbitrator in this matter. Mr. Haverd agreed in principle. There was some delay before the parties were ready to proceed. On 22<sup>nd</sup> January 2002 Mr. Haverd wrote to the parties formally accepting appointment as arbitrator. There were some delays in the progress of the arbitration. The claimant dispensed with the services of its expert accountant, Mr. David Saunders. Also, the claimant reformulated its case following a change of solicitors.
22. The substantive hearing of the arbitration took place over three days, commencing on Monday 28<sup>th</sup> June 2004. At that hearing the claimant was represented by Mr. Louis Flannery of Howes Percival Solicitors. The defendant was represented by Mr. Michael Daiches of counsel. Mrs. Jayson gave evidence on behalf of the claimant. Two expert witnesses gave evidence on behalf of the defendant.

They were Mr. Julian Jones, an accountant, and Mr. Peter Tobin, a chartered surveyor and an estate agent.

23. On 28<sup>th</sup> October 2004 the arbitrator published his award, which contained an error. That error was corrected by the arbitrator in his 'Revised Final Award Part 1' published on 23<sup>rd</sup> November 2004. For brevity I shall refer to the Revised Final Award Part 1 as 'the award'.
24. In the award the arbitrator assessed the compensation payable to the claimant as £108,000.00 made up as follows: Loss of profits during the period of the works £78,390.00, loss of the business at Torridon Road £29,453.00. The total of these two figures amounted to £107,843.00. The arbitrator rounded this figure upwards to arrive at the total figure of £108,000.00.
25. Since the defendant had already paid £15,000.00 on account to the claimant the arbitrator directed that the defendant should pay the balance of £93,000.00 within 28 days. The arbitrator also directed both parties to serve their written submissions on interest and costs so that the arbitrator could make a further award dealing with those matters in due course.
26. Before leaving the arbitrator's award it is necessary for me to say a little more about the first element of compensation, namely loss of profits. The arbitrator analysed the evidence concerning loss of profits in great detail on pages 17 to 34 of the award. His final conclusions on this matter, as set out in paragraph 126, were as follows. If the business had not been interrupted by the defendant's construction works it is probable that the business at Torridon Road would have achieved a sale of 132 properties at an average sales price of £80,000.00.

MRS JAYSON: *I think he said 138.*

MR JUSTICE JACKSON: *Commission on those sales at 2% would have achieved a total of £220,800.00. Taking a profit margin at 22% that yields a profit of £48,576.00. To this must be added costs incurred during the period of the works, namely £29,814.00. Thus the total loss of profits was £78,390.00. That was, as I say, the arbitrator's reasoning in paragraph 126 of his award.*

27. It can be seen from this calculation that the arbitrator took a profit margin of 22%. The reasoning which led the arbitrator to take a figure of 22% is set out in paragraphs 121 to 125 of his award as follows.

*"121. The claimant wished to adopt the same profit margin as that which it asserts it would achieve in Surrey Quays. But in its post hearing brief the claimant submitted that the profit margin should be 32% (or no less than 30%) on the first £100,000.00 of turnover and 75% on the excess over £100,000.00. As I have found that the accounts for Surrey Quays are unreliable it is impossible to extract meaningful or reliable expenditure figures from that office to calculate the profit margin to apply to the loss of turnover of Torridon Road. Mr. Jones considered a profit margin of 10%, a figure which he has taken from the OFT report, and he has also used a margin of 12.75%, which he noted was the projected margin in the business plan prepared by Mr. Berner.*

*122. The claimant contended that it would be wrong to adopt the profit margin contained in the OFT report. That report it is said was hardly concerned with the estate agents profitability and the OFT figures were not reliable or relevant. They were not specific to properties in the Torridon Road area and the chart in the report showed that average profitability over the period 1996 to 1997 to 2001 to 2002 was more in the region of 7% to 8% than 10%. The OFT report contained no back up data showing how its profitability figures were reached and Mr. Jones agreed that this was the case. The accounts for Surrey Quays for the period May 1996 to April 1997 recorded a net margin of 28.6%. Mr. Jones' figure of 10% it was stated was wrong because it took no account of the Surrey Quays results, the increase in housing valuing in SE6 (annualised at 285%), or the fact that the OFT report indicated that when the market is buoyant excess profits or high levels of profitability are possible. In cross-examination Mr. Jones conceded that the massive increase in sales volume (number of sales times the value of the properties) in the Torridon Road area was likely to result in a commensurate rise in profits.*

