



Neutral Citation Number: [2021] EWHC 472 (Comm)

Case No: CL-2019-000683

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

**IN THE MATTER OF AN ARBITRATION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 03/03/2021

**Before:**

**SIR ROSS CRANSTON**  
**Sitting as a High Court judge**

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**Between :**

**(1) STUART ALAN CHARLES CAKEBREAD** **Claimants**

**(2) JULIETTE DORA LEVY**

**- and -**

**ARTHUR PANAYOTIS FITZWILLIAM** **Defendant**

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**STUART CAKEBREAD and JULIETTE LEVY for the Claimants**  
**JAMIE CARPENTER QC (instructed by Colman Coyle) for the Defendant**

Hearing dates: 22, 23 February 2021  
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**Approved Judgment**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 3 March 2021 at 10:30 am.**

## SIR ROSS CRANSTON:

### Introduction

1. This is an application by the claimants to challenge under section 68 of the Arbitration Act 1996 the Fourth Interim Award (“the Award”) issued by the Arbitrator on 10 October 2019. The claimants have an additional challenge to the Award under section 69 of the Act on a question of law arising out of an award, but that appeal is awaiting the outcome of this case. In this application, the claimants’ case is that, in reaching his conclusion, the Arbitrator did not give them a fair opportunity to deal with certain points and so there was a serious irregularity justifying the court’s intervention.

### Background

2. The claimants are barristers. The defendant is the owner and controlling mind of Plantation Holdings (FZ) LLC (“Plantation”), a property development company. The claimants acted for Plantation in the claim *Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC* [2017] EWHC 520 (Comm), where it was suing the bank for damages of \$2 billion for alleged breach of a restructuring agreement. Picken J found for Plantation but awarded only nominal damages. In the course of his findings Picken J concluded that he could not accept the evidence of the defendant concerning what was called the Chescor deal: [129], [259].
3. In relation to that litigation by Plantation against Dubai Islamic Bank PJSC, the claimants entered a damages-based agreement (“DBA”) in April 2014 with the defendant and Plantation. There had been an earlier DBA and the April 2014 DBA was therefore referred to sometimes as the “Second DBA”. In this judgment it is called the DBA.
4. Under the DBA the claimants were to be paid between 5% and 45% of the damages recovered (“the DBA payment”). Clause 8.2 contained a duty on the part of the defendant and Plantation of utmost good faith to the claimants to disclose all facts and matters which may be relevant to the claim, and not to mislead the claimants or to act unreasonably or improperly. Clause 9 of the DBA provided for its termination. Clause 9.2 stated that if the defendant and Plantation terminated the agreement, the claimants were entitled at their absolute discretion to the DBA payment if the claim had been won or to their “Legal Fees”, plus any outstanding costs, expenses and disbursements. The Legal Fees were defined in terms of the hourly rates for work done under the claimant’s terms of business from time to time. Clause 9.6 conferred the right to terminate on the claimants, and again either the DBA payment or Legal Fees were payable. Clause 18.2 provided for arbitration in the event of disputes.
5. Following the decision of Picken J, Plantation applied for permission to appeal, but the appeal was compromised. The claimants took the view that Plantation had terminated the DBA under clause 9.2. In April 2018 they demanded payment of their Legal Fees under the agreement, in other words, for the work done based on the hourly rates, in total some £6,922,532.51. The Legal Fees were evidenced in the detailed fee notes prepared by the claimants, which had been sent to the defendant. The defendant had not challenged the amount of work done, or the rates, in relation to what was evidently complex litigation. Up until this point the fee notes had not been relevant since the claim was being advanced under a DBA.

6. The defendant denied liability and the matter was referred to a sole arbitrator.

### **The arbitration hearing**

#### *Pleadings for the arbitration*

7. In their Points of Claim dated 6 March 2019, the claimants advanced three causes of action. The first was that the defendant had terminated the DBA and was liable to pay under clause 9.2 for the work done based on hourly rates. The second was that the defendant was in breach of his duty of good faith in clause 8.2 by giving deceitful instructions regarding the Chescor deal, so that the claimants could terminate the Second DBA under clause 9.6 and charge the defendant for the work done on hourly rates.
8. In his Second Interim Award, the Arbitrator found that the DBA was unenforceable because of breaches of the Damages-Based Agreements Regulations 2013, SI 2013/609. He therefore rejected the claimants' first two causes of action. No more need be said about them.
9. That left the third cause of action. As advanced in the Points of Claim this was that the claimants were induced by defendant's deceitful instructions regarding the Chescor deal to provide legal services without an unconditional guarantee of payment and/or to enter into the DBA.
10. After setting out the nature of the deceitful instructions, paragraph 14 of the Points of Claim contained particulars of the deceitful inducement. In paragraph 14(iii) the claimants stated that if they had known that the defendant was lying regarding the Chescor deal, they would not have agreed to provide legal services without an unconditional guarantee of payment and/or enter the DBA.
11. Paragraph 15 then stated:

“15. The respondent's deceit has caused the claimants loss and damage.

