

Neutral Citation Number: [2018] EWHC 3366 (TCC)

Claim No: HT-2017-000389

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th July 2018

Before :

RECORDER ANDREW SINGER QC
(Sitting as a Judge of the Technology and Construction Court in private)

Between :

A

Claimant

- and -

B

Defendant

Mr Nicholas Vineall Q.C. (instructed by Carter-Ruck Solicitors) for the Claimant
Mr Richard Harrison (instructed by Reed Smith Solicitors) for the Defendant

Hearing date: 28th June 2018

Judgment Approved

Recorder Andrew Singer QC:

Introduction

1. This is an arbitration application dated 18th December 2017 brought by A, an airline, against B which operates as an independent technical solution provider for airlines such as the Claimant.
2. The parties entered into an Agreement for the Performance of Engine Maintenance Services dated 24th November 2011 (“the Agreement”) [Bundle 3, Page 538 and following]. Work was done and invoices rendered under that Agreement. Disputes arose and pursuant to Clause 21.2 of the Agreement a Request for Arbitration under ICC Rules was issued. A was Respondent to the arbitration and B was the Claimant. The arbitral Tribunal produced a final Award dated 20th November 2017 and this application is a challenge to parts of that Award under Section 68 of the Arbitration Act 1996. In brief, A complains that the decision of the Tribunal to exclude some factual evidence given in examination-in-chief during the oral hearings in London in late August 2016 amounts to a serious irregularity under Section 68 and the issue of admissibility and the consequences thereof should be remitted to the (same) Tribunal.

Evidence put before the Court

3. A’s application is supported by the written evidence of its solicitor for the application (not the arbitration), Mr Wescott. His statements relevant to the application are in the Application Bundle 1 at tabs 9 and 12. The Defendant’s evidence is in the witness statement of Mr Naegeli, who represented the Defendant in the arbitration. The exhibits to Messrs Wescott’s and Naegeli’s statements are found in Bundles 2 to 5 of the Bundle.
4. I have read the statements and the exhibits suggested as pre-reading and the parties’ respective Skeletons and all the documents shown to me during the oral hearing of the application on 28th June. I have taken the contents of all evidence and documents referred to into account, as I have the parties’ respective written and oral submissions, in reaching my decision. I am grateful to both parties’ Counsel, Mr Vineall QC for A and Mr Harrison for B, for their helpful and succinct submissions.

Issues to be Decided

5. The parties have agreed that the following issues need to be determined on this application:

- (1) Was the decision to exclude the oral evidence of Mr X an irregularity falling within one or more of the categories set out in Section 68(2) of the Arbitration Act 1996?
- (2) If so, has that irregularity caused substantial injustice to A (in which case it will be a serious irregularity within the meaning of the Act)?
- (3) If so, what is the appropriate remedy?

The Agreement

6. The relevant clauses of the Agreement are as follows:

“9.9. A shall report any discrepancies or disputes in writing to B within thirty (30) days from the date of receipt of the relevant invoice by fax or e-mail. In case an invoice is only disputed in parts, A shall pay the undisputed part of the respective invoice within the period stated in Clause 9.6. Any invoice or part thereof not disputed within thirty (30) days shall be deemed accepted by A and payment shall be made as specified in this Agreement. The Parties shall negotiate in good faith to resolve invoice disputes within thirty (30) days. If such dispute is resolved in favour of B, A shall pay the amount agreed including daily interest at the rate of nine per cent (9%) per annum from the date the payment would have been due.”

“9.11. Except as provided for in Clause 9.9 or in the case of a credit memo, A is not entitled to withhold, offset or delay any payment or invoice due or issued under this Agreement in connection with any alleged or actual defence, counterclaim or other right against B.”

Clause 12.2 headed “Time Limitation” provides:

“B is only liable to rectify defects as per Clause 12.1 if such defect or failure occurs within seven thousand (7000) operating hours or thirty (30) months after the date of the release note whichever occurs first and which are reported in writing by A to B as soon as practical and in any event within thirty (30) Business Days after A becomes aware of it.”

Clause 19.1 under the heading “Entire Agreement” provides:

“This Agreement (including the Annexes attached hereto, which are incorporated herein by reference) sets forth all of the covenants, promises, agreements, warranties, representations, conditions and other standards between the Parties hereto with respect to the subject matter hereof constitutes and contains the complete, final and exclusive understanding and agreement of the Parties with

respect to the subject matter hereof; and cancels, supersedes and terminates all prior agreements and understandings between the Parties with respect to the subject matter hereof. There are no covenants, promises, agreements, warranties, representations, conditions or undertakings, whether oral or written, between the Parties other than are set forth herein. No subsequent alteration, amendment, change or addition to this Agreement shall be binding upon the Parties hereto unless reduced to writing and signed by the respective authorised officers of the Parties.”

