Neutral Citation Number: [2019] EWHC 1176 (Ch)

Case No: E30BS342

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil & Family Justice Centre
2 Redcliff Street, Bristol BS1 6GR

Date: 10/05/2019

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

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Between :

(1) RICHARD BRYAN FORREST GRACIE **(2) DORSET BUILD & MAINTENANCE COMPANY LIMITED**	**Claimants**
- and -	
PATRICIA MARIE ROSE	**Defendant**

- -
- -

Charlie Newington-Bridges (instructed by **Porter Dodson LLP, Yeovil**) for the **Claimants**
Mark Anderson QC (instructed by **W. Parry & Co, Swansea**) for the **Defendant**

Hearing dates: 30 April and 1 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE RUSSEN QC

His Honour Judge Russen QC :

Introduction

1. By a Claim Form issued on 9 March 2018 the Claimants ("Mr Gracie" and "the Company") have brought an arbitration claim against the Defendant ("Mrs Rose") under the Arbitration Act 1996 ("the Act").

2. By their Claim they seek to challenge an Arbitration Award dated 9 February 2018 ("the Award") which was made by Mr David Bunker FCA ("the Arbitrator").

3. The dispute between the present parties which had been referred to the Arbitrator arose out the terms of a Shareholders Agreement dated 1 April 2005 to which Mrs Rose's late husband, Edward Rose, his son Alan Rose, Mr Gracie and the Company were each party. Mr Edward Rose died on 10 October 2015, a little over a year after Alun Rose had relinquished his directorship of the Company and been bought out of his shareholding. In circumstances where Mr Rose's death led Mrs Rose (as his executrix) to be treated as a "Retiring Shareholder" for the purposes of the Shareholders Agreement, the issue arose as to the price to be paid for Mr Rose's 50% shareholding in the Company. There was also an issue over Mrs Rose's entitlement to receive dividends (or other "distributions") equivalent to those received by Mr Gracie since Mr Rose's death.

4. The purchase of the remaining Rose shareholding fell to be addressed under the terms of Schedule 6 to the Shareholders Agreement. In default of the Company being wound up, as the "Continuing Shareholder" Mr Gracie was obliged to purchase that shareholding for a sum calculated in accordance with the Schedule, though its terms expressly provided that he "might arrange for them to be purchased by the Company but the liability to pay the Retiring Shareholder shall remain that of the Continuing Shareholder[s]". It was the Company which had purchased, and duly cancelled, Alun Rose's shareholding in September 2014.

5. Although the Company is a party to the present proceedings and (as appears below in the discussion of the third ground of challenge) was party to the arbitral proceedings, the real dispute was between Mrs Rose and Mr Gracie. He was the single party identified in the statements of case and in the Award itself as "the respondent". In relation to share price, the central issue was whether that element of it referable to a valuation of the Company's goodwill was to be calculated by reference to the "aggregate" of the Company's profits over 3 years (as the Shareholders Agreement stated and Mrs Rose claimed) or by reference to their "average" over those 3 years (as Mr Gracie contended). In relation to Mrs Rose's claim to equal dividends (or other distributions) the dispute was essentially over the correct characterisation of the sums that Mr Gracie had received (and whether they or any part of them were to be treated as remuneration, dividends or loans).

6. Mr Gracie had also made a counterclaim in the arbitration against Mrs Rose. It was based upon her alleged breach of the Shareholders Agreement in divulging confidential information to one of the Company's most important customers, Direct Line. The Company specialised in carrying out restoration work funded by insurers. Mr Gracie

claimed unliquidated damages to reflect the diminution in the value of his shareholding which he said had resulted in the harm caused to the Company by the alleged breach.

7. By the terms of the Award, the Arbitrator (1) upheld Mrs Rose's computation of the share price (by reference to the "aggregate" of the three years' profit); (2) substantially upheld her claim to an entitlement equal to the dividends received by Mr Gracie in addition to his salary (though not that aspect of the claim which had asserted that, like Mr Gracie, she was entitled to what I might describe as a "base" payment of £1,500 per month); and (3) concluded that Mr Gracie was not entitled to make his counterclaim for damages based upon reflective loss.

8. It is these findings that Mr Gracie seeks to challenge, though only the third of them would have involved consideration of the legal merits behind the finding on an appeal (on a point of law) under section 69 of the Act. Mr Gracie's challenge to the first two findings is instead made under section 68 of the Act and his claim that in reaching them the Arbitrator was guilty of at least one irregularity in the conduct of the arbitration which has caused substantial injustice. As it is, Mr Gracie's appeal against the Arbitrator's rejection of his counterclaim – the fourth ground identified in the Claim Form - was abandoned by his solicitors' letter dated 22 October 2018, leaving the first three grounds of challenge based upon one or more limbs of section 68(2).

9. This is my judgment on the three remaining grounds identified in the Claim Form, the nature of which I identify below when addressing each in turn.

10. At the hearing of the arbitration claim before me, Mr Gracie and the Company were represented by Mr Charlie Newington-Bridges and Mrs Rose was represented by Mr Mark Anderson QC. I am grateful to each of them for their submissions. They revealed a significant difference in the suggested application of the legal principles on a claim under section 68. Although the principles are well established, I have therefore considered it necessary to summarise them and to set out the interrelationship between some of them for the purposes of explaining my decision on each of the three grounds.

Legal Principles

11. As Mr Anderson QC urged upon me, by reference to the decision of Morison J in *Fidelity Management SA and others v Myriad International Holdings BV and another* [2005] EWHC 1193; [2005] 2 ALL (Comm) 312, at [2]-[5], the court should be cautious in contemplating the exercise of its jurisdiction under section 68 and pay due regard to the fact that the parties have agreed to have their dispute determined by arbitration. He referred me to the notes in the White Book upon section 68 of the Act (2019 ed, Vol 2 para. 2E-262) which record the authorities making it clear that "the section is 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" (a departmental committee comment on what was then the Arbitration Bill that was later endorsed by the House of Lords in the *Lesotho Highlands* decision mentioned below). It is clear that the test of "substantial injustice" is intended to support the freestanding nature of the arbitral process rather than to encourage interference with it.

12. Section 68(2)(d) of the Act identifies a want of due process through the "failure of the tribunal to deal with all the issues that were put to it." That provision is relied upon in support of Grounds 1 and 2 of the challenge to the Award.