*123. Because of the unreliability of the Surrey Quays accounts I am unable to accept that it was achieving profit margins of 28.6%. However, I am also unable to accept Mr. Jones' selection of a 10% profit margin. Both of the above margins are unreliable, as is Mr. Berger's forecast of a net profit margin of 12.5%.*

*Nevertheless, I find that due account has to be given to the argument submitted by the claimant. Hence I am satisfied that a profit margin in excess of 10% is appropriate for the loss of profits calculation.*

124. *I have turned to Mr. Tobin for a commercial view of the likely profit margin. He explained that he is not an expert in matters of profitability and can only offer an informed but not expert view based on his experience of estate agency. In his opinion the likely margin (excluding reference to drawings) is between 20% and 30% and during the first year of trading more likely than not it would be at the bottom end of the range. I accept Mr. Tobin's opinion as I believe that it is based on a lifetime's commercial experience in the estate agency business.*

125. *In determining the appropriate profit margin I take into account that expenditure in the first year of a new lease is often greater than planned, e.g. Mr. Tobin believed that regular advertising would have been needed. I also have to be satisfied that an appropriately full share of the administration costs incurred in (inaudible) are included as an expense of the claimant. I am unable to accept the claimant's submission in its post hearing brief that a high profit margin is advanced. No reliable data have been produced in support of these high figures. It is usually appropriate to deduct any costs that the claimant may have saved in closing the office because of the works. I have decided not to take account of any such savings here. First, the savings were likely to be relatively immaterial, and, second, with the adoption of a necessarily broad brush because of the unreliability of the financial data fine tuning does not seem appropriate. I determine that the appropriate margin to adopt for loss of profits is 22%".*

28. The claimant was aggrieved by the arbitrator's decision to award only £78,390.00 for loss of profits. Accordingly, in order to challenge that decision the claimant commenced the present proceedings.

**Part 3 – The Present Proceedings:**

29. By a claim form issued on 10<sup>th</sup> January 2005 the claimant claimed the following relief against the defendant. (1) An order declaring the award on the merits to be of no effect, in part because the Tribunal did not have substantive jurisdiction pursuant to Section 67(1)(b), and that the award be varied, as set out below, pursuant to Section 67(3)(b). (2) An order that the award in this matter be remitted to the Tribunal in part for reconsideration pursuant to Section 68(3)(a). These then were the two claims advanced by the claimant in its claim form under Section 67 and Section 68 of the 1996 Act.

30. The basis of the claimant's first claim was the proposition that Mr. Jones, the defendant's expert accountant, had conceded in cross-examination that in respect of turnover above £100,000.00 the appropriate profit margin would be 75%. Starting from this proposition the claimant argued that there was an agreement between the parties as to the appropriate profit margin. Therefore, the arbitrator did not have jurisdiction to apply a flat rate of 22% to the whole of the lost commission income which amounted to £220,800.00.

31. The claimant's second argument, as referred to in paragraphs 27 to 33 of the claim form, ran as follows. The arbitrator made a serious error in failing to act on the evidence given by Mr. Jones in cross-examination. Furthermore, the arbitrator derived his figure of 22% from the evidence given by Mr. Tobin. That evidence assumed a turnover of £100,000.00. It was wrong to apply that figure of 22% to a turnover of £220,800.00. The arbitrator's conduct in this regard was a breach of his duty under Section 33 of the 1996 Act and therefore a serious irregularity within the meaning of Section 68(2)(a) of the 1996 Act.

32. The claimant's legal contentions in respect of both limbs of its case were neatly summarised in paragraph 11 of the claim form, which reads as follows. "The arbitrator was wrong to conclude that the profit margin was 22% on the whole turnover of £220,800.00, either because (a) the only dispute between the parties concerned the profit margin on the first £100,000.00 of turnover (so that the arbitrator had no jurisdiction to decide on a matter which was not by the time of the award in dispute) or (b) the arbitrator did not act fairly and impartially between the parties in extrapolating the profit margin adopted by one party's expert on a turnover of £100,000.00 to a turnover of £220,000.00 in the light of unchallenged evidence as to the claimant's likely level of expenditure i.e. a serious irregularity under Section 68(2)(a)".

