His Honour Judge Peter Coulson QC : 30th November 2005

INTRODUCTION

1. By an arbitration claim form issued on 12 July 2005, the Claimant, Walsall Metropolitan Borough Council ("WMBC") sought permission to appeal on two matters arising out of an arbitrator's award dated 15 June 2005.The award, entitled *"Award No 1"*, was produced by the arbitrator, Ms Victoria Russell, as part of an ongoing arbitration in which the defendant in these proceedings, Beechdale Housing Association Ltd ("Beechdale"), seeks to recover damages for breach of warranty against WMBC, and WMBC counterclaim pursuant to a separate agreement.

2. The claim form enclosed a document entitled *'Grounds for Application under Section 69 of the Arbitration Act 1996'*. It was supported by the witness statement of Mr Paul Wilson, WMBC's solicitor. The application was opposed by Beechdale, with the grounds of their opposition contained in a brief written response document dated 9 September 2005. WMBC replied to this response document on 16 September 2005.

3. Unfortunately, when I came to consider these papers later in September, I noticed that there was a suggestion in the WMBC documents that, in the alternative, they also sought to rely on section 68 of the 1996 Act (serious irregularity). As a result of my request for clarification, WMBC sought to amend their application by adding an express reference to section 68, a request I granted on 19.10.05. This in turn resulted in the need for a letter from the arbitrator, dated 4.11.05, explaining what had happened, and further written submissions from the parties. There was also a witness statement from Mr Richard Dalton, Beechdale's solicitor, dated 8.11.05. These various events have resulted in a two month delay in the production of this Judgment.

4. WMBC and Beechdale are agreed that I should determine these applications on the basis of the documents referred to in paragraphs 1, 2 and 3 above. In accordance with the usual practice for this sort of application, there has been no oral hearing.

THE ARBITRATION AND THE AWARD

5. By an Agreement dated 26 March 1996, Beechdale purchased from WMBC about 1,500 housing units, forming part of the Beechdale estate, for the sum of £3,750,000. By clause 2.1 of Part II of the Fifth Schedule to the Agreement, WMBC represented and warranted that *"all information contained and referred to in Schedules 2 and 3 is true and accurate and fairly presented and nothing had been omitted from Schedules 2 and 3 which renders that information incomplete or misleading …"* Clause 2.6 provided Beechdale with a remedy for any breach of that warranty, requiring WMBC to pay to Beechdale " an amount equal to the loss suffered by [Beechdale] which arises directly or indirectly from any of the Warranties being untrue, misleading or breached and which would not have existed or arisen if the Warranty in question had not been untrue, misleading or breached". The Agreement contained an arbitration agreement.

6. In the arbitration, Beechdale complained that WMBC were in breach of the warranty because they had not disclosed all the information which they possessed relating to the structural integrity of the units. The particular complaint centred on WMBC's failure to disclose documents which demonstrated that some of the units had been the subject of sulphate attack. WMBC did not originally admit the alleged breach of warranty although, by later amendments, they admitted the failure to disclose certain information which, they accepted, rendered them in breach of the warranty. WMBC also pursued a counter-claim arising out of a separate agreement with Beechdale, referred to in the documents as the RTB Agreement.

7. There were hearings in the arbitration in September 2004 and February 2005. Award No 1 was produced in June 2005. The award was a lengthy, detailed document, amounting to some 92 pages and 243 paragraphs. The net effect of the award was that WMBC had to pay Beechdale the sum of £200,737 plus VAT and interest in respect of repair costs, and £374,799.60 in respect of future costs. Under the RTB agreement, Beechdale were obliged to pay Walsall £929,431.55 together with interest of £467,862.94. In short, WMBC were the net winners of the arbitration.

THE APPLICATIONS MADE BY WMBC

8. The applications for permission to appeal and/or to set aside the award due to a serious irregularity highlight those two elements of Award No 1 where the arbitrator found sums due from WMBC to Beechdale.

9. First, WMBC seek to challenge the award of £200,737 plus VAT and interest in respect of the actual costs of repair. WMBC contend that the arbitrator was obviously wrong to award Beechdale the actual costs of repairs carried out because, they say, that was the incorrect measure of loss for the admitted breach of warranty. WMBC contend that the correct measure of loss was the amount by which the transfer price would have been different had the breach of warranty not occurred.

10. As a further argument relating to the award of actual costs, WMBC contend that, even if such an award was correct in principle, the arbitrator erred in law in failing to apply the contractual cap to the losses claimed, and erred in allowing a claim for VAT and interest over and above the contractual cap.