Clause 20.1 provides inter alia that:

“All contractual notices, correspondence and documents given under this Agreement shall be given by courier or registered mail from A addressed to B at B, Account Management Engines [B’s address] and a copy to: B, Attention General Counsel, [B’s address].”

Clause 21.2 is an arbitration clause providing for an ICC arbitration to be held in London with a three person tribunal.

7. In addition to the Agreement itself, a side letter with regard to Representatives and Field Assistance was executed by the Parties on the same day as the Agreement [Bundle 3, Pages 602 and 603]. The Parties referred to Clause 2 of that letter which reads as follows:

“Local B Representative

If mutually agreed, B shall assign a local representative who shall only act as technical and commercial interface between A and B in respect of the fulfilment of the Agreement, specifically in regard to the following matters:

- (a) disruptions, if any, due to engine problems;
- (b) engine removals;
- (c) work scopes;
- (d) engine transportation;
- (e) on site support.

The representative shall regularly report and follow-up on technical and/or commercial issues.

Rates and charges: The services in this clause 2 are included in the RBS FHR stated in the Agreement.”

Mr Z was the local representative for B. He did not give evidence at the oral hearing.

8. Clauses 9.9, 12.2 and to a lesser extent 19. 1 are central to the issues on this application.

The Arbitration

9. On 27th May 2015, disputes having arisen between the parties, B made a Request for Arbitration pursuant to Clause 21.2 of the Agreement.
10. On 3rd December 2015 the procedural timetable was agreed [Bundle 3, Page 608]. That provided, so far as relevant to this application, for the service of witness evidence with each round of pleadings culminating in A's Reply to Defence to Counterclaim. Specifically it provided that:

“The Respondent [i.e. A] shall provide its Reply to the Defence to the Counterclaim with witness evidence and documents which are limited to responding to the Defence to Counterclaim and upon which it intends to rely in respect of the Defence to Counterclaim, by 20 June 2016.”

(In fact, the dates were extended and A's Reply to the Defence to Counterclaim was not served until 11th August 2016. When it was served, it had no witness statements attached to it.) On 12th January 2016 [Bundle 2, Page 304] agreed terms of Reference were reached which provided that:

“Subject to the provisions of the ICC Rules, the rules of procedure to be followed shall be as determined by the Tribunal in its discretion, after consultation with the parties. In determining such rules, the parties have agreed that the IBA Rules on the Taking of Evidence in International Arbitration (2010) shall serve as guidelines for the Tribunal.”

Although there was some argument before me both in the parties' respective written arguments and orally as to the effect of the IBA Rules and particularly the requirements for the contents of the witness statements, it did not seem to me to take the matter any further not least because the events which have given rise to this application commenced when the Reply to Defence to Counterclaim was served by A without any witness statement being served with it so there was no issue of compliance with the Guidelines in terms of the contents of a statement. Further, in my view the Guidelines do not add materially to the Terms of Reference.

11. On 1st February 2016 B submitted its Statement of Claim, which included two witness statements of fact and an expert report [Bundle 2, Page 307]. It is accepted that Clause 9.9 was expressly referred to in the Statement of Claim as follows under the heading “A's Claims are Forfeited”:

“86. Pursuant to Clause 9.9 of the Agreement A shall report any discrepancies or disputes in writing to B within thirty (30) days from the date of receipt of the relevant invoice by fax or e-mail. Any invoice or part thereof not disputed within thirty (30) days shall be deemed accepted by A and payment shall be made as specified in this Agreement.

87. Before this Arbitration was initiated A has never specifically disputed the quality of the work and services performed by B. A merely made some general remarks about purported deficient services without every specifying which service it meant. Let alone did it refer to a specific invoice.”

Paragraph 101 summarised this defence:

“At any rate, A has forfeited its right to notify defects (Clause 9.9 of the Agreement). B’s invoices are deemed accepted and payable in accordance with the Agreement.”