13. Section 68(2)(d) does not enable the claimant to launch an indirect appeal against the arbitral tribunal's decision on a particular claim, or issue within it, by criticising the reasoning in support of it. Like the other grounds in the subsection which are concerned with due process, instead of being directed to an error of judgment it addresses the arbitrator's "failure" to deal with an issue: see *Weldon Plant Ltd v Commission for New Towns* [2000] EWHC (TCC) 76; [2001] 1 All ER (Comm) 264, either [29] or [31] according to the report, per Judge Humphrey Lloyd QC.

14. Although the subsection refers to a failure by the tribunal to deal with *all of the issues* that were put to it, the authorities show that the arbitrator does not have to deal with every point raised in argument. Instead, "failure" for section 68(2)(d) purposes is tested by reference to the concept of what some of them describe as "essential issues". Use of the term "issue" has the potential to confuse when there can be different grades of such, descending to particular points of legal or factual detail advanced in argument (and therefore "in issue" between the parties) and said to be relevant to the outcome. To come within section 68(2)(d) the failure must be one that involves the tribunal overlooking a key issue that needs to be addressed, and "dealt with", if a fair decision on the reference is to be reached.

15. In the *Weldon Plant* case the judge referred, in addition to the scenario of a head of claim having been overlooked, to an inability to justify the decision because "a particular key issue has not been decided which is crucial to the result." I refer also to the decisions of Colman J in *World Trade Corporation Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm); [2004] 2 ALL ER (Comm) 813, at [16]; Morison J in the *Fidelity Management* case at [9(3)]; and of Mr Gavin Kealey QC (sitting as a Deputy High Court Judge) in *Buyuk Camlica Shipping and Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), at [28]-[29]. The chain of citation in those later cases shows that they can be traced back to the relevant paragraph in the *Weldon Plant* case.

16. Obviously, the concept of a key issue, required to be addressed, is one that embraces not only essential elements of the claim but also of any "specific defences" raised in response to it: see *World Trade Corporation* at [16]. In that case, Colman J (at [20]) observed that the answer as to whether or not an issue is "essential" or "key" for section 68(2)(d) purposes will normally be obvious by asking whether or not, if the case was proceeding in court, the issue would be included in an agreed list of issues prepared for the purposes of a case management conference. For completeness, I note that the specialist court guides require the parties to identify and ideally agree upon the "main", or "principal", or "main" or "key" issues of fact or law in the case: see the Commercial Court Guide, para. D6.1; the Circuit Commercial Court Guide, para. 6.11; and the TCC Guide, para. 14.4.1, addressing the PTR (paragraph 17.62 of the Chancery Guide contemplates by reference to one set of model directions, that the parties shall attempt to define and narrow "the issues in the claim"). No such List of Issues was prepared for the purposes of the arbitration in this case and, as I note below in relation to Ground 1, the parties disagree as to whether or not Mr Gracie's mistake/rectification plea would have featured upon it.

17. That is to test the concept of an essential issue by looking at the position prior to the substantive hearing. The decision of the Deputy Judge in *Buyuk Camlica*, at [30], shows that the terms of the arbitrator's award may reveal that a point that was thought to form an issue requiring determination (whether advanced in support of a claim or a defence to it) has ceased to be such in the light of the other findings that he has made. There will be no failure in the section 68(2)(d) sense if it is plain from the express findings or conclusions contained in the award that an issue has necessarily fallen away (or at least fallen out of the category of being a "key" one). In that case, the court's analysis showed that tribunal did not need to rule explicitly on the charterer's contentions that the owner was estopped from denying the described depth of the vessel in the successive charterparties, or was precluded from relying upon its own wrongful description of the vessel's depth, because of its finding that the owner was in breach of the description warranty in each charterparty.

18. That said, the Deputy Judge went on to say that the tribunal might wish to articulate what would have been its decision on the point had it been necessary to reach one. A failure to address a point which, as a matter of analysis on the tribunal's other findings, has become a "non-point", or relegated to being a subsidiary one, will not trigger section 68(2)(d); though, as the judge appears to have had in mind, it *might* encourage an application under section 57(3)(a) or possibly a challenge under section 68(2)(e) ("uncertainty or ambiguity as to the effect of the award"). And, rather like the situation of a judge who by *obiter dictum* expressly addresses a point that does not form part of the *ratio*, in order to cover the possibility of an appeal against the order which rests upon the court's decision on what it regards as the essential points, one can see that an arbitral decision which takes care to sweep up the non-essential points *may* influence the appetite for any appeal under section 69, on the ground of an alleged error in law in the decision on the main ones, or indeed the relief to be granted on any such appeal which is then made.

19. For those reasons one can therefore see the desirability of the award first identifying the issues, as they emerge from the parties' statements of case or any synopsis of them, even if the tribunal's decision on the essential issues means that some of them only fall to be addressed (perhaps simply by being "ticked off" as no longer significant to the decision) in the interests of clarity rather than to rationalise that decision. However, the very terms of section 68(2)(d) and section 57(3) addressed below (and indeed the court's power under section 70(4) to order the tribunal to state its reasons in sufficient detail) recognise that there is no prescribed procedural fail-safe against initial, perhaps enduring, oversight on the part of the tribunal in addressing particular points presented to it for decision.

20. On any application under section 68 it is not enough for the applicant to make out one or more the grounds identified in section 68(2)(a) to (i) if the award is to be remitted to the tribunal or set aside or declared ineffective in whole or in part. Importantly, the relevant irregularity must be a "serious" one in that it "has caused or will cause substantial injustice to the applicant." The parties were agreed that, on an application under section 68(2)(d), the test for determining whether there has been substantial injustice requires the applicant to show that, if the issue had been dealt with, the result might well have been different. The applicant need not show that the result would have been different: see *Buyuk Camlica*, at [47], citing earlier authority.

21. The observations above about the scope and impact of section 68(2)(d) (one of the three limbs of s. 68(2) relied upon by Mr Gracie) bring me to the interplay between that provision and section 57. Section 70(2) of the Act provides that an application under section 68 or an appeal under section 68 may not be brought if the applicant has not first exhausted "any available recourse under section 57 (correction of award or additional award)". Section 68(1) itself provides that the right to apply under that section is "subject to the restrictions in section 70(2) and 70(3)" (the latter stipulating a 28 day period for the making of any application to which I return below).