11. Secondly, as to the award of £374,799.60 in respect of future costs, WMBC contend that it was obviously wrong to award Beechdale future costs without taking account of a deduction for early receipt of the future losses.

SECTION 69: APPLICABLE PRINCIPLES

12. Section 69 (3) of the Arbitration Act 1996 provides that:

"(3) Leave to appeal shall be given only if the court is satisfied –

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award –

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question".

13. It therefore follows that, in respect of each of the grounds for their application for permission to appeal under section 69, WMBC need to demonstrate that:

(a) there is a question of law;

(b) the outcome of which will substantially affect the rights of one or more of the parties;

(c) which the Arbitrator was asked to determine;

(d) on which the Arbitrator was obviously wrong (it being no part of WMBC's case that the matters that they raise are of general public importance); and that

(e) it is just and proper for the court to determine such questions.

I deal shortly with a number of these ingredients below.

Question of Law

14. There can be no error of law if the arbitrator reached a decision which was within the permissible range of solutions open to her: see ***The Matthew*** [1992] Lloyds Reports 323.

Substantially affecting the rights of one or more of the parties

15. The court must be satisfied that any question of law will substantially affect the rights of one or more of the parties. Too often, this is *'taken as read'*, rather like the requirement for substantial injustice under Section 68. As Lord Steyn made plain in his speech in ***Lesotho Highlands Development Authority v Impregilo SPA and Others*** [2005] UK HL 43, it was not good enough for the parties simply to assume that there was a substantial injustice. Similarly, I am of the view that it is not good enough simply for a party to assert that the alleged issue in question must affect their rights because it goes to an aspect of the dispute in the arbitration. The party asserting that its rights are adversely affected needs to demonstrate the various options open to the arbitrator and how and why the particular point which the arbitrator has erroneously decided has a substantial effect on the rights of the claiming party. As Lord Phillips expressed it in ***The Northern Pioneer*** [2003] 1 Ll. Rep 212, the claimant must show that the issue has a substantial impact on the rights of the parties at issue in the arbitration.

Obviously wrong

16. Since WMBC do not suggest that the alleged errors of law raise any point of public importance they must demonstrate that on each of the issues in question, the arbitrator was obviously wrong. On an application for permission to appeal under Section 69 (3)(c)(i) the obvious error must normally be demonstrable on the face of the award itself. It is not appropriate to refer to transcripts, submissions and evidence in the arbitration: unless the error of law relied on is clear and obvious from the face of the award, the application under Section 69 (3)(c)(i) must automatically fail.

17. This is an important point for the purposes of the present application. In ***Foley's Ltd v City and East London Family and Community Services*** [1997] ADRLJ 401, Colman J had been told (wrongly) that the TCC regularly admitted material, other than the award, in deciding applications for permission to appeal. In trenchant terms, he made it clear that the only document that a court would consider when dealing with an application of this kind was the award itself. The same point was reiterated by HHJ Thornton QC in ***Hok Sport Ltd v Aintree Racecourse Co Ltd*** [2003] BLR 155 when he said that *"it should now be clear to experienced practitioners in the TCC that extraneous materials are not to be referred to in arbitration leave applications"*. For the avoidance of doubt, the Second Edition of the TCC Guide, published on 3.10.05, states at paragraph 10.2.4 that, save in exceptional circumstances, the only material admissible on an application of this kind is the award, and any documents attached to the award.

SECTION 68: APPLICABLE PRINCIPLES

18. Section 68(1) of the 1996 Act allows a party to an arbitration to challenge the award if there is *"a serious irregularity affecting the tribunal, the proceedings or the award"*. In this case WMBC rely on an alleged failure by the arbitrator to comply with section 33 of the 1996 Act, because they contend that the award made findings against them with which they did not have an opportunity to deal or was otherwise the product of a procedure that was unfair.

Serious Irregularity

19. There are numerous cases concerning what (rare) types of situation are properly covered by section 68, and what are not. Perhaps the best-known is the judgment of His Honour Judge Humphrey Lloyd QC in ***Weldon Plant v The Commission for New Towns*** [2000] BLR 496, quoted with approval by Colman J in ***World Trade Corporation v C. Czarnikow Sugar Ltd*** [2004] 2 All E.R. (Comm). Judge Lloyd said that section 68 was only concerned with the complete failure by the arbitrator to address a claim or a key issue; *"it is not concerned with a failure on the part of the tribunal to arrive at the right answer to an issue."* For the section to operate, the judge said, it was necessary to show that "*the tribunal has not done what it was asked to do*".