33. Howes Percival, the claimant's solicitors, served together with the claim form a bundle containing the arbitrator's award and a number of other relevant documents which were referred to in the claim form. Shortly after issuing and serving the claim form Howes Percival ceased to be instructed as the claimant's solicitors. Mrs. Jayson, being an officer and shareholder of the claimant company, took over the conduct of the claimant's case.
34. On 15<sup>th</sup> February 2005 the defendant served its evidence. This comprised a witness statement by Ms. Janine Lee, a legal executive in the defendant's legal department, and an accompanying bundle of documents.
35. On 17<sup>th</sup> February 2005 Mrs. Jayson produced a draft amended claim form, which she sent both to the court and to the defendant's legal department. In this draft amended claim form Mrs. Jayson advanced two separate claims, namely serious irregularities falling within Section 68(2)(e) and (g) of the 1996 Act, and a right of appeal under Section 69. This draft amended claim form was served long after the expiry of the 28 day time limit imposed by Section 70(3) of the 1996 Act. Accordingly, the claimant also applied for an extension of time in order to advance these new claims. The grounds set out in the draft amended claim form contain several allegations of misconduct.
36. By a letter dated 24<sup>th</sup> February 2005 the defendant's counsel informed the court that the defendant would oppose any application by the claimant to raise the proposed new grounds of claim out of time.
37. On 8<sup>th</sup> April 2005 the arbitrator sent to both parties, and to the court, a witness statement commenting on the draft amended claim form. The arbitrator denied the various allegations of misconduct which were made against him. He explained in further detail the reasoning process which had led to his award. He explained that he had given the benefit of the doubt to the claimant on certain matters. He said that given the evidence which had been called his award was generous to the claimant. It appears from his statement that the generosity which the arbitrator refers to was motivated, to some extent, by his genuine recognition of the plight in which Mrs. Jayson and her business had been placed by the defendant's construction works. That completes my summary of the procedural history.
38. The claimant's various applications have come on for hearing today. At today's hearing Mrs. Jayson represents the claimant company. Mrs. Jayson has put her case moderately and clearly. At the end of her submissions she handed up to me some additional documents which she asked me to look at. I paused for half an hour before starting this judgment in order to look at those documents and to reflect upon what Mrs. Jayson had to say.
39. The defendant is represented today by Mr. Michael Daiches of counsel. Mr. Daiches has produced an extremely helpful skeleton argument. In the event, I did not find it necessary to call on Mr. Daiches to amplify his skeleton argument today by means of oral submissions.
40. Against that background I must now give my decision on the issues which arise.

**Part 4 – Decision:**

41. I shall deal first with the original two grounds of claim and then I shall deal with the application to amend.
42. **Ground 1.** There is no evidence that Mr. Jones did make the concession which is alleged. No note or transcript of Mr. Jones' evidence has been produced. The defendant's evidence indicates that Mr. Jones failed to make any clear admission in cross-examination. Moreover, Howes Percival's letter dated 22<sup>nd</sup> November 2004 is hardly consistent with the claimant's case as pleaded in the claim form issued on 10<sup>th</sup> January 2005.
43. Let me assume, however, that Mr. Jones did make an unequivocal admission in cross-examination that in respect of turnover above £100,000.00 the appropriate profit margin was 75%. Such an admission would not have deprived the arbitrator of any jurisdiction. It still remained an issue in the reference for the arbitrator to determine what was the appropriate profit margin to take. There was never any agreement between the parties that this particular issue should be taken out of the arbitrator's hands and resolved by bilateral agreement. During the course of the hearing no arguments

were raised by either party concerning the scope of the arbitrator's jurisdiction. Furthermore, the arbitrator's award does not deal with any jurisdictional challenge or issue.