#### Particulars of loss and damage

(i) In reliance upon the deceitful instructions the claimants undertook work to the value of £7,118,954.50 including interest to date in respect of the Plantation Action;

(ii) If they had known the respondent had lied in his instructions they would not have undertaken the work without correction of the respondent's 2011 witness statement and would have charged at the rate agreed in the Second DBA. They would not have agreed to do the work without an unconditional guarantee of payment in view of the highly prejudicial effect of the respondent's deceit on the prospects of success and/or the recovery of substantial damages by Plantation.”

12. In paragraph 16 the claimants also sought exemplary damages on the basis that the defendant through his deceit calculated to make a profit which might exceed any compensation payable to the claimants.
13. In his points of Defence and Counterclaim, the defendant denied any liability to the claimants or that they were entitled to any payment: the DBA was unenforceable; it had not been terminated; in any event there were no grounds to terminate it; and there was no basis for their allegations in deceit. If there was deceit, the defence and counterclaim denied that it induced the claimants to enter the DBA: they would have done so even if the false representations had not been made: para. 45.
14. As to the deceit claim, the defendant pleaded at paragraphs 46-47:
  - “46. Further and in any event, neither Plantation nor the Respondent would have agreed to pay the Claimants regardless of the outcome of the Plantation Action. Neither Plantation nor the Respondent had the means to fund any litigation on an ordinary privately paying basis. If the Claimants had demanded the same, then the Respondent would have sought representation elsewhere.
  47. Paragraph 15 is misconceived:
    - (a) As to subparagraph (i), the value of the work undertaken by the Claimants under the Second DBA does not per se represent a loss to them.
    - (b) As to subparagraph (ii), the counterfactual scenario is not one in which the Claimants knew that the Respondent’s instructions were untrue; it is one in which the alleged misrepresentations were not made at all, i.e. that there had never been any mention of the Chescor Deal in the proceedings.”
15. In their Points of Reply, the claimants stated inter alia, in relation to the deceit claim:
  - “43. To the extent that paragraph 47(a) is understood it is denied.
  44. Paragraph 47(b) is incorrect. The ‘counterfactual scenario’ is one in which:
    - a. the express deceitful instructions were not given; and
    - b. the respondent told the claimants that the evidence in the 2011 witness statement regarding the Chescor meeting, the Chescor deal and the circumstances of his arrest, already submitted to court and in the public domain in the First action, was untrue.”
16. Nothing of relevance was stated in the defendant’s Points of Rejoinder.

*The skeleton arguments*

17. In their skeleton argument on deceit dated 23 August 2019, the claimants set out the nature of their case and the legal elements of their claim in deceit: a. the defendant made statements in the form of instructions; b. these were untrue; c. the defendant knew they were false, or did not believe them to be true; d. the deceitful instructions were intended to, and were one of the matters which induced the claimants to act to their detriment by agreeing not to require unconditional payment of their fees; and e. as a result of acting to their detriment the claimants suffered loss and damage (para. 29).
18. At paragraph 30 the claimants stated that as a matter of law for success, they did not have to establish, inter alia:
  - “c. [the defendant] would not have agreed to pay them unconditionally for their services (fraudsters rarely intend to pay the proper price if they are not successful in their deceitful behaviour);
  - d. the claimants would have made comparable profits, if they had not been deceived, by receiving other instructions (though that is an alternative or additional head of loss in some circumstances – see *Parabola Investment Ltd v Browallia Cal Ltd* [2011] QB(CA)...”
19. In the following paragraphs the claimants set out how the elements of a deceit claim (set out in their para. 29) were met. As regards e, the claimants suffering loss and damage from the deceit, the skeleton explained:
  - “36. The claimants’ entitlement to damages is simple and straightforward. Their legal services had a value agreed by the respondent by reference to their hourly rates. They practise law as a profession, not as a hobby, and their loss is not non-pecuniary inconvenience but actual commercial loss.
  37. It is not open to the [defendant] to suggest, if he does, that they suffered no loss because he would not have instructed them on an unconditional fee basis. Such an argument is a non sequitur. As pointed out above the unwillingness of a fraudster to pay the proper price in the event that he is unsuccessful in his deceit provides him with no defence. His victims have suffered loss because he tricked them into undercharging or not charging at all for the services they actually provided.”
20. The defendant’s skeleton argument, also dated 23 August 2019, contended that he was not guilty of any deceit. As to causation and loss, the defendant’s skeleton stated by reference to *Clerk & Lindsell on Torts*:

“45. It is trite law that, if the claimant in a deceit claim would have done the same thing whether or not the representation was made, then there is no recoverable loss...