12. On 22nd April 2016 A submitted its Defence and Counterclaim with three witness statements, one from Mr X whose evidence at the oral hearings is the subject of this application. The quality and quantity of the witness statements have been criticised by B as not complying with the IBA Guidelines and more importantly perhaps as not providing an evidential basis for the defence to the claim and in support of the Counterclaims it is said by A were affected by the exclusionary ruling. I have already dealt with the IBA point at paragraph 10 above. The Tribunal did not exclude or refuse to consider Mr X’s witness statement; simply his oral evidence. The witness statement appears at Bundle 3, Pages 530 to 533. It is somewhat lacking in detail but does seek to verify the facts and matters set out in the Defence and Counterclaim. Contractual variation was not expressly pleaded in the Defence and Counterclaim although it was argued at the oral hearings and thereafter.
13. On 29th April 2016 the Tribunal issued a further modified timetable for the arbitration.
14. On 15th July 2016 B submitted its Reply and Defence to Counterclaim and a supplementary expert’s report [Bundle 3, Page 435 and following].
15. On 21st July 2016 the Tribunal issued an Amended Procedural Order [Bundle 3, Pages 617 to 619]. Paragraph 8.3 of that Order reads as follows:

“The party presenting the witness shall have the right to make a short examination-in-chief of that witness which shall be limited to new facts or developments, if any, which have taken place since the date of filing of his/her last witness statement. Such examination should not exceed ten minutes.”

It should be noted for completeness that the same order was made in a Procedural Order on 14th July 2016 [Bundle 3, Pages 614 to 616]. It is not suggested by A that the Order itself was in any way irregular.

16. On 11th August 2016 A served its Reply to Defence to Counterclaim [Bundle 3, Page 499 and following] which, as I have already noted, had no further witness statements attached to it. At the hearing on 28th June 2018, no explanation was proffered for the lack of a further witness statement from Mr X.

17. Oral hearings were held in London on 30th and 31st August 2016. The Court has been shown transcripts of what occurred at the hearing in relation to the issues of admissibility of evidence given in examination-in-chief by Mr X and it is appropriate to set out the transcript at some length. (The evidence begins at Bundle 4, Page 736, but references will be given to the internal pages of the transcript rather than the bundle pages, there being four pages of transcript on each bundle page.)

Having raised a letter of 16th August 2016 [Page 145, Line 1], in response to an interjection from a Member of the Tribunal, Ms Vickari, A's Counsel for this part of the hearing, moved to another topic as follows [at Page 147, Line 9]:

“Question: Are you aware that since you provided your witness statement, B contends that A did not provide notice of damages caused to a thrust reverser cal due to a missing clamp?

Answer: I am aware.

Question: Okay. Is that true?

Answer: No.

Question: Would you explain for us?

Answer: Yes. So we were duly notifying B through their representative all of the time. This issue-it happened somewhere in 2012. The day of occurrence, the pilot reported a defect that there was a bleed overhead, there was a bleed trip due to that. When the engineer went and investigated why it was happened, what happened, then they found the missing clamp.

Question: Okay. Mr X, I'm going to direct you to what has been marked as respondent's exhibit 15. That is at Page 461 of the hearing bundle. I believe it is the other binder.”

At this stage there was an objection from Mr Naegeli who, as I have noted, provided the witness statement in opposition to the application and was Counsel for B at the hearing, as follows [Page 148, Lines 4 and following]:

“Mr Naegeli: May I just state that this document is not a new one. That document was known at the time that Mr X issued his witness statement. It has been filed with the statement of defence. I wonder whether this is new development he should testify on.

Ms Vicari: This document is a predicate about what I am going to ask him about and it has been B' argument that we didn't provide notice to B in order to establish that we did provide notice and when we provided notice, this document, the dates on it, is going to serve as a predicate to that. I think it is important that the panel have those facts in front of them on the notice issue.

The Chairman: Please proceed.

Ms Vicari: Thank you. Mr X, do you have in front of you R15 ...

Answer: Yes.

Question: And specifically Page 465 of the hearing bundle?

Answer: That's right.

Question: Okay. Would you please tell us the date of the incident that is at issue here?

Answer: So I can see the exact date now is 22 April 2013.

Question: Okay. And what happened on 22 April 2013?

Answer: So I saw -- and it states the factual thing here because this is a report we submitted to [the regulator] also. Whenever there is an occurrence, there is an event, we need to submit a report to [the regulator], our regulatory authority. And it states that there was a bleed trip due to overhead condition which is reported by pilot. Further down -- I can read it word by word here, but I can give you a brief ..."

Further at Line 19:

“Question: Okay. When was B notified of this issue?