Substantial Injustice

20. Furthermore, as this and other cases make clear, the serious irregularity must have resulted in substantial injustice to the complainant. According to para 280 of the **DAC report**, cited with approval by Tuckey J (as he then was) in ***Egmatra A.G. v Marco Trading Corporation*** [1999] 1 Ll. Rep.862, "the parties cannot validly complain of substantial injustice unless what has happened cannot, on any view, be defended…section 68 is really designed as a long stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected." Thus, if the result of the arbitration would most likely have been the same or very similar, despite the irregularity, there is no basis for overturning the award: see Ward LJ in ***Checkpoint Ltd v Strathclyde Pension Fund*** [2003] EWCA Civ 84. As noted in paragraph 15 above, the fundamental importance of demonstrating a substantial injustice was recently emphasised by Lord Steyn in ***Lesotho Highlands***.

ADMISSIBLE MATERIAL UNDER SECTION 69

21. There is a threshold reason why I consider that WMBC's application under section 69 for permission to appeal on the two points identified above should fail. In order to argue that there were errors of law within the award, on which the arbitrator was obviously wrong, WMBC are not relying simply on the award itself. On the contrary, in order to make good their submissions, they purport to rely on a whole raft of extraneous material, including the pleadings, extracts from both parties' written opening submissions, extracts from the transcripts of the hearing, extracts from the both parties' written closing submissions, and elements of the expert evidence. Such material is inadmissible on an application for permission to appeal under section 69, for the reasons set out above. This material may, of course, be relevant to an application under section 68, but that is a separate matter.

22. It cannot be said that, on the face of the award, there is any error of law, much less an obvious error. Indeed, WMBC advance no such case: hence their need to rely on this inadmissible material. Accordingly, this is the first reason why I consider that the application under section 69 should fail. However, in case I am wrong about that, I now go on to consider the detail of the application under section 69 by reference to the material provided by WMBC, and I also deal with the amended application under section 68.

THE AWARD FOR THE ACTUAL COST FOR REPAIR

The Application under Section 69 (Permission to Appeal on a Point of Law)

23. I do not consider that WMBC have discharged the burden required of them by Section 69 (3) of the 1996 Act. In particular, I do not consider that the arbitrator was *'obviously wrong'* to award Beechdale the actual cost of repair. In addition, I am not persuaded that the points WMBC raise in respect of actual costs would, even if they were correct, substantially affect their rights in the sense outlined by Lord Phillips in ***The Northern Pioneer***. My reasons for these views are set out below.

24. I have set out the terms of the relevant warranty at paragraph 5 above. There is no doubt that the wording is unusual. On the face of the wording of this particular warranty, it seems to me that it was at least arguable that the costs of repair would or could be recovered under the terms of the warranty. WMBC's argument, as crystallised in paragraph 7 and 8 of their reply document, essentially contends that actual costs could not be recoverable because actual costs "*would always have existed or arisen, irrespective of the breach*". However, under the terms of this warranty, it is not cost "*which would not have existed or arisen if the warranty in question had not been untrue, misleading or breached*" but loss. In my judgment, WMBC wrongly elide the concepts of cost on the one hand and loss on the other. The costs may always have been incurred but it is at least arguable that the loss only arose because the warranty was untrue and/or misleading. It therefore seems to me that the arbitrator was not obviously wrong, and arguably right, to conclude that, pursuant to the words of this warranty, the claim for actual costs was recoverable.

25. The unusual wording of the warranty in question is clearly of assistance to Beechdale. In my judgment, the express stipulation that the sum due to Beechdale would be equal to the loss arising from the warranty being untrue, and which would not have existed or arisen if the warranty had not been untrue, puts them in a better position to argue for the recovery of the loss measured by reference to the costs of repair. Such costs would or at least might be caught by the express stipulation in the warranty in a way that might not have been the case if the warranty was in standard terms.

26. To put the point another way, I consider that the arbitrator's conclusions were within the range open to her. I note that WMBC complain that the parties had, at some stage during the hearing, agreed that loss would not be measured in this way, but Beechdale maintain, in their submissions to me, that, in all the circumstances, this finding was still open to the arbitrator. I cannot, even on the material with which I have been provided, conclude that they are wrong in this submission. However, this is a point to which I return under section 68 below.

27. For these reasons, I consider that WMBC have not demonstrated that the arbitrator was obviously wrong to conclude that the cost of repair constituted a head of loss which would not have arisen if the warranty had not been untrue or misleading, and was therefore recoverable in law. The application for permission to appeal the arbitrator's conclusion that the actual cost of repairs was recoverable must therefore fail.