22. Section 57 addresses the power of the arbitral tribunal to correct an award or to make an additional award. The section makes it clear that the parties are free to agree upon the tribunal's powers in this respect. If there is no such agreement over the powers it should have, then under section 57(3) the tribunal may either on its own initiative or on the application of a party "(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award." In the absence of agreement between the parties which operates to extend either period, any such exercise of the initiative to correct (under "(a)") and any application (under either "(a)" or "(b)") must be taken or made within 28 days of the award. And, unless otherwise agreed by them, any correction made on such an application and any additional award must be made within 56 days of the original award.

23. Section 57(3)(a) therefore addresses the situation where the tribunal either offers or is persuaded by a party to provide a correction to the award or to clarify or remove any ambiguity within it. It is akin to the slip rule which applies to judgments and orders (though the absence of equivalent statutory rigidity and restriction upon the grounds for further challenge to those within the court system means that case law, rather than a statutory hurdle equivalent to section 70(2), governs the practice of making appropriate requests for clarification of a judgment prior to any appeal). It is clear, therefore, that this limb of the subsection cannot be used as a platform for an application which advances further substantive argument on points which have already been argued and decided (albeit perhaps in terms which involve a clerical error or accidental oversight). Section 57(7) provides that any correction of an award shall form part of the award.

24. Likewise, section 57(3)(b) is concerned with *claims* that were "presented to the tribunal" but not dealt with in the award. Again, the focus is upon the tribunal's corrective powers by reference to matters aired before the award under review was made.

25. In circumstances where section 68(2)(d) is concerned with the tribunal's failure to deal with all the essential issues that were put to it, there is clearly the potential for overlap with section 57(3)(b) at least so far as overlooked *claims* (as opposed to "specific defences") are concerned.

26. Although not a ground relied upon by Mr Gracie, section 68(2)(f) – addressing a serious irregularity created by "uncertainty or ambiguity as to the effect of the award" – also creates, at least at first sight, the potential for overlap with section 57(3)(a).

27. It is clearly with this potential overlap between the two rights of recourse in mind (which otherwise would require a choice between two diverging paths to be made by the applicant within the same 28 day period) that section 70(2) has been enacted. Its effect is clear and further confirmation of the restricted nature of the court's jurisdiction under section 68: see paragraph 11 above. A party should not be heard to complain to the court about serious irregularity in the arbitral process, in the arbitrator having arguably overlooked a key issue or head of claim or having expressed himself in uncertain or ambiguous terms, if that party has not first availed himself of the section 57 right which is an adjunct to that process. The language of section 68(1) expressly recognises that any challenge should be to an award which is potentially correctable within the confines of section 57(3), either by a change in its earlier language or by words of clarification or (in the case of a previously overlooked claim) which is an addition to the original award. The language of section 70(2) and (3) makes it clear that the aggrieved party is *not* required to make a choice between applying to the tribunal (under section 57(3)) and applying to the court (under either section 68(2)(d) or (f)). The 28 day period for any application to the court, should one still be thought to be justified in the light of it, only applies once the outcome of the application under section 57 is known. In the *World Trade Corporation* case, at [11], Colman J said "[I]t must not be forgotten that the facility under section 57(3) is made available to facilitate such limited supervisory jurisdiction as is provided for" under section 68.

28. The need to apply the test of "substantial injustice" under section 68 also dictates that the section 57 procedure should first be exhausted when the outcome of the applicant doing so could have a real impact upon the relevant ground under section 68(2). There is something odd in the court being asked to consider whether the tribunal well might have reached a different conclusion, if only a particular issue had been addressed with greater clarity or linguistic accuracy or with less ambiguity, when an application under section 57 might produce the answer from the tribunal itself. I refer below to the way in which the Arbitrator in this case expressed himself on the question of whether the goodwill valuation mechanism in the Shareholders Agreement had been "changed" or "modified". Where it properly applies to prevent an application, section 70(2) must exist to avoid the kind of inevitable thought I had when counsel were addressing me on Ground 1; and that was to wonder what the Arbitrator himself had intended to cover by his use of those terms.

29. As I endeavour to explain below, the issue between the parties on Ground 1 has really arisen because Mr Gracie's plea of rectification was not presented as a distinct *claim.* Had it been, and then overlooked in the Award, the springboard for an argument that 68(1) and 70(2) operated to bar what would otherwise be an impermissibly precipitate application to the court (in the absence of an application under section 57(3)(b)) would have been clear. Instead the plea was put alongside the defence of variation and Mr Gracie contends, but Mrs Rose denies, that Arbitrator failed to address it; not even in ambiguous terms for the purposes of section 57(3)(a).

30. Some of the authorities cited by the parties address the interplay between section 57(3)(a) and section 68(2)(d). I should note at the outset that the focus of these authorities is upon apparently overlooked issues rather than overlooked claims. That is understandable for the reason just identified. Allowing for what might be the relative informality in the way the parties' rival cases are advanced before the tribunal (though in the present reference there were formal statements of case) in most cases it ought to

be clear whether or not a claim, advanced before the tribunal, has or has not been addressed for the purposes of section 57(3)(b). Whether or not an issue which is integral to the proper determination of a head of claim has been decided may be less clear where, as in the present case, the conclusions within the award are expressed with brevity.

31. *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm); [2004] 2 Lloyd's Rep 446 was relied upon by Mr Anderson QC in support of his argument based on section 70(2). In that case the applicant had applied under section 68(2)(d) on the basis that the arbitrator had found that misrepresentations about a vessel's deck strength had been made but that his award had failed to address the question of whether or not the second of them had induced the applicant to enter into the relevant charterparty (other matters which were said to support the applicant's challenge to the tribunal's decision that it was barred from rescinding it were the subject matter of a proposed appeal). Cooke J, at [25], noted the language of section 57(3)(a) and said:

> "If Torch is correct in its submission that the arbitrator simply failed to deal with the issue to which I have adverted, then there is no question of any clerical mistake or error arising from an accidental slip or omission. This is a wholesale failure to deal with an important issue."