Answer: Okay, so the moment we found that there is a missing clamp, our power plant team, our engineering team, found out this engine was serviced at B and then further on, further development, we found that this was missing clamp from the B shop. On the same day, we informed B's representative, Mr Z, verbally, via my team.

Question: And why was Mr Z advised verbally?

Answer: So he was co-located with us and this was the working relationship we had: the moment we noticed anything, we need something from B, we used to go to Mr Z and directly get involved and he used to get us answers also.

Question: So this is how A normally notified B of issues with its workmanship?

Answer: That's right. This is the first level of notification.

Question: Why no e-mail in this situation?

Answer: So we had a good working relationship with Mr Z there and he used to take up our issues and later on he used to escalate through [inaudible].

Question: When this particular engine was sent to B by A was it missing the clamp?

Answer: Yes.

Question: Are you aware that B contends that A should have tagged the engine to identify that the engine was missing the clamp when it was sent in for its shop visit?

Answer: Yes, I am aware.

Question: What is your response to that contention?

Answer: So we have seen in the past that that is what has been notified by my team as well, that when you tag the engines, during the shipping process, the tag goes missing. In the process someone just puts them in the wrong places so it can be a misleading fact to the engine shop. So later on we developed a method of --in consultation with B, we used to not tag them and told them verbally, are removed.

Question: Thank you. Let's change gears and discuss turnaround time."

In answer to the issue of turnaround time at Page 151, Line 15 Mr Naegeli again stated:

"Mr Naegeli: I am sorry, I have to intervene again. This is now really an attempt to substantiate what has not been substantiated during the submissions and which should have been substantiated at that time. I really wonder whether that is admissible.

The Chairman: Counsel, the tribunal has decided that as the subject matter is outside the scope of the witness' witness statement, that that objection should be sustained.

Ms Vicari: Well, respectfully, this is an issue that is being set forth in B's reply.

Mr Y [one of the Tribunal]: This is direct testimony.

Ms Vicari: The witness is allowed to testify in direct to events that have transpired since he submitted his witness statement. The submission of the reply of B happened since then. B contends and argues that our claims are unsubstantiated. In response we have put in documents on that issue. I would like to have Mr X walk the tribunal through those documents in order to respond to the arguments.

Mr Y: You can do that in submissions, but that is not evidence; it is a submission that your claim is unsubstantiated. So you as Counsel, in your post-hearing brief will be able to take us through the documents that you say substantiate your claim. It is not the function of evidence and it is not the function of a witness to do that.

Ms Vicari: I mean, you know, the witness is going to give factual context to the document and he is also going to discuss the course of dealing between B and A about how they determined what the proper turnaround time would be for a particular engine.

Mr Y: I think the tribunal just needs to understand the sequence here. Are you saying that this is evidence that arises by reason of something you have not had the opportunity to raise before?

Ms Vicari: Well, we are going to have Mr X provide context to the documents we submit.

Mr Y: No, no, let's just take it a stage at a time.

Mr Haveles: Let me just add something. Yesterday, when Mr V testified, he gave testimony with respect to issues or points that were made in the answers to the counterclaim which were submitted after he gave his witness statement.

Mr Y: Right, this is what I want to understand.

Mr Haveles: This is addressing -- this is testimony that is addressing exhibits that were filed in our reply, our second pleading, just like Mr V addressed documents and issues that were attached to B's second pleading and operating on the adage taught to me by my mother, what is sauce for the goose is sauce for the gander. If it is appropriate for B to allow Mr V to talk about evidential points raised in subsequent pleadings under the guise that this was a development since his witness statement, then that same concept should apply to what Mr X is now doing.

[Pause]

The Chairman: Thank you. The tribunal has decided that we will take the evidence but we are not making a decision as to what we will do with the evidence. It gives us a chance to reflect on the timings, the scope at a later date. Understood?

Ms Vicari: Understood and thank you."

Further on in respect of a further document annexed to the Reply, Mr Y, one of the Arbitrators, noted that the document was:

"new since his testimony, I see. He did have an opportunity to submit a witness statement with his -- so this is supplying the deficit of not having put in a witness statement with your Reply?

Mr Naegeli: [it is likely that Mr Haveles is wrongly named here]: One could have said the same with respect of Mr V's testimony that was addressing issues in his.

Mr Y: Which you may do in your closing submissions

Mr Haveles: Objections. I understand. We are almost done. Two or three minutes at most.

Mr Y: Okay."