44. In these circumstances, the claimant's attack upon the award under Section 67 of the 1996 Act is, I am afraid, misconceived. The claimant's first ground fails.
45. **Ground 2.** The claimant's essential argument here is that on the evidence the arbitrator ought not to have taken so low a profit margin as 22%. The arbitrator's error in this regard was so egregious as to constitute a breach of Section 33 of the 1996 Act. In my judgment, this argument is unsound for three reasons.
- (1) On the material before me the evidence does not seem to have been as powerful as the claimant alleges. No transcript or note of Mr. Jones' evidence or Mr. Tobin's evidence has been produced. Moreover, Howes Percival, in their letter dated 22<sup>nd</sup> November 2004, admit that the evidence on this issue was not fully ventilated. They also speculate about what Mr. Tobin might have said, if he had been asked the crucial question.
  - (2) The weight to be attached to each piece of evidence was entirely a matter for the arbitrator (see Section 34 of the 1996 Act). Furthermore, the arbitrator was entitled to draw upon his own expert knowledge and experience when assessing matters such as the appropriate profit margin. This is what the arbitrator did, as explained in his witness statement. Looking at all the material which is before the court in the present application, I see no possible basis for criticising the arbitrator's decision to take a profit margin of 22%.
  - (3) Even if I am wrong in my conclusions so far, the claimant's challenge must still fail. Even if the arbitrator fell into error in his assessment of the evidence relating to profit margin, that error would be neither a breach of Section 33 nor an irregularity within the meaning of Section 68 of the 1996 Act. It is not permissible to use Sections 33 and 68 as a device to mount an appeal against the decision of an arbitrator on a question of fact.
46. Accordingly, the claimant fails in both of the grounds set out in its original claim form.
47. **The Application to Amend.** The new heads of claim which the claimant seeks to advance in the draft amended claim form may be summarised as follows.
48. First, there is a claim for remission of the award on the grounds of serious irregularity pursuant to Section 68(2)(e) of the 1996 Act. It will be recalled that Section 68(2)(e) refers to any arbitral or other institution or person vested by the parties with powers in relation to the proceedings for the award exceeding his powers. The claim under this head is dealt with at paragraphs 28 and 29 of the draft amended claim form. The claimant there alleges that the arbitrator's award was produced to satisfy other vested parties and is not in the interests of the claimant. Then various criticisms are made of certain solicitors.
49. The second substantive matter which is advanced in the draft amended claim form is a claim for remission on the grounds of serious irregularity under Section 68(2)(g) of the 1996 Act. Sub-paragraph (g) refers to the award being obtained by fraud, or the award or way in which it was procured being contrary to public policy. This ground is developed by the claimant in paragraphs 32 and 33 of the claim form. Criticisms are made of Mr. Tobin, who it is said did not have the relevant expertise or skills. Criticism is made of Mr. Jones, who it is said distorted certain evidence, and a criticism is made that the claimant was not given a voice at the arbitration.
50. The third claim which is advanced in the draft amended form is a claim pursuant to Section 67(1)(b) of the 1996 Act for a declaration that the award is void because the arbitrator did not have substantive jurisdiction. It is argued in paragraph 36 of the claim form that the arbitration imposed an intolerable burden on the claimant, points are made about the evidence, and it is said that the claimant had already proved its case on the balance of probabilities.
51. The fourth new head of claim which is advanced in the draft amended claim form is a proposed appeal on a question of law under Section 69 of the 1996 Act. This is dealt with in paragraph 40 of the draft amended claim form. In that paragraph it is asserted that the determination of liability of two

letters mentioned by the arbitrator in the award was not discussed at the arbitration, and further points are advanced in that regard.

52. I have come to the conclusion that each of these proposed new grounds of claim is not only unsubstantiated but incapable of being substantiated. The allegations which are made against the arbitrator are vigorously denied by him in his affidavit. He denies any question of the award being procured by fraud. He denies that he did not give the claimant a voice or an opportunity to be heard. He denies that he placed reliance on material which was not mentioned during the arbitration.
53. I am bound to say, looking at all the material before this court, I see no possible justification or support for the very serious criticisms which are made of the arbitrator in the draft amended claim form. Likewise, I see no support for the serious criticisms which are made of the experts and various solicitors in the draft amended claim form.
54. In my judgment, the proposed new heads of claim have no prospect of success. In those circumstances, it is hardly surprising that Messrs. Howes Percival, when they were acting for the claimant, did not include those grounds in the original claim form. In those circumstances, it is not right for this court to extend time under Section 80 (5) of the 1996 Act. Nor is it right for this court to allow the claim form to be amended out of time, in order to raise those new heads of claim. In this regard, see the reasoning of Mr. Justice Colman in *Aoot Kalmefit v Glencore International AG* [2002] 1 Lloyd's Law Reports 128 at paragraphs 73 to 74.
55. It therefore follows that the application to extend time and to amend the claim form must be dismissed. Indeed, it follows that all of the various applications made by Miss Jayson must be dismissed.
56. For my part, I can understand the considerable distress which Miss Jayson and her colleague, Mr. Berger, must have felt at the wanton destruction of their business project at Torridon Road as a result of the defendant's construction works. Nobody looking at the facts of this case dispassionately can feel anything other than considerable sympathy for the plight in which the defendant's works put the claimant and the claimant's shareholders. Nevertheless, this court must deal with the challenges which are sought to be made to the arbitration award pursuant to the 1996 Act.
57. It seems to me that the arbitrator produced a very thorough and careful award. He took note of all the points made in the claimant's favour. Indeed, it seems to me that he expressed sympathy for the claimant's circumstances and he awarded such compensation as he properly could on the evidence which was before him.
58. In those circumstances, the various challenges to the arbitrator's decision which the claimant brings, or seeks to bring, under the 1996 Act fail and the claimant's claim is dismissed.

MISS JAYSON (in person) appeared on behalf of the CLAIMANT

MR DAICHES appeared on behalf of the DEFENDANT