46. Once the claimant establishes that they would have done something different, it is for them to prove that they have suffered a loss as a result.”

21. The skeleton then explored what was said to be the wrong counterfactual the claimants had advanced. On the basis of the claimants’ counterfactual, the skeleton argued, they faced factual difficulties, that the defendant had long been clear that he would not have agreed to pay for their services on ordinary hourly rates, and that once they were only willing to be instructed in this way, there was no particular reason to use them given, inter alia, the hourly rates they said they would have demanded (paras. 56-57). The section of the skeleton dealing with quantum began:

“58. It bears repeating that the only basis on which [the claimants] seek to recover damages is that [the defendant] would absent his deceit have agreed to pay them to do all the work which they in fact did at the hourly rates provided for in the DBA.”

*Written closing submissions*

22. There were four days of evidence, 28-29 August and 4-5 September 2019, with witnesses largely on the liability issue. Written closing submissions were prepared for the final day, 6 September 2019, and exchanged between the parties that morning.
23. The claimants’ written closing submissions set out their analysis of the factual evidence. Under the heading “causation”, the submissions stated that there was really no live causation issue (para. 28), and that it was beyond argument that they had relied on the representations made by the defendant that his story in the 2011 witness statement was true. “To suggest however that the claimants would have agreed not to require the payment of unconditional fees if they had known of the [defendant’s] deceit is fantasy...” (para. 29). Under the heading “loss”, the written closing submissions stated:

“30. It appears that the [defendant] still maintains an argument that the claimants were not caused loss because the [defendant] would not have agreed to pay their fees on an unconditional basis. That is an absurd argument. The loss is the transfer of value by way of fees...The loss of the value of those fees is a loss directly and naturally following from the deceit...”

24. After canvassing the factual submissions, the defendant’s written closing submissions addressed causation at paragraphs 67-77. There was a fundamental issue of law between the parties, said paragraph 67, as to what the claimants had to prove in order to recover damages, even if deceit was proved. The claimants’ case, it continued, was that all they had to prove was deceit and that they did not have to prove that the defendant would, in the counterfactual world, have instructed them on an hourly rate basis. Paragraphs 68-69 stated by reference to, inter alia, *Clerk and Lindsell on Tort*,

that the claimants had to prove loss. Thus they had to plead and prove what they would have done absent the fraudulent misrepresentation: para. 70. There were two issues, reliance and what they would have done instead (para. 71). The submissions then continued:

“72. What is unusual about this case is that what [the claimants] have allegedly lost as a result of the deceit is not money per se, but time. Doubtless [the claimants] consider their time valuable, but it is only valuable insofar as people are willing to pay them to do things with it and the existence of such people cannot be assumed.

73. [The claimants] might have been expected to put their case on the basis that, but for the deceit, they would not have taken this case on at all. Instead, they would have done other paid work between June 2013 and May 2017. Supported by evidence of their earnings in the period before June 2013 and after May 2017, such a basis of establishing loss might have been hard to resist.”

25. Paragraph 74 observed that the claimants had chosen not to advance such a claim, even in the alternative. They had instead advanced a very specific factual alternative case, and reference was made to paragraphs 14(iii) and 15(ii) of the claimants’ Points of Claim. Paragraph 75 stated that the claimants had made no attempt to prove that they would not have entered the DBA or that they would have insisted on payment on an ordinary hourly basis: para. 75. The parties’ positions on loss represented a “stark legal dichotomy”, paragraph 76 observed, and it meant that it was no longer necessary to consider precisely what the counterfactual situation looked like.

*Oral closing submissions*

26. There were oral closing submissions by Mr Cakebread and Mr Carpenter on 6 September 2019. There are witness statements from both of them and from Ms Levy as to the submissions made. There is some disagreement as to what was said during these oral closings. Mr Cakebread recalls that during Mr Carpenter’s submission the Arbitrator stated that the claimants had provided time, effort and product to the defendant, which had value to him even if to no one else and that they were seeking the value of their work.
27. In his witness statement, Mr Carpenter says that while it was no part of the claimants’ case before the Arbitrator that they had a restitutionary remedy or that he should award damages on a restitutionary basis, he (Mr Carpenter) had introduced the concept of restitution in his oral submissions when addressing whether the claimants were entitled to damages assessed by reference to the value of their work to the defendant. He had submitted to the Arbitrator that that was tantamount to a restitutionary claim, but he did not develop the submission to any extent since it was simply intended to illustrate that the basis on which the claimants were putting their claim was not consistent with the tortious measure of damages.
28. Ms Levy’s recollection is similar to Mr Cakebread, in particular that the Arbitrator seemed to have rejected Mr Carpenter’s submissions on value and concluded that the