28. In addition, and for the avoidance of doubt, I am not persuaded, even on all the material with which I have been provided, that the arbitrator's decision on this particular issue substantially determined the rights and liabilities of the parties. After all, this is ultimately a point about the proper quantification of loss arising from an accepted breach of warranty. There is nothing in the material before me that demonstrates that, if WMBC are right and the

measure of loss is the reduction in sale price that could otherwise have been negotiated, this deduction would or should have been radically different from the figure for the actual cost of repair. There is an analogy with the surveyors' negligence cases, where the measure of loss is the diminution in value of the property, not the cost of repair. Despite that principle, it has often been held that the cost of repair can still provide one way in which that diminution in value can be ascertained.

29. There is a subsidiary complaint that, even if the arbitrator was right to award actual costs, there was an error of law in not applying the contractual cap and also awarding VAT and interest. I am bound to say that I do not consider that this point amounts to a point of law; indeed, no error of law is identified in the documents. In any event, it could not be said that the arbitrator was obviously wrong in reaching the conclusion that she did. I therefore reject this subsidiary point.

The Application under Section 68 (Serious Irregularity)

30. The principal point as to the actual cost of repair made by WMBC under section 68 was that it was their clear understanding that Beechdale had agreed that, although they had pleaded their claim in this way, the actual cost of repair was not in fact the appropriate measure of loss. That allegation is neither expressly denied nor admitted by Beechdale; neither is it a point dealt with by the arbitrator in her letter of 4.11.05. The evidence of a failure to abide by an alleged agreement between the parties is not, therefore, entirely clear and thus it is not a matter on which I would wish to make a definitive finding. However, it is unnecessary for me to do so because it is clear beyond doubt that no substantial injustice has resulted from the alleged irregularity. Because of the non-disclosure, there was a breach of warranty that had to be quantified. The arbitrator clearly thought that she could value that by reference to the actual cost of repairs. There is nothing before me that could lead me to conclude that, if the value of the breach had been measured in another way, either by reference to the notional reduction in the purchase price or adopting some other approach, it would have resulted in a significantly different figure to the one utilised by the arbitrator: see paragraph 28 above.

31. For these reasons, therefore, it seems to me clear that, even assuming that WMBC are right, and there was an irregularity because the arbitrator used a methodology which had been abandoned by Beechdale, it is not possible to say that it was serious; more importantly still, it has not been shown that such an irregularity caused any substantial injustice at all. The final figure for the loss due to the breach of warranty may well have been the same, or nearly the same, even if a different valuation methodology had been used.

32. For these reasons, I conclude that the application under section 68 in respect of actual costs must fail. Even if there had been an irregularity, there was no substantial injustice. I should also say that, approaching the matter generally, I have no doubt that the arbitrator's use of the actual cost figure represented a just and fair conclusion which brought finality to at least this aspect of the proceedings. On the facts, therefore, this case is a long way from the sort of "*extreme cases*" for which section 68 was designed. However the figure of £200,737 was arrived at, I take the view that the valuation of the deduction by the arbitrator constituted a just and fair result in all the circumstances.

THE AWARD FOR FUTURE COSTS

The Application under Section 68 (Permission to Appeal on a Point of Law)

33. WMBC complain that *"as a matter of law, it was obviously wrong to award future costs without taking account of a deduction for early receipt"*. In my judgment, this complaint is not a matter of law and is, in any event, not something on which it could possibly be said that the arbitrator was obviously wrong. I therefore reject this ground of appeal.

34. As to the question of whether or not this is a matter of law, it is, in my view, only necessary to set out the details of the complaint to demonstrate that it is not, on its face, a question of law. WMBC complain that:

    (a) there was no dispute between the parties' valuation experts that any award of costs relating to an expenditure over a defined period had to be reduced to take account of the timing of that expenditure;

    (b) because the valuation experts had not dealt precisely with her finding of fact (that 11.32% of the housing stock [120 properties] was at risk of damage by sulphate attack), the arbitrator ignored the joint approach altogether rather than seeking to apply the approach to her findings of fact;

    (c) in any event, and notwithstanding any agreement between the parties, it was obviously wrong when awarding a sum representing the cost of future repairs over the lifetime of the relevant properties not to take account of the early receipt of the future losses).

35. These arguments, developed at length in Mr Wilson's statement at paragraphs 36 – 42, fail to identify any legal principle on which it could be said that the arbitrator was obviously wrong. Mr Wilson's statement merely seeks to re-argue some of the technical and evidential points raised by WMBC in the arbitration, which the arbitrator rejected. Of course, such an approach is wholly illegitimate in an application of this kind.