32. At [27], Cooke J then addressed the concept of a "claim" within section 57(3)(b), saying that the language is "apt to refer to a head of claim for damages or some other remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims." So far as such issues making up the decision-making process were concerned, the judge (using words which articulate my own speculative thoughts during submissions, mentioned above) said, at [28]:

> "If however Torch had reverted to him, applying for clarification as to whether he had decided against it on inducement by the second representation, it would have been clear in this court whether or not he had determined the issue. It seems to me that section 57(3)(a) can be used to request further reasons from the arbitrator where none exist. The policy which underlies the Act is on one of enabling the arbitral process to correct itself where possible, without the intervention of the Court. Torch contended it was clear that the arbitrator had not decided the issue and that therefore there was no ambiguity in the award which required clarification, but the very existence of a genuine dispute on this question militates against that argument. If there was unarguably a clear failure to deal with an issue, it could be said that there was no ambiguity in the award, but as set out in *Al Hadha*" at paragraph 70" – a reference to the decision of HHJ Havelock-Allan QC in *Al Hadha Trading v Tradigrain* [2002] Lloyd's Rep 512 – "an award which contains inadequate rationale or incomplete reasons for a decision is likely to be ambiguous or need clarification. There was therefore room for an application by Torch under section 57, as an exchange of letters with the Owners in relation to this part of the Award would have revealed, so that the time limit of 28 days (for which section 57(4) provides) applied. In these circumstances Torch had available recourse under section 57, which had not been exhausted and section 70(2) therefore presents an insurmountable bar to Torch's section 68 application. I nonetheless go on to

> determine the section 68 application, should I be wrong on the ambit of section 57."

33. Mr Anderson QC relies upon that passage to say that, even if there had arguably been a failure within the meaning of section 68(2)(d), in connection with the rectification issue, Mr Gracie should instead have made an application under section 57. He cannot say that there was unarguably a wholesale failure to address it.

34. Mr Newington-Bridges countered by relying on the decision of Toulson J in *Ascot Commodities NV v Olam International Ltd* [2001] Lexis Citation 1962; [2002] CLC 277. In that case, the point under section 68(2)(d) arose because the claimant said the tribunal had failed to address the point that, even if the defendant (as claimant in the arbitration) had a sufficient interest in the relevant cargo to maintain a claim for its loss, the loss should have been measured on the basis that it held the relevant bills of lading as security for payment of the price of the cargo (which might still have been paid by a third party) and not as beneficial owner. The judge agreed that the tribunal had missed this point. He also concluded that substantial injustice had resulted from it doing so.

35. I should note at the outset that sections 57(3) and 70(2) were not, it seems, mentioned in terms in the *ex tempore* judgment of Toulson J. It is right that in paragraphs [28] and [29] (the second is quoted below and, I think, involved the names of the claimant's and the defendant's counsel being transposed) he noted the defendant's alternative argument that "if the terseness of the Board's findings made it legitimate for [the Claimant] to have requested further reasons, they could have asked for them but they have not done so." I also note that at paragraph [20] the judge said, in relation to the "sufficient interest" point mentioned above, that had he agreed with the defendant as to the meaning of the tribunal's conclusion then: "I would be driven to the conclusion that they were so ambiguous as to amount to no clear finding on a central matter. Subject to the question of serious injustice, that would be a serious irregularity within s. 68(2)(f) which refers to uncertainty or ambiguity as to the effect of the award." That *obiter dictum* did not contemplate that pursuit of the point might also have been subject to section 70(2).

36. What Toulson J did say on the loss point, at [29] in a passage relied upon by Mr Newington-Bridges, was as follows:

> "On a fair reading of the award it seems to me that this is not a case in which the tribunal has directed itself to, and rejected the central issue argued by [the Claimant] but has, in truth, missed it. I acknowledge that I may have missed what the Board intended, but I can only go on the brief words in para. 6.7 in which their findings were expressed. As to requesting further reasons, I accept Mr Wormington's point" – I think he meant the point introduced in paragraph [28] and made by Mr Young QC for the defendant - "that where there is a finding which addresses a central issue, but leaves its reasoning unclear, the appropriate course is to ask for further reasons. But if an award, as delivered, fails to contain a finding on a central issue, it would be odd to ask for reasons for something which is not there."

37. *Ascot Commodities* was cited in *Torch Offshore* where Cooke J (at [21]) described the earlier decision as one where a "central point" raised by a party had not been decided. Although sections 70(2) and 57(3) were not mentioned in terms in *Ascot Commodities*, and putting to one side what was said at [20], the quoted passage in paragraph [29] reflects the obvious limits upon what may be done under section 57(3)(a). If there are no words to be corrected, removed or clarified - because the complete absence of them on an essential issue means there has been a "failure" in the section 68(2)(d) sense – then any application under section 57(3)(a) aimed at "correcting" the omission on that issue would risk blurring the distinction between the exercise of taking up clerical points and that of repeating earlier substantive submissions as if the reward had been remitted to the tribunal for further consideration under section 68.

38. In resisting the argument based on section 70(2), Mr Newington-Bridges also relied upon the decision in *Buyuk Camlica*. Although, as noted above, the judge in that case found that certain issues had fallen away in the light of the tribunal's finding that there had been a breach by the owners of the description warranties, he held that the award had not addressed the issue as to whether or not the charterers had waived the breach of the description warranty. This was despite him saying that he was not all surprised that the tribunal had not done so, making comments (at [37]) to the effect that the point had been ill-developed, lacked particularisation and, it seems, obvious merit.

39. It was in connection with the apparent lack of merit in the waiver point that the judge went on to contemplate that it may have been rejected without the tribunal feeling it necessary to articulate its reasons for doing so. But he said that, whilst the lack of merit might be relevant to the application of the "substantial injustice" limb of the test, if the issue needed to be determined to dispose of the claim then it should be addressed and "it should not be left to the parties, or the task of the court, to engage in speculation of that kind." He referred to observations in *Ascot Commodities* and said, at [38]:

> "As those observations recognise, there should be some form of communication, normally in the form of a decision, by an arbitral tribunal to the parties from which the latter can ascertain whether or not an essential issue has been dealt with. It is not sufficient for an arbitral tribunal to deal with crucial issues *in pectore*, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked; the legislative purpose of section 68(2)(b) is to ensure that all of those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined."