claimants' loss was made up of time, effort and product, hence his introduction of the example of the artist producing a painting of value to the person commissioning her. Ms Levy further states that next to Mr Carpenter's submission that the claimants had to prove the loss on a but for basis, she had written "Not deceit - 'Quantum Meruit'." She has no recollection of Mr Carpenter referring to restitution or that the claimants' claim was tantamount to a restitutionary claim. If he had, she would certainly have made a note.

29. The Arbitrator asked for further written closing submissions.

*Further written closing submissions*

30. The defendants' further written closing submissions, dated 14 September 2019, said that they would only address the causation issue (para. 1). The Arbitrator had to determine what the counterfactual situation looked like on the basis of what the claimants had pleaded and proved (para. 2). The claimants had only pleaded that, absent the deceit, the defendant would have agreed to pay them on an hourly rate basis (para. 3). The claimants had not attempted to establish their counterfactual case (para. 5). The claimants had lost their time, had chosen to establish what they had lost by alleging a specific counterfactual situation in which the defendant agreed to pay them for their work come what may, but had not made out this case and could not in light of their decision not to challenge the defendant's evidence to the contrary (para. 7). As regards the hypothetical case the Arbitrator raised about an artist induced to paint a portrait of value only to the sitter, paragraph 8 stated:

"To award the price of the commission as a proxy for the value of the artist's time would be to fall into the trap of awarding a contractual measure of damages as compensation for a tort. So too would be awarding some sort of reasonable price/quantum meruit."

31. The claimants' further written closing submissions of 16 September 2019 addressed the defendants' written closing submissions paragraph by paragraph. As to paragraphs 66-77 of the latter, the claimants' further written submissions stated at paragraph 31: "These contentions were largely addressed in oral submissions. It is self-evidently wrong, inter alia, for the reasons suggested by the Tribunal." Then at paragraph 32 the claimants stated they were seeking the loss caused by the deceit, not as a result of the first or second DBA.

"The claimants seek not their fees but damages to reflect the fact that they were cheated out of charging unconditionally for their work which is recorded in their fee notes at the rate agreed by the [defendant]..."

**The Award**

32. After canvassing the substantive issue at length, the Arbitrator found that the defendant had lied to the claimants and that influenced them in entering the DBA (para. 69).



33. The Arbitrator then turned to compensatory damages at paragraphs 70-88. The claim was not in debt or contract but in tort, he said, “and the measure of damage is the loss directly flowing from the claimant’s [sic] reliance [on] statements made by [the defendant]. The burden of proof in this respect falls squarely upon the claimants” (para. 70). He referred to the claimants’ points of claim (para. 71).
34. The Arbitrator then set out the parties’ competing positions on loss referred to in their skeleton arguments. He rejected the defendant’s submission that the counterfactual to adopt was one where there was no misrepresentation and the claimants would have acted with the same outcome (paras. 72-74). In particular he referred to the defendant’s closing submissions that the claimants might have been expected to have put their case on the basis that, but for the deceit, they would not have taken on the action at all, but that was not how they had approached the case (para. 75). The Arbitrator then stated: “I am certainly satisfied that [the defendant] would never have advanced the action on a privately paying basis” (para. 76).
35. The Arbitrator at paragraph 77 of the Award then asked himself the question, “What therefore is the claimants’ potential loss and what have they proved?” In that paragraph and the following paragraph, paragraph 78, the Arbitrator quoted passages from *McGregor on Damages*, 20th edition, para.49-002, to conclude that an individual making recovery in deceit was not entitled to damages founded upon the loss of a bargain, but on a tortious basis. The arbitrator referred to *Doyle v Olby (Ironmongers)* [1969] 2 QB 158 and *Smith New Court Securities v Scrimgeour Vickers* [1997] AC 254 (paras. 78-79).
36. At paragraphs 80 and 81 the Arbitrator made these findings:
- “80. I agree with Mr Carpenter that [the] Claimants’ loss is not simply the sum of the fee notes delivered to [the defendant]. Even if that is limited to the period after the execution of the Second DBA that would still represent the measure of damages for the loss of the bargain.
81. Has any such loss been proved? It seems to me clear that, had the lies not been uttered, the claimants would not have taken on the case. I considered in the course of argument and thereafter whether, as submitted by Mr Cakebread, the damages would fall to be calculated by reference to the value of the services dishonestly obtained pursuant to the fee notes. This seems to me to be tantamount to seeking a form of restitutionary award in the context of a claim in deceit which is an approach which has been denied by the courts: see *Halifax Building Society v Thomas* [1996] Ch 217.
82. On careful reflection I consider that the correct approach to loss in this case would be to assess what the claimants were deprived of by entering into this agreement by reason of the deceit...I think the true position is that, had [the defendant] provided a truthful account at the time of the Second DBA, the claimants would have ceased acting...