[See Page 157, Lines 1 to 10.]

18. The position was noted in the Tribunal's Final Award at Paragraph 137 [Bundle 2, Page 161] as follows:

“[Mr X] who had been the Respondent’s Vice-President - Engineering and Maintenance - since 18 March 2014, provides a statement dated 12 April 2016. He gave direct evidence which the Tribunal observed should have been included in a witness statement with the Respondent’s Reply to the Defence to Counterclaim. Counsel for the Claimant objected to this evidence and the Tribunal allowed the evidence to be adduced subject to the Tribunal’s ruling on its admissibility.”

Thereafter, the Final Award set out the transcript of evidence as set out in this judgment above.

19. It is of some significance in my judgment that the oral evidence of Mr X which was excluded related solely to issues arising out of A’s counterclaims and did not address the giving of any notice in respect of B’s invoice claim. It follows clearly, therefore, that no such evidence was excluded because it was not given and A’s evidence in answer to the invoice claims was that contained in the statements it had served with its Statements of Case.

20. Thereafter the parties exchanged voluminous written Closing Submissions. The objection to the admissibility of the oral evidence of Mr X was renewed and set out clearly and at length at Paragraphs 103 to 124 [Bundle 5, Pages 976 to 981]. At Paragraph 120 of the Submissions was an express request for the Tribunal to strike “the following statements made by Mr X from the record and not consider them as evidence: Transcript 2, Page 147/Line 9 to Page 151/Line 7, Bundle 5, Page 979 and in addition Transcript 2, Page 151/Line 8 to Page 158/Line 13, see Bundle 5, Page 980.” At paragraphs 123 and 124 of the closing argument, B identify the respects in which they claim that admission of Mr X’s oral evidence would be unfair to them. In his oral submissions Mr Vineall QC for A sought to characterise those paragraphs as “potential prejudice” but it seems to me that the paragraphs raise issues which at the very least required an answer from A at the hearing and in any event rather than being “potential prejudice” they amount absent an answer, to actual prejudice to B for the reasons they raised with the Tribunal. That objection was pursued in the oral closing submissions which were conducted by Skype in early December 2016. So at internal Pages 48 and 49, Line 25 and following [Bundle 4, Pages 810 to 811] an oral submission was made as follows:

“Accordingly, the testimony of the respondent’s witnesses has to be discounted to the extent they raised new allegations. This is all the more required, as Claimant had no possibility to cross-examine [the] Respondent’s witnesses on these new allegations that the respondent was not obliged to take into consideration.

There would be a clear violation of the principle of equal treatment of the parties, if the new allegations of the respondent’s witnesses were accepted. I refer you to Paragraphs 108 to 124 of claimant’s post-hearing submission.”

21. A had, of course, the opportunity to respond to B's written and oral objections to the admissibility of the vast majority of Mr X's oral evidence. They did so in short form at transcript Pages 9 and 10 [Bundle 4, Page 801]. At Page 9 between Lines 2 and 11 there was a suggestion that the complaint was a:

“bit of a pot calling the kettle black because B's direct examination of Mr V did the exact same thing.”

At Page 10 a slightly different tack was taken. That tack was continued at Line 2:

“What Mr X did was no different than what Mr V did. He elaborated only on exhibits and facts that were part of A's original pleading to which he had attested in his witness statement and further attested to at trial without objection.”

No other challenge to the complaints raised by B was made by A.

I note that A do not rely on these points in this application.

22. In their Final Award the Tribunal dealt at Paragraphs 122 and following under the heading “Notice Period and Course of Dealings” with the issues raised in respect of Clauses 9.9 and 12.2 and the side letter. They set out the parties' respective pleaded cases and then identified what occurred at the hearing and at Paragraph 137 set out the matters set out above including parts of the transcript. Thereafter, the Tribunal set out the parties' respective post-hearing submissions and at Paragraphs 141 to 146 set out its findings. At Paragraph 141 the Tribunal states:

“The Tribunal construes the contractual notice period set out in the Agreement at Clauses 9.9 and 12.2 is relating to two separate regimes; one by Clauses 9.6 and 9.9 relating to disputes arising from the invoices themselves, their acceptance and settlement, and the other relating to disputes arising from defective quality of services and workmanship. The former regime results in claims being made by the Claimant against the Respondent for non-payment of the invoices and the latter regime results in claims being made by the Respondent against the Claimant for damages. Thus each regime is independent of the other.”