40. The Deputy Judge then went on to consider the defendant owner's submission that the claimant had not exhausted the recourse available under section 57(3)(a) and (at [42]) concluded that the subsection did not apply in circumstances where there was no ambiguity in the tribunal's reasons but, instead, a failure to address the waiver defence. He referred to a similar irregularity established through the tribunal's failure to address a waiver/estoppel defence by the decision of Christopher Clarke J in *Van der Giessen-De-Noord Shipbuilding Division BV v Inmtec Marine & Offshore BV* [2008] EWHC

2904 (Comm); [2009] 1 Lloyd's Rep 271, [43]. *Van der Giessen* is an authority upon which Mr Newington-Bridges also relied in connection with Mr Gracie's Ground 2, where he relied upon subsection 68(2)(b) of the Act.

41. *Buyuk Camlica* therefore addressed the point of distinction identified in *Ascot Commodities* with the provisions of sections 57(3)(a) and 70(2) expressly in mind. The later decision shows that in testing whether or not the ground in 68(2)(d) has been triggered, as opposed to assessing whether any such failure is the cause of substantial injustice, there is no need nor any sound basis for the court to attempt to explore any unspoken reasons (beyond those which can properly be identified from what the tribunal has decided) as to why the failure occurred. Section 68(1) is concerned with a challenge to the award and ground "(d)" is a ground of procedural irregularity which, if it exists, will emerge from consideration of terms of the award itself in the light of each party's case presented to the tribunal. The clear and simple language of section 68(2)(d) requires nothing more than an objective analysis on that front.

42. It should be noted that in *Buyuk Camlica* (at [45]) the court's alternative reason for rejecting the challenge on other grounds which, so it held, had implicitly fallen away in the light of other findings was that the reasoning had "precisely that quality and degree of ambiguity or lack of clarity as to engage the powers of the Arbitral Tribunal under s. 57(3)(a)". In relation to those other grounds, the findings in the award could be interpreted as having "dealt with" them, albeit only in implicit terms.

43. Mr Newington-Bridges emphasised the comment in *Buyuk Camlica* that *the parties* should not be left to guess whether or not a key point has been decided. He submitted that it is one thing for the court, applying its knowledge of the law and legal reasoning, to speculate as to whether or not the Arbitrator dealt with the mistake/rectification issue (I have already mentioned the language of "change" and "modification" used in the Award) but that his client, Mr Gracie, should not be expected to do so. In my judgment, by the time the court's confined supervisory jurisdiction under section 68 is invoked, there is no real point of distinction to be made between the parties and the court. That is why the Deputy Judge in *Buyuk Camlica* referred to the need for the tribunal to avoid leaving either to speculate as to what has been decided. Of course, where a distinction does fall to be made between the parties and the court is at the stage before the court's jurisdiction is properly invoked because there is then the potential recourse available under section 57. To the extent that the language of the award indicates that it may fall on the *Torch Offshore* side of the line – i.e. inadequate rationale or incomplete reasons on an issue - then the aggrieved party has the right and (before applying to court) the prior obligation to seek clarification before that stage is reached. By applying under section 57(3)(a) in such circumstances the party is not seeking to extract from the tribunal that which remained *in pectore* and unspoken. It is the different endeavour of striving for certainty or clarification on matters that have been expressed by the tribunal.

44. The other grounds under 68(2) upon which Mr Gracie and the Company rely in support of their challenge to the Award are those in limb "(b)" (the tribunal exceeding its powers) in relation to Ground 2 and limbs "(b)" and "(c)" (the latter being a failure to conduct the proceedings in accordance with the procedure agreed by the parties) in relation to Ground 3. Although the Claim Form also identifies limb "(d)" in support of Ground 2, Mr Newington-Bridges did not press the argument that the Arbitrator had failed to address the dividends issue. Instead, the thrust of his argument was that he

had not dealt properly with issue but had done so by drawing on suggested points of company law and HMRC practice upon neither of which had he been addressed by the parties. Accordingly, Mr Anderson's corresponding reliance upon sections 57(3) and 70(2) rather fell away in relation to Ground 2.

45. In connection with Grounds 2 and 3, and section 68(2)(b), Mr Newington-Bridges relied upon what Christopher Clarke J said in the *Van der Giessen* case at [11]-[12]. There the judge observed, by reference to textbook and earlier authority, that to decide an issue on the basis of a point which was not raised or argued, without giving the parties an opportunity to deal with it, will be a procedural irregularity. As I observed during the course of counsel's submissions, the passages relied upon appear to rest upon the tribunal's duty under section 33 of the Act to act fairly and impartially, and to extend to the parties the opportunity of putting their case. A failure to comply with that duty is a separate ground of challenge identified by section 68(2)(a) of the Act.

46. In further support of the challenges under section 68(2)(b) reliance was also placed upon the decision of the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43; [2006] 1 AC 221. At [24], Lord Steyn said:

> "But the issue was whether the tribunal "exceeded its powers" within the meaning of section 68(2)(b). This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power which it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail."

47. It is therefore clear that limb "(b)" is concerned with the tribunal exercising a power that is not given to it by the terms of any arbitration agreement or its terms of reference or which the parties may have agree it should have (as to which see section 38 of the Act) or which (as illustrated by the decision in *Lesotho Highlands*) is conferred by the Act. The decision in *Lesotho Highlands* establishes that it does not cover an alleged error in the exercise of a power conferred upon the tribunal.

48. For his Ground 3 challenge Mr Gracie relies, in addition to "(b)", upon section 62(2)(c): a "failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties." This ground does not call for any elaboration of principle.

49. With the above legal principles operating upon the grounds of challenge invoked by Mr Gracie in mind, I now address his three grounds of challenge to the Award.

<u>Ground 1</u>

50. Ground 1 proceeds on the basis that the Award failed to address Mr Gracie's case that the Shareholders Agreement should be rectified so that the Goodwill Value element of

the price payable by him for Mrs Rose's shares was calculated not be reference to the "aggregate" of the Company's profits (before payment of tax and any dividend) for the last three complete accounting periods but, instead, by reference to the "average" of those last three years. The challenge is made under section 68(2)(d).

51. I have mentioned above the desirability that an award should clearly identify the issues presented for decision even if the decision itself shows that certain of them need not be decided (and, ideally, records as much) and even though the reasoning in support of the decisions on those that remain may be quite concise. That process of identifying the issues was not undertaken in the present case and, even though Mrs Rose would dispute any conclusion that Ground 1 has properly arisen as a consequence, I think can be little doubt that the way the Award is structured and expressed has meant that the parties' submissions upon it and my analysis of it have been less straightforward than might otherwise have been the case.