36. Accordingly, I do not regard the second matter raised by WMBC as being a question of law at all. Section 69 is therefore not triggered.

37. However, even if I were wrong about that, and this is a matter of law, paragraphs 36-42 of Mr Wilson's statement themselves make plain that it could not possibly be said that the arbitrator's approach on this topic was *"obviously wrong"*. Mr Wilson constructs a careful argument by reference to the expert evidence, the transcripts and the submissions, and explained why and how the arbitrator could – he would say should - have come to a

different conclusion. That material is inadmissible on an application under section 69 of the 1996 Act, for the reasons previously explained. Even if it were admissible, there is nothing in that material which demonstrates that the arbitrator was obviously wrong to adopt the approach that she did. Again, given the wording of the warranty, she was, in my view, arguably right. The conclusion she reached was clearly open to her. I therefore find that, for that reason as well, this part of the application under section 69 must fail.

The Application under Section 68 (Serious Irregularity)

38. In respect of the first criticism of the arbitrator (as to actual costs of repair), it was possible to see why WMBC considered that, because of the alleged failure to operate the parties' agreement that actual cost was not the measure of loss, there was a potential breach of sections 33 and 68 of the 1996 Act. However, on the second point, as to future costs, there is no material at all which would allow me to conclude that there had been a serious irregularity, let alone one which had caused substantial injustice. The arbitrator considered the valuation evidence and came to a series of conclusions that she was quite entitled to reach. She decided the issue referred to her; WMBC may not like the result, but there has been no injustice. I reject the suggestion that somehow her conclusions were not open to her, or were arrived at without giving the parties a proper opportunity to address the valuation evidence. On the contrary, I conclude that the parties had a full opportunity to set out their respective cases to the arbitrator, and that, thereafter, she resolved the valuation disputes in a careful and considered way. The application under section 68 in respect of future costs therefore fails.

CONCLUSIONS

39. In my judgment, a complete bar to the application under section 69 lies in the fact that, contrary to the 1996 Act and the numerous authorities on the point, the entire application is based on material which is inadmissible under section 69 of the 1996 Act. No obvious errors of law identifiable on the face of the award are relied on by WMBC. I find that there were none. Notwithstanding this finding, I have considered the detail of the section 69 application in any event.

40. The first ground for the application for permission to appeal, namely the arbitrator's decision to award Beechdale the actual cost of repair, was not a matter on which it could be said that the arbitrator was obviously wrong. Indeed, because of the unusual wording of the warranty itself, I consider that she was arguably right to conclude that the actual losses were recoverable under the warranty.

41. Further and in any event, I do not regard the first ground of appeal as being a matter which would substantially affect the rights of either party. It is plain that the arbitrator could have approached the measure of loss in a different way and still come to the same or a very similar financial assessment of the damages recoverable.

42. As to the subsidiary point as to the cap, VAT and interest, I do not consider that this was a matter of law or that the arbitrator was obviously wrong in relation to it.

43. The application relating to the actual cost of repair under section 68 is based on the allegation that the arbitrator used a method of valuation which WMBC thought had been abandoned. This raises a matter of fact which it is difficult for me to resolve on the evidence that I have. However, I am quite satisfied that it is unnecessary for me to resolve it because, even assuming there had been an irregularity, it is clear that it had no or little effect on the award. A valuation of the loss had to be made, and the arbitrator valued it by reference to the cost of repair. In the absence of any suggestion that a different valuation method would have produced a radically different result, there can be no basis for saying that the alleged irregularity was serious or gave rise to a substantial injustice. The test of substantial injustice under section 68, recently stressed by Lord Steyn, has simply not been made out.

44. As to the second ground for these applications, namely the arbitrator's award of future costs, I do not regard that as a matter of law at all. Section 69 is therefore not triggered. If I were wrong about that, I do not believe that WMBC have demonstrated that this was a matter on which the arbitrator was obviously wrong. The material in Mr Wilson's witness statement amounts to an attempt to re-argue the detail of the arbitration and to have another go at arguments which the arbitrator rejected. I regard such an approach as quite illegitimate under Section 69.

45. The same points mean that the alternative claim under section 68 in respect of future costs must also fail. No irregularity has been identified in the arbitrator's conduct, much less any substantial injustice.

46. For all these reasons, therefore, I dismiss WMBC's application for permission to appeal under section 69, and their alternative application under section 68. It seems to me that, in consequence, WMBC must pay Beechdale's costs of the application, to be assessed on the standard basis if they cannot be agreed.