Paragraph 143 is the exclusionary ruling which is the subject of this application and reads as follows:

“The Tribunal finds that the evidence of Mr X is inadmissible as it was outside the scope of his own witness statement and not foreshadowed in any witness statement provided in this arbitration. The Tribunal notes that given the terms of its Amended Procedural Order for hearing at Paragraph 8.3 the Respondent's right of direct examination of Mr X was limited to new facts or developments which had taken place since the date of filing of his statement which was 12 April

2016. Such statement of facts or developments are out of the admissible scope of the direct examination and therefore cannot be considered as admissible, this being particularly true for statements on issues which were not referred to in his statement. For reasons of fairness and due process, the examination of a witness about facts and developments that are neither new nor included in witness statements should not be allowed.”

Thereafter the Tribunal referred to Clause 19.1 of the Agreement and the law as it then was understood to be by virtue of the Court of Appeal’s decision in the *MWB Business* case. (Since the Final Award, the *MWB* decision has been overturned in the Supreme Court.)

23. At Paragraph 146 the Tribunal stated:

“In applying these principles to the issue of a variation by a course of dealing which arises in this arbitration the Tribunal has considered the entirety of both the documentary and oral evidence before it, in addition to the related submissions made by the Parties and finds that the evidence does not establish that there was on the balance of probabilities a variation in the obligations which are set out in Clauses 9.9, 12.2 and 19.01 of the Agreement and which relate to notification of disputes by the Respondent to the Claimant and to the alteration to the Agreement.”

24. At Paragraphs 154 to 157 the Tribunal found that the Claimant’s invoice claims were made out due to the operation of Clause 9.9 of the Agreement and the lack of a dispute of any specific invoices.

25. In respect of two of the Respondent’s counterclaims, the counterclaim in respect of the missing clamp to Engine ESN89420 which was in the sum of over US \$1.5 million (although approximately US\$189,000 of that claim is accepted to be excluded by Clause 12.3 of the Agreement) was dismissed at Paragraph 358:

“The Tribunal determines that the Respondent has not adduced evidence to support a finding that the Claimant was requested to install the clamp to the engine in the required manner, that is by way of notification by tagging, nor that it provided a notification of the defect to the Claimant in time and in writing as required by Clause 12.2 of the Agreement. Therefore the Tribunal finds that the Claimant is not in breach of contract and that the claim for the replacement thrust reverser cowl in the engine and the claim for lost revenue are both dismissed noting that the claim for lost revenue would have been excluded in any event under Clause 12.3 of the Agreement.”

26. As to another counterclaim, the classification of shop visits claimed in the sum of over US \$1.3 million, the Tribunal found at Paragraph 461 [Bundle 2/Page 270]:

“that the Respondent did not raise any dispute in respect of Invoice No. M90211987 of 15 November 2013 within 30 days of receipt and did pay that invoice and that that the Respondent has not adduced evidence to establish that the shop visits were wrongly classified.”

27. A contends that the exclusion of Mr X’s oral evidence was a serious irregularity affecting A’s ability to defend a number of the invoice claims against it (invoices C 7 and 15-22, approximately a quarter of those claimed by value) and to pursue its counterclaims in respect of the missing engine clamp and the classification of shop visits.

The Law

28. The applicable law is not disputed. The statutory framework is set out in Section 68(1) and (2) of the Arbitration Act as follows:

“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...”

Section 68(2) provides:

- “(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) ...
 - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
 - (d) failure by the tribunal to deal with all of the issues that were put to it.”

Section 33(1) of the Act provides:

“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 of a resolution of the matters falling to be determined.

- (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings and its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.”

Section 68(3) concerns the relief which the Courts can grant to remedy procedural irregularities as follows:

- “(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may:
- (a) remit the award to the tribunal in whole or in part for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect in whole or in part.

The court shall not exercise its powers to set aside or to declare an award to be of no effect in whole or in part unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.”

It is submitted by Mr Vineall QC on behalf of A and accepted by Mr Harrison on behalf of B that the focus of Section 68 is firmly on the **process** adopted by the Tribunal, to which I would add and its effect on the Award.

29. Mr Harrison submits and Mr Vineall QC does not argue to the contrary that the authorities strongly favour a non-interventionist approach to arbitration awards. Indeed, both parties referred me to the statement of Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA* [2006] AC 221 at para.27 citing Paragraph 280 of the report of the Departmental Advisory Committee on Arbitration Law (“the DAC Report”) as follows:

“[that Section 68 is] really designed as a longstop only available 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.”