52. The point is illustrated by the fact that at the hearing before me each side sought to turn the nature of the opponent's argument to its own advantage. Mr Newington-Bridges submitted that the very process of Mr Anderson's analysis of the Award, with a view to establishing both that the mistake/rectification issue lacked any merit and had been addressed by the Arbitrator, only served to demonstrate that the issue had in fact not been addressed in the Award. Mr Anderson QC obviously did not accept that conclusion but, echoing *Torch Offshore* at [28], said that the nature of the argument before the court revealed a situation that had instead cried out for an application by Mr Gracie for clarification under section 57(3).

53. The Award contained (at Section 2) a section headed "Issues in Dispute". However, as Mr Anderson volunteered, that section did not really contain a synopsis of the issues. It was really an outline of the claim and counterclaim, as indicated by the Arbitrator's use of the language of "seeks an order" and "denies" in summarising a party's position.

54. In relation to Ground 1, the Award said this:

> "2.1 The Claimant seeks an order that Mr Gracie purchase the shares in the Company held by the Estate for the sum of £328,816 pursuant to the valuation provisions in Schedule 6 of the Agreement. The Claimant seeks an order for interest at 3% above Bank of England base rate on this sum under the terms of Section 49 Arbitration Act 1996 ("AA96").
>
> ……….
>
> ……….
>
> 2.5 The Respondent agrees that he should purchase the shares in the Company from the Estate but denies that the sum claimed is the correctly calculated amount."

55. Although Mr Gracie had advanced a counterclaim for damages based upon an alleged breach of the Shareholders Agreement by Mrs Rose, I have already noted that he did not advance a claim that the agreement should be rectified. The way the mistake/rectification argument was advanced in his Points of Defence was to introduce

as "accurate" the minutes of a meeting on 29 November 2011 (said to have been based on notes made by Mr Gracie during it) and then aver:

> "10. Further or alternatively, it was agreed at the meeting in or about November 2011 and at previous meetings and all the director/shareholders understood that use of "aggregate" was a mistake in the Shareholder's Agreement and nonsensical in the context of the Company and the Shareholders' Agreement. Accordingly, it was agreed and intended by the parties accordingly that that Shareholders' Agreement at clause 9.2 of Schedule 6 should be rectified so that the word "aggregate" is replaced with "average"."

56. That plea was in addition and an alternative to Mr Gracie's case that it had been agreed at the meeting on 29 November 2011 that the Shareholders Agreement should be varied so that "average" should replace "aggregate" (as set out in paragraphs 7 and 8 of the Points of Defence).

57. In response to the rectification plea, Mrs Rose's Reply disputed the accuracy of the minutes and said:

> "Paragraph 10 does not plead a proper basis for rectification. Rectification is appropriate where the words of a written instrument do not reflect the intention of the parties to the instrument at the time it was made. Paragraph 10 instead alleges a subsequent agreement. In any event it is denied that any such agreement was made.".

58. The parties did not prepare before the arbitration hearing a list of issues which required or were at that stage thought to have required determination. However, they had each filed a written opening or skeleton argument. Mr Anderson's opening statement had identified "the issue" on the share purchase claim as follows:

> "17. Mr Gracie claims that the Shareholders' Agreement was amended by a three-way agreement between all the shareholders made on 29.11.11. Alternatively he claims that the written document entitled "Shareholders' Agreement" wrongly recorded the parties' actual agreement and should be rectified. Both alternatives would change the word "aggregate" in paragraph 9.2 of Schedule 6 to "average.""

59. Mr Anderson's written opening went on to focus upon the typed minutes of the meeting on 29 November 2011, the genuineness and suggested effect of which was challenged, and the absence of any ground for changing the effect of Schedule 6. The Award (at paragraph 3.6) came to record that the Arbitrator was not satisfied that the minutes were a contemporaneous document and, amongst other points, noted that they were not signed by those who were said to have understood and accepted there should be such a change.

60. The opening statement for Mrs Rose does not appear to have addressed the separate manuscript notes (referred to in the Points of Defence as having been made on 29 November 2011), upon which Mr Gracie now heavily relies in support of Ground 1, and about which the Award said (at paragraph 3.5):

> "I have seen handwritten notes of a Board meeting maintained in a notebook by the Respondent and I have been provided with no clear evidence to doubt their authenticity. It is clear from those notes that the subject of Goodwill was discussed at that Meeting."

61. Mr Newington-Bridges' skeleton argument, filed before the arbitration hearing, had relied upon both the manuscript notes and the typed minutes and, like Mr Anderson's document, identified (at paragraph 29) as issues which needed to be decided in the arbitration both the "agreed variation" and the alternative "mistake that should be rectified" bases for changing the language of Schedule 6 from "aggregate" to "average". It dealt with both grounds separately, both in the summary of legal principles and the submissions on behalf of Mr Gracie. Textbook authority and one authority (*Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep. 353, 359, with a brief quote from it) were cited.

62. The arbitration hearing took place between 20th and 24th November 2017 with a sixth day for oral closing submissions on 18 December 2017.

63. Prior to that final day for closing oral submissions the parties prepared written closing submissions. The dates of them suggest that they were served and lodged sequentially (that was counsel's recollection) with the submissions for Mr Gracie coming first. On his behalf Mr Newington-Bridges identified four separate issues of which "Rectification", as distinct from the first of "Variation", was the second, and on which he said:

> "25. The alternative case made by R is that the Shareholders' Agreement should be rectified. If, as submitted, the handwritten notes are genuine then the parties recognised that there was a mistake in the Shareholders' Agreement which did not reflect their intentions at the time of entering into the Agreement. In those circumstances, in law (see paragraphs 41 to 42 of the Skeleton Argument for R), the Shareholders' Agreement can be rectified by replacing the word "aggregate" with average."

64. Mr Anderson QC, in his written closing submissions to the Arbitrator, identified at the outset "only two factual issues" (the second related to Mr Gracie's counterclaim with which I am not concerned). The first was: "Was Schedule 6 amended?". As with his opening submissions, Mr Anderson focused upon the typed minutes, and aspects of testimony which were said to make Mr Gracie's reliance upon them unconvincing, rather than the manuscript notes. His closing submissions contained four paragraphs under the heading "Rectification" which said there was no evidence to suggest that in 2005, when the Shareholders Agreement was executed, the parties had intended "average" rather than "aggregate" and that "the party claiming rectification has to

prove not only that there is something wrong with the wording of the written contract, but that it was contrary to a preceding settled agreement, the terms of which he must also prove."