83. In my judgment what the claimants were deprived of was the opportunity to utilise their skills on other paid tasks in the period between entering the Second DBA and the end of their retainer. This of course has to be predicated upon the existence of alternative instructions and the fees these would have generated...

85. In approaching this issue I must emphasise that the claimants have tendered no evidence of their normal charging rates and typical annual incomes let alone whether they were able to undertake any other work during the period of their retainer.

86. I have considered very carefully whether I can make any loss of earnings award to the claimants in these circumstances. It seems to me that they have not pleaded a case consistent with the appropriate measure of damage. They have not tendered evidence which would support a calculation on such a basis.”

37. The Arbitrator then considered whether he could nevertheless make a broad brush “jury assessment” and concluded that he could not because that was not an approach canvassed in the pleadings or evidence, and that in any event he did not have the basis to form any view as to whether any other work was actually undertaken by the claimants during the relevant period and what scale of income they might have expected to achieve during the period they were engaged in the action as a result of entering the DBA (paras 86-87).
38. Therefore, the Arbitrator concluded, he could not award compensatory damages by reference to loss of earnings (para. 88).
39. However, he went on to find that the defendant’s conduct was deliberate and cynical and to award exemplary damages (paras. 89-92).

### **The legal framework**

40. An award may be challenged under section 68 of the 1996 Act if there has been a serious irregularity in the tribunal, the proceedings, or the award which is of a character falling within one of the categories specified in section 68(2), and the serious irregularity is one that the court considers has caused or will cause substantial injustice to the applicant.
41. Section 68(2)(a) refers to a “failure by the tribunal to comply with section 33 (general duty of tribunal)”.
42. Section 33 provides:

“(1) The tribunal shall –

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

(b) adopt procedures suitable to the circumstances of the particular case, 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.”

43. In *Lesotho Development v Impregilo SpA* [2006] 1 AC 221 Lord Steyn said at paragraph [26] that a major purpose of the Act was to reduce drastically the extent of intervention of courts in the arbitral process and endorsed what the Departmental Advisory Committee [DAC] Report had said, namely, that section 68 is 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. More recently Popplewell J quoted what Bingham J had said in *Zermalt Holdings SA v Nu-Life Upholstery Repair Ltd* (1985) 275 EG 1134), that “the courts do not approach awards ‘with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration’”: *K v A* [2019] EWHC 1118 (Comm), [25].
44. In *Reliance Industries Ltd v The Union of India* [2018] EWHC 822 (Comm), [2018] 2 All E.R. (Comm) 1090, Popplewell J reiterated at paragraph [14] the principles he had synthesised in relation to section 68(2)(a) in *Terna Bahrain Holding Co WLL v Bin Kamel Al Shamzi & others* [2012] EWHC 3283 (Comm), [2013] 1 All E.R. (Comm) 580, [2013] 2 CLC 1 at [85]. These include the following:

“...

(2) The test of serious irregularity giving rise to substantial injustice involves a high threshold. The threshold is deliberately high because a major purpose of the 1996 Act was to reduce drastically the extent of intervention by the courts in the arbitral process.

(3) A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court’s intervention. Relief under s. 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

(4) There will generally be a breach of s. 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.

(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s. 33 or a serious irregularity."

45. Underlying point (4) in this synthesis is a rich caselaw on establishing a breach of section 33 of the Act. Tomlinson J's observation in *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1, has often been cited, that there had been no breach of the duty to act fairly where the claimant "had had a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion": [72]. If a point is not an essential building block, "it is not necessary for the tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it": *OAO Northern Shipping Company v Remol Cadores De Marin SL* [2007] EWHC 1821 (Comm), [22] per Gloster J. In *Terna* itself, Popplewell J had added at [106]:

"[W]hilst s.33 requires a party to be given a reasonable opportunity of addressing his opponent's case, that does not mean that the tribunal is acting unfairly in deciding a case on a point to which the party raising it does not give any great emphasis, or which is not the subject matter of any great exposition...Provided the issue is raised, however briefly, the opposing party has an opportunity to address it at whatever length and in whatever detail he chooses." See also *Reliance Industries Ltd*, [32].