In a similar vein are dicta from Lawrence Collins LJ in *Bandwidth Sipping Corporation v. Intaari (a firm)* [2008] Bus LR 702 at Paragraph 46 that Section 68 is:

“intended for cases where it could be said that what had happened was so far removed from what could reasonably be expected of the arbitral process that the court could be expected to take action.”

It is accepted that the burden of proof is on A to establish substantial injustice.

30. As to whether an irregularity causes or will cause substantial injustice, I accept that the test is fact and context dependent. I also accept - and again it was not argued to the contrary - that the substantial injustice requirement will be satisfied if it is reasonably arguable that the outcome *might* have been favourable to the applicant if there had been no irregularity in the arbitral proceedings. I note Paragraph 90 of the Decision of Coleman J in *Vee Networks Ltd v. Econet Wireless Special Ltd* [2004] EWHC 2909:

“Where there has been an irregularity of procedure it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which but for the irregularity it might well never have reached provided always that the opposite conclusion is at least reasonably arguable.”

31. In the TCC, Ramsey J in *London Underground Ltd v. Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC) stated at Paragraph 47:

“The test for a substantial injustice focuses on the issue of whether the arbitrator has come by inappropriate means to one conclusion whereas had appropriate means been adopted he might realistically have reached a conclusion favourable to the applicant. It does not require the court to try the issue so as to determine, based on the outcome, whether substantial injustice had been caused.”

It is accepted that a wrongful refusal to admit evidence can constitute serious irregularity, as to which I was referred to *Arbitration Law* (Service Issue No.78), Professor Robert Merkin QC at para. 20.17:

“It is settled ... that a wrongful refusal to admit evidence can constitute serious irregularity.”

The Challenge

32. The core issue is whether the decision to exclude the evidence Mr X gave in examination-in-chief was a wrongful decision or an exercise in case management by experienced Arbitrators in accordance with their own procedural directions.

Mr Vineall Q.C. says the former and Mr Harrison the latter.

33. At Paragraph 68 of his written Submissions, Mr Vineall QC for A summarises his case as follows:

“Standing back this is a case where the Tribunal has clearly exercised their discretion in the wrong way - simply barring evidence because it came later rather than addressing the discretion appropriately.”

Again, at Paragraph 70, having accepted that the Tribunal did have a discretion in terms of how to deal with oral evidence from Mr X, he stated that was:

“true so far as it goes ... The root problem here is that the Tribunal then completely failed to engage on the factual enquiry and balancing exercise which was required in order for there to be a proper exercise of their discretion.”

34. I note that the criticism is of the exercise of a discretion and clearly where discretion is involved the Court must be alive to the wide latitude given to the Tribunal as to how it exercises its powers. It is not enough, as Mr Vineall QC properly accepted during the hearing on 28th June, for the Tribunal to have exercised its discretion in a “harsh” way. The decision must be effectively outside the bounds of what can be characterised as an exercise of discretion at all. (See in the same vein Lord Steyn in *Lesotho* and Lawrence Collins LJ in *Bandwidth* as quoted at Paragraph 29 above).
35. The complaint of irregularity proceeds on the basis that the objection to Mr X’s oral evidence as a whole should have been taken by B at the hearing in August but was not so taken. It is accepted that any failure to take an objection is not the Tribunal’s fault, but said that that failure cannot count against A.
36. I do not accept that wholesale objection to Mr X’s oral evidence was not made at the oral hearing. It seems to me on a fair reading of the transcript that the objection grows incrementally and that by the end of Mr X’s oral evidence the Tribunal had made it clear and A’s then Counsel understood that all issues of admissibility would be dealt with in closing submissions (see the transcript quoted at Paragraph 17 above and paragraph 137 of the Final Award).
37. Even if that is wrong, there was no irregularity of the process by the Tribunal at that stage, nor is one alleged.
38. In accordance with its ruling at the oral hearing and its general duty under Section 33 of the Arbitration Act 1996 the Tribunal gave both parties the opportunity to make submissions as to the admissibility of Mr X’s oral evidence and B took full advantage of that as noted at Paragraphs 20 and 21 above. In my judgment, there can be no criticism of the opportunity given to A to argue in favour of admitting Mr X’s oral evidence. The way in which A chose to so argue was of course a

matter for itself and its advisers, but the Tribunal is plainly not responsible for the arguments made by the parties before it.