65. It is clear from the terms of the Award that the Arbitrator had sought legal advice from solicitors on what he described as "points of legal construction" and had at some point circulated it to the parties with an invitation to comment upon it. This advice was not in the bundles before me and I wondered whether it might have engaged with the claim to rectification. However, counsel informed me that the advice was not material to Ground 1 and it addressed only the question of reflective loss (the point that would have been material to the subsequently abandoned appeal under section 69 on Ground 4).

66. I asked Mr Newington-Bridges whether the *Agip* authority had been referred to at the hearing before the Arbitrator and (although he made the common-sensical observation that it was likely he did having referred to it in his skeleton) he very fairly said that he could not recall either way. There was no transcript or note of the 2017 hearings before me.

67. I have referred above to the Arbitrator's outline of the dispute (in the section of the Award headed "Issues in Dispute"). The only part of that outline which can be said to have covered Mr Gracie's argument on variation and rectification was in the quoted sentence above which mentioned "the correctly calculated amount".

68. However, in Section 3 of the Award (headed "Appraisal") the Arbitrator noted the alternative grounds of challenge when he said:

> "3.2 The objection to the basis of calculation of Goodwill is that the wording "aggregate of profits for the last three years" in Clause 9.2 of Schedule 6 of the Agreement was subsequently changed by mutual agreement of the parties to the Agreement to read "*average of profits for the last three years*." Alternatively, it is argued that it was agreed between the parties to the Agreement that there was mistake in the original Agreement and that the word "aggregate" should be replaced by the word "average".

69. As Mr Newington-Bridges correctly pointed out, that is the only reference in the Award to the concept of "mistake" and it does not mention "rectification" at all.

70. In the paragraphs which followed within that section the Arbitrator then addressed the three occasions on which the valuation of goodwill came up for discussion – 2007, 2011 (in connection with which he considered the manuscript notes and typed minutes) and 2014 – and made observations, but no definitive findings, against the conclusion that the basis of valuation had been reappraised or, as he also put it in relation to 2011 and 2014, "changed".

71. As I pointed out to counsel, although the thrust of those paragraphs appears to be directed to the defence of Mr Gracie based upon a consensual change to the Shareholders Agreement some 2, 6 or 9 years after entering into it (see, for example, his point that they did not sign off on the 2011 minutes) it is also fair to say that neither

did the Arbitrator use the word "variation" in the Award. Nor did he address the argument in the skeleton argument for Mr Gracie that an oral agreement between the parties might constitute variation provided it was supported by consideration. Yet it is no part of the claim before me that he failed to address the issue of variation.

72. What the Arbitrator did do (in Section 4 headed "Conclusions") is decide that:

> "4.2 The basis of calculation of the value of Goodwill in the Company should be as set out in the Agreement with no modification".

73. The question I have decide is whether the Arbitrator's conclusion expressed in those terms, with his appraisal of the evidence preceding it, justifies the conclusion that he has failed to deal with the mistake/rectification issue. Mr Newington-Bridges said that the omission is obvious and has clearly caused substantial injustice in circumstances where the consequence of it is that Mr Gracie may well have been directed to purchase Mrs Rose's shares at a heavily inflated valuation of goodwill. Against that, Mr Anderson QC said that the Arbitrator did address the issue albeit succinctly and in terms of "modification" of the goodwill calculation. As already noted above, Mr Anderson's fall-back argument on the analysis of the Award, which he advanced as a knock-out point by reference to section 70(2) (and section 68(1)), was to say that the challenge under section 68 was barred because of Mr Gracie's failure to avail himself of the section 57 procedure. As a yet further point, Mr Anderson submitted that, even if Mr Gracie's claim was properly made and established a failure within the meaning of section 68(2)(d), the failure was not one that had caused substantial injustice to Mr Gracie because the rectification argument was, he submitted, "hopeless".

74. In his skeleton argument before me Mr Anderson QC had relied upon section 57(3)(b) in saying that section 70(2) provided a complete answer to Mr Gracie's challenge. Whether or not encouraged by my observation during Newington-Bridges' prior oral submissions that (despite the existence of his counterclaim for other relief) Mr Gracie had not advanced any "claim" for rectification, by the time he came to make his oral submissions Mr Anderson relied primarily upon section 57(3)(a). Even if there was some doubt over whether the issue of mistake had been addressed, he submitted that Mr Gracie should have applied to the Arbitrator for clarification on that point. But Mr Anderson did not abandon his reliance upon section 57(3)(b). He said that, in circumstances where he had not taken "a pleading point" before the Arbitrator (or at least not one going beyond that mentioned in paragraph 57 above) Mr Gracie should be in no better position – so far as section 70(2) is concerned – than if he had sought the equitable relief of rectification in the way a court would expect it to be formulated. Therefore, he submitted, Mr Gracie fell foul of section 70(2) either by reason of section 57(3)(a) or (3)(b).

75. These competing submissions bring me to the fundamental point on which I consider my decision on Ground 1 to turn. It is a short point, in the light of what I have set out at length above, and it is whether or not the language of paragraphs 3.2 and 4.2 of the Award reveal that Mr Gracie's mistake/rectification submission was addressed in ambiguous terms or, alternatively, not at all.

76. Mr Gracie's rectification claim was a somewhat unorthodox one, and I refer below to certain oddities within it. For a start, one might have expected the claim that the 2005 agreement mistakenly failed to reflect the parties' true agreement to have been presented as his primary case, with an alleged variation of it in 2011 (effective for the future if not back to 2005) being relied upon in the alternative. However, applying the guidance of Colman J in the *World Trade Corporation* case, the mistake/rectification plea would in my view have justified separate inclusion on any list of issues that the parties might have prepared for the tribunal. The language of paragraph 3.2 of the Award supports this view.

77. Nevertheless, in my judgment, Mr Gracie has not established that the Arbitrator failed to deal with the mistake/rectification issue. As I have remarked, it is no more apparent from the language of paragraph 4.2 of the Award that the Arbitrator overlooked that issue than it is that he failed to address the issue of a contractual variation (or "subsequent change by mutual agreement" as it was described in his paragraph 3.2, in contradistinction to the case based on the parties' recognition of a mistake). His conclusion that the goodwill was to be calculated "with no modification" is apt to cover either or both issues.