46. More recently in *RJ and another v HB* [2018] EWHC 2833 (Comm), [2019] Bus LR 175, Andrew Baker J said:

"27. There was no dispute before me but that it is a serious irregularity within section 68(2) of the 1996 Act for an arbitrator to decide a dispute on a basis significantly different to anything raised by or with the parties, if that causes or will cause substantial injustice. I say "by or with" the parties because of course arbitrators are not restricted to choosing between whatever rival contentions are developed by the parties; but if they are to contemplate determining a dispute on some different basis, fairness dictates, and so the arbitrators general duty of fairness under section 33 of the 1996 Act requires, that the parties be given notice and a proper opportunity to consider and respond to the new point."

47. In determining whether there has been substantial injustice the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. In *Terna*, Popplewell J put the point thus: "The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome": para. [85(vii)].

### **The claimants' case**

48. The claimants' contention is that the Award is flawed because of two serious irregularities. First, the conclusions in paragraph 81 of the Award on the nature of the claimants' claim and the availability of restitutionary damages in the tort of deceit constituted a decision on a new point which had not been argued or relied upon by either party and which they had not been given an opportunity to address; and secondly, the findings in paragraphs 83-88 of the Award, that the claimants' loss was in effect consequential loss which had not been proved by them, when no such claim had been made by them and there had been no argument on the issue during the arbitration.

#### *Paragraph 81 of the Award*

49. In advancing the case before me, Mr Cakebread contended by reference to the pleadings, written submissions and Award that the claimants' case on loss had always been that, absent the deceit, they would not have agreed to provide the work on the contingent basis actually agreed; as result of the deceit there had been a transfer of value to the defendant in form of work product the claimants provided him; that value was best quantified by the minimum amount the defendant had agreed their work was worth in the event of certain eventualities; this amount was available from the fee notes; the claimants never sought a contractual measure of damages; the loss they were seeking was primary, not consequential loss; and as with valuing the loss of money or a valuable object as a result of deceit, there was no need for the claimants to prove what they would otherwise have done absent that deceit.
50. Mr Cakebread examined at length how the defendant had misunderstood the claimants' case in its pleadings and submissions before the Arbitrator. He contended that Mr Carpenter provided no legal support for what he submitted was the defendant's central submission, namely, that the claimants had suffered no primary loss since their work had, or could have, no value. Yet in paragraph 81 of the Award, Mr Cakebread submitted, the Arbitrator had decided the case on the basis not that there was no loss but that the loss was not recoverable. That was on the basis of the restitutionary principle which the arbitrator invoked in paragraph 81, citing an authority which neither party referred to and which, as the defendant acknowledged, did not support the principle.
51. That restitutionary issue, Mr Cakebread submitted, was never in play or even mentioned. There was no defence involving the inadmissibility of a restitutionary claim, let alone reliance on any authority to support it. If there had been, he submitted, it is improbable that the claimants would not have addressed such a vital issue in their closing submissions. Even if Mr Carpenter had made passing mention in his oral closing to restitution, there was nothing in the way of an argument relating to the claimants seeking restitutionary damages, as opposed to compensatory damages, or to any basis in law for denying that they would be available if such a claim had been made. Moreover, submitted Mr Cakebread, the Award gives no indication that a restitution issue was raised in any of the written material provided by the parties or their submissions. A characteristic of the Award is that the Arbitrator records the principal arguments advanced and his view on them, but there is nothing in this regard which hints at restitution.

52. Nonetheless, Mr Cakebread contended, the Arbitrator identified the issue of the damages being restitutionary in paragraph 81 of the Award. His reasoning was (a) that the claimants said that damages would fall to be calculated by reference to the value of the services dishonestly obtained pursuant to the fee notes; (b) that was tantamount to their seeking restitutionary damages; (c) if damages could be categorised as restitutionary, they could not be categorised additionally or alternatively as compensatory; (d) restitutionary damages are “denied by the courts” in a claim arising from deceit; and (e) the decision of the Court of Appeal in *Halifax Building Society v Thomas* supported his conclusions in (c) & (d).
53. In Mr Cakebread’s submission, none of propositions (b)-(e) was argued for or against by either party in their pleadings or written submissions raised by the Arbitrator or either party in oral discussion. The *Halifax Building Society* case, cited by the Arbitrator, was cited by neither party during any part of the arbitration and was not referred to by the Arbitrator at the hearing. All this, Mr Cakebread submitted, constituted a serious irregularity under section 68 demanding that this part of the Award be set aside or the issue remitted.