39. In his oral submissions, Mr Vineall QC pointed out that in the exclusionary ruling at p 143 [Bundle 2, Page 168] the Tribunal failed to use the words “prejudice” and “balance”, and as a matter of fact that is correct. However, the Tribunal did refer to “reasons of fairness and due process” which to my mind amount to very similar concepts to balance and prejudice and show that the Tribunal did exercise their discretion in accordance with factors which they were clearly entitled to take into account and that the decision was a balancing exercise, not simply a clear-cut “in/out” exercise.
40. In any event, I do not accept that even if the balancing act carried out by the Tribunal did not (contrary to my views at paragraph 39 above) in terms address the question of prejudice that as a matter of law the Tribunal was bound to consider the issue of prejudice to one or both parties when determining whether and how to apply its own rulings as to the admissibility of evidence. The arbitration process is not the same as the litigation process and the process adopted in this arbitration was for the vast majority of evidence to be given in writing with a very short timetable for any oral evidence, particularly supplementary oral evidence. Whilst it may be the case that a Court would be obliged to consider and to note that it had considered the issue of prejudice in considering the admissibility of evidence, I have been shown no authority for the proposition that an arbitral tribunal is always obliged to consider and say it has considered prejudice. Nor does it seem to me that as a general proposition that can be correct.
41. Criticism was made of the Tribunal for their interpretation of Paragraph 8.3 of the amended Procedural Order (see Paragraph 15 above). I agree with Mr Harrison’s submissions that the ruling can only properly be construed as meaning that a party cannot seek to put in evidence which should have been in a witness statement but was not. In addition, the lack of a witness statement served with A’s Reply to Defence to Counterclaim is unexplained and itself would provide grounds for excluding Mr X’s oral evidence.
42. In my judgment, in light of the above, the Tribunal made a ruling that it was wholly entitled to make, having given both sides more than fair opportunities to address the issue of admissibility of/reliance upon Mr X’s oral evidence. It carried out a balancing exercise which, even if it were characterised as harsh - and I do not so characterise it myself - was clearly well within the bounds of its wide discretion.
43. I do not accept that the Tribunal failed to act in accordance with Section 33 or with its own procedure.

44. In addition, the oral evidence of Mr X clearly did not address the Clause 9.9 issue, so it cannot be an irregularity affecting the invoice claims even if, contrary to my view, it is an irregularity at all. There was no wrongful refusal to admit evidence and hence no irregularity.
45. The issue of substantial injustice does not strictly arise, since I have found that there was not an irregularity at all. However, in case this matter should go any further and because it was fully argued, I set out my views briefly as follows.
46. The test for substantial injustice is as set out at Paragraphs 30 and 31 above. It is entirely fact and context dependent. I have already noted that the defence to the invoices claims were not the subject of any oral evidence from Mr X and so even if there were an irregularity there could be no prospect at all of that affecting the decision to award the invoices claimed to B.
47. As to the counterclaims said to be affected by the ruling, first as to counterclaim C, the missing engine clamp claim, I agree with Mr Harrison's submissions that Mr X's evidence as given really did not go to establish that a request was made for this clamp to be fitted, and even if the evidence had been admitted then the result would be wholly unaffected. The opposite conclusion is unarguable.
48. As to counterclaim I, the classification of shop visits, I am satisfied that the Tribunal found at Paragraph 461 [Bundle 2/ Page 270] as a separate ground of defence to their counterclaim, that A had not addressed evidence to establish that the shop visits were wrongly classified, which Mr X's oral evidence did not address.
49. It follows that substantial injustice cannot be established.
50. I do not need to deal with, nor do I express any view on, the effect of the Supreme Court's decision in the *MWB* case and whether the Court should deal with the prospects of a different conclusion being drawn by the Tribunal because the law has now changed. It seems to me that the effect, if any, of a subsequent change in law (or restatement following Appeal) is an interesting point which should be left for a matter where its determination is required, unlike this application where in light of my finding that there is no irregularity it does not strictly arise.
51. The issue of remedies does not arise and I express no views on that other than to note that the issues to be remitted were largely agreed.

Decision

52. In light of my findings above, the agreed issues are answered as follows:

- (1) No.
- (2) Does not arise, but in any event no.
- (3) Does not arise.

53. Since this Judgment was handed down in draft the parties have agreed an Order as to costs and consequential directions as to any possible application for permission to Appeal which the Court has approved. To the extent necessary time for making such an application to me and/or the Court of Appeal is extended until 7th September 2018.

A M SINGER QC