78. That the conclusion might have been intended by the Arbitrator to extend to the issue of mistake/rectification is supported not only the express recognition of the two issues in paragraph 3.2 but also the way in which the rectification issue was expressed. Firstly, as I have noted there was no prayer for rectification of the Shareholders Agreement in Mr Gracie's counterclaim. Had there been such a prayer, or "claim" within the meaning of section 57(3)(b), then it would have fallen to be addressed in the same manner as the Arbitrator, at paragraph 4.5, dealt with the counterclaim Mr Gracie did make. Any failure to address it would have clearly indicated the proper path to be taken by an application under section 57(3)(b). Secondly, and as Mrs Rose's Reply pointed out, the way the rectification point was pleaded involved focus upon what the parties had allegedly agreed in November 2011 rather than what they had agreed by 1 April 2005 (but failed properly to reflect in the Shareholders Agreement of that date). That was the point that Mr Anderson QC had drawn out in his closing submissions to the arbitrator (see paragraph 64 above).

79. It may be that Mr Gracie felt compelled to put his case that way. Whereas the manuscript notes recorded "*Aggregate X That should read average and all agreed that we would regard it as average in future*" (the "X" denoting an error), the typed minutes said: "*AR is still not happy with any value being placed on goodwill – but it was agreed by all that the wording is incorrect and that (at the most) the average figure would be used for RG's future buy out*." The minutes were pleaded by Mr Gracie to be an accurate reflection of the notes, and before the Arbitrator he had sought to rely upon both together, but neither document provided a clear indication of what it was the parties had allegedly otherwise agreed in 2005 as opposed to what should hold good for *the future*. The fact that his Points of Claim pleaded that there had been post-2005 discussions of the goodwill valuation, under an express provision in the Shareholders Agreement for an annual review on the point, adds a further element of uncertainty over a claim which, as a matter of analysis, should relate back to that year.

80. Although the Arbitrator's "no modification" conclusion may be read as extending to the rectification issue, advanced as it was by reference to a discussion in November 2011, in my judgment the language of the Award is ambiguous and uncertain on that

point. It follows that not only has Mr Gracie failed to establish ground "(d)" but it is apparent that his attempt to do so should be treated as barred by section 70(2) and his failure to seek clarification or resolution of the ambiguity on an application under section 57(3)(a).

81. Those conclusions are sufficient to dispose of Ground 1 against Mr Gracie.

82. Had I been persuaded that, on the language of the Award, the mistake/rectification issue had clearly not been dealt with then (operating on that premise) I would not have been dissuaded from remitting the point to the Arbitrator on the basis that no substantial injustice had resulted.

83. Mr Anderson QC made a number of powerful points in support of his alternative argument that the rectification argument was hopeless and there was no prospect that the Arbitrator would have reached a different conclusion on the valuation of goodwill. They included the point, which had struck me during my pre-reading, that there was no proper basis for rectifying the Shareholders Agreement when (at paragraph 8 of Schedule 6) it contained the express provision for the shareholders to conduct an annual review of the goodwill valuation and make any necessary amendments to the Schedule; though the puzzlement I expressed at the hearing as to how this could work to readjust, if considered appropriate, the cumulative effect of the first two of the three "aggregate" years *might*, on further reflection, be said to indicate that "average" had instead been intended.

84. Mr Anderson also said that, since the Arbitrator had reached his conclusion that the typed minutes of the November 2011 meeting were not contemporaneous, Mr Gracie had sought to make much more of the handwritten notes than he had during the arbitration. Whereas Mr Newington-Bridges said that the conclusion that those notes were "authentic" meant that they must be taken to be accurate, Mr Anderson said their content fell way short of establishing grounds for rectifying the Shareholders Agreement arose upon it having been executed. He also referred to evidence that had been before the Arbitrator about events before and after 2011 which cast doubt upon the conclusion which Mr Gracie sought to read into the notes.

85. Powerful as some of these points against rectification appeared to be, in my judgment the very nature of them showed that it would risk me presuming too much and perhaps corrupting the test for determining whether a substantial injustice has resulted (see paragraph 20 above) to conclude that the Arbitrator would obviously reject the argument which, for present purpose, I should assume he has so far overlooked. A challenge under section 68 is not concerned with the merits of the tribunal's decision and, having particular regard to the scope of the argument that the terms of ground "(d)" permit, there is an obvious limitation upon the court's ability to decide points of merit in place of the tribunal which heard the evidence and the submissions upon it.

<u>Ground 2</u>

86. Ground 2 relates to the Arbitrator's conclusion (at paragraph 4.4 of the Award) that Mrs Rose was entitled to the same dividend from the Company as had been drawn by Mr Gracie since the death of Mr Rose in October 2015. Mr Gracie claims that the

Arbitrator failed to deal with all the issues that were put to it in relation to issue of dividend and/or exceeded his powers in relation to the issue of dividend. His challenge is made under section 68(2)(d) and/or (b).

87. By the Award the Arbitrator rejected Mrs Rose's claim that the Shareholders Agreement provided that she should receive "a monthly sum (subject to availability of funds) of at least £1500 on account of remuneration and dividends". He concluded, in effect, that Mr Gracie was entitled to the £2,500 per month that he had received as remuneration since January 2016 but that Mrs Rose was entitled to an equivalent sum received by him in excess of his salary.

88. Paragraph 3.14 of the Award stated as follows:

> "I note that as well as PAYE salary Mr Gracie has withdrawn from the Company, since the death of Mr Edward Rose, a total of £45,000 by 31 May 2017 in addition to his salary and that these withdrawals have simply been regarded as Drawings. Company Law does not recognise this term; HMRC considers any sum withdrawn without PAYE as being a distribution and to be liable to tax as a dividend. I consider that the other shareholder is entitled to regard the sums drawn, whatever their description, as being dividends."

89. It was on that basis that the Arbitrator reached the conclusion of equal entitlement to dividend in paragraph 4.4 of the Award.

90. Mr Gracie complains that this involved an infringement of due process in that the Arbitrator ignored the evidence adduced in relation to drawings (and thereby overlooked the issue