*Paragraphs 82-88 of the Award*

54. In Mr Cakebread’s submission the Arbitrator, having concluded in paragraph 81 that the claimants’ primary loss was not recoverable, proceeded in paragraphs 82-88 to deal with the claimants’ claim as having to be one for consequential loss only. It was the type of situation Andrew Baker J had dealt with in *RJ and another v HB* [2018] EWHC 2833 (Comm), [2019] Bus LR 175, where a primary irregularity – in this case in paragraph 81 - played out in the remainder of the award. The possibility of consequential loss had not been raised by the Arbitrator during the arbitration. Nor, Mr Cakebread contended, had the defendant raised the possibility, since his case was that the claimant had suffered no primary loss. The arbitrator’s citation of *East v Maurer* [1991] 1 WLR 461 and *Doyle v Olby (Ironmongers)* [1969] 2 QB 158 was to authorities not relied upon by either party, for the reason that the issue of consequential loss was not in play. The issue had been whether there was value transferred to the defendant, not whether such value could be recovered.
55. In other words, submitted Mr Cakebread, the arbitrator was “freewheeling” in his approach to quantification. He had asked neither side whether the work the claimants had undertaken was evidential of the loss of earnings claim which he had characterised, and he made no attempt to see whether the claimants could establish such a claim. In paragraphs 86 and 87 he addressed issues without asking the parties. Having acknowledged that his approach was not canvassed in the pleadings or evidence he should have posed questions to the parties if he thought they had both missed the point regarding the effect of the law of restitution and that the only recoverable claim in law was for consequential loss. In paragraph 87, having undertaken the task of quantifying consequential loss and concluding that he was unable to complete it, he should have sought the assistance of the parties to do so.
56. In all the Arbitrator has made findings on issues without notice to the parties that he was considering doing so, thereby depriving the claimants of any opportunity, let alone any proper opportunity, to address any such case. The claim fell squarely within the type of serious irregularities identified in the authorities. The substantial injustice to the claimants was that they have been deprived of the opportunity of being able

fully and fairly to put their case which had resulted in their being denied a very substantial award of compensatory or restitutionary damages despite the extensive findings of deceit against the defendant and the enormous consequential time and effort they have expended, and material services they provided to him.

### **Discussion**

57. It is not my task to assess whether the Arbitrator was correct in rejecting the claimants' submissions on the law of tort relating to a loss resulting from deceit. As mentioned earlier in the judgment the claimants have a section 69 application before the court, where they are challenging the Arbitrator's legal approach. What is relevant, however, is how the Arbitrator analysed the matter and reached his conclusion Award that the claimants were not entitled to compensatory damages. After considering the pleadings and submissions set out earlier in the judgment, my conclusion is that the Arbitrator accepted the defendant's submissions, and rejected the claimants', about how loss was to be assessed following their reliance on deceit which he had found established; that the reference to restitution in the last sentence of paragraph 81 was not an essential building block to that outcome and did not need to be referred back to the parties; that paragraphs 82-88 of the Award were part of his essential building blocks and did not flow from his remarks in the last sentence of paragraph 81; and that the claimants had a fair opportunity to address all those essential building blocks which formed part of the Award.

#### *The Arbitrator's essential building blocks*

58. Without repeating at length the Arbitrator's reasons, it seems to me that his essential building blocks to the conclusion that the claimants were not entitled to compensatory damages are (i) damages for their loss were to be awarded on a tortious basis and not on a loss of a bargain or contractual basis (paras. 70, 77); the defendant would never have advanced his claim against the bank on a privately paying basis (para. 76); the sum of the fee notes delivered to the defendant was not the claimants' loss (para. 80); the correct approach to their loss was to assess what they were deprived of by entering into the DBA agreement by reason of the deceit (para. 82); what they were deprived of was the opportunity to utilise their skills on other paid tasks in the relevant period (para. 83); that was predicated upon the existence of alternative instructions and the fees these would have generated, but the claimants tendered no evidence of normal charging rates and incomes or whether they were able to undertake other work during the period (paras. 83, 85); and they had not pleaded a case consistent with the appropriate measure of damages for their loss or tendered evidence to support a calculation on that basis (para. 86). Thus, the Arbitrator concluded, there could be no award of compensatory damages because loss (of earnings) had not been established (para. 88).
59. In adopting those essential building blocks to his conclusion, the Arbitrator in my judgment was accepting the defendant's submissions. Again, there is no need to repeat how the defendant advanced its case, and how during the arbitration it was varied to meet the claimants'. By the close of the case, however, Mr Carpenter's contentions for the defendant about causation and loss were clear: first, the claimants had not attempted to prove that the defendant would in any event have instructed them on an hourly basis (which he submitted was their only case on causation and loss on the pleadings), the defendant having denied that he would have; second, what the

claimants needed to establish was that, absent the deceit, they would have been in a financially better position, in other words, the deceit caused them loss; third, that loss was not of money or a valuable object but of their time; fourth, they had not attempted to prove the value of that time by adducing evidence that there were others who were willing to pay for it so they would have undertaken other paid work during the relevant period; fifth, it would be a trap to award what were effectively contractual damages in a claim in tort; and thus sixth, no loss had been established. Those points were mirrored in the Award.

60. On the hand, while the Arbitrator accepted the claimants' case that the defendant had been deceitful and that they had relied on the deceit to their detriment, he rejected the claimants' approach on loss. That approach involved the denial, as stated in their skeleton argument, that they needed to prove that the defendant would have agreed to pay them unconditionally for their services or that they would have made profits by doing other work if they had not been deceived. Instead, they stated that their entitlement to damages was "simple and straightforward", that "their legal services had a value agreed by the respondent by reference to their hourly rates". In their written closing submissions, the basis of their claim on loss was summed up at paragraph 30, quoted earlier, as "the transfer of value by way of fees...The loss of the value of those fees is a loss directly and naturally following from the deceit..." The fact is that, rightly or wrongly, the Arbitrator did not adopt that approach.

*Restitution and paragraph 81*

61. In considering in paragraph 81 the claimants' submission that damages fell to be calculated by reference to the value of the services dishonestly obtained pursuant to the fee notes, the Arbitrator observed in the last sentence of the paragraph that this seemed to be tantamount to seeking a form of restitutionary award which was not permissible in a claim in deceit. As explained earlier Mr Cakebread submitted that this constituted the Arbitrator deciding the case on the basis that the loss was not recoverable because of this restitutionary principle to which no reference had been made in the arbitration. In my view, as I have also explained, this was not an essential building block to the outcome in the Award. In other words, this sentence could be ignored without in any way affecting the Arbitrator's reasoning. This conclusion is reinforced by the context of that sentence since, in the language of the first sentence of paragraph 82, the Arbitrator is turning, as he says, to "the correct approach to loss in this case..."
62. There were submissions before me about whether restitution was in play in the arbitration. Mr Cakebread denied it ever was; if there had been any suggestion of it, he informed me, he would have addressed it. Mr Carpenter says in his witness statement that he referred in passing to restitution in oral closing, although Mr Cakebread and Ms Levy have no recollection of this and Ms Levy made no note about it. Certainly in his further written closing submissions Mr Carpenter referred to the trap of awarding a contractual measure of damages or some sort of reasonable price/quantum meruit as compensation for a tort, and Ms Levy has a note of his mentioning quantum meruit in his oral closing. In their written closing submissions, the claimant referred to a transfer of value, which is redolent of a restitutionary claim, although Mr Cakebread underlined that he was using transfer of value in the context of the legal test for the normal measure of damages for the tort of deceit (referring in his submissions to me to a passage in *McGregor on Damages*, 21<sup>st</sup> ed., para. 49-028).



Given that I have decided that no restitutionary principle was an essential building block in the Award, there is no need for me to decide whether the issue was in play.

*Paragraphs 82-88 of the Award*

63. As I have described, Mr Cakebread's case was that paragraphs 82-88 of the Award dealt with consequential damage. Because this had not been canvassed by the Arbitrator with the parties there was a serious irregularity. There is no need for me to decide whether it is correct to characterise what the Arbitrator was examining here were consequential loss. I simply note that there was no reference to this term in the parties' submission or in the Award. In my view, the key point is that these paragraphs contain essential building blocks for the Arbitrator's conclusion that the claimants had not established loss. The issue in these paragraphs was not new since Mr Carpenter's case had been that the claimants had to establish loss; that was through establishing what they would have earned in relation to other instructions absent the fraud; but that they had not done.
64. As one aspect of this, in his written closing submissions Mr Carpenter had said that the claimants might have been expected to establish they would have done other paid work in the relevant period, adding that if supported by evidence of their earnings at that point "such a basis of establishing loss might have been hard to resist". In their oral closing and further written closing submissions, the claimants made no attempt to meet the point. What the Arbitrator did at paragraphs 86-87 was to consider whether he could award damages on the basis of a "jury assessment" of the claimants' loss of earnings although they had not advanced such a case or produced evidence. He decided he could not do that, not least because there was no evidence of alternative earnings. There was nothing unfair or irregular in this, perhaps the opposite. The bottom line was that the claimants could have advanced a case based on what they would have earned, but they eschewed that course throughout, even when Mr Carpenter told them – admittedly on the last day of the hearing – that he would have found it difficult to resist such a case.

**Conclusion**

65. For these reasons I do not consider that the claimants have passed the high threshold in section 68 of the 1996 Act. There is no basis for the court to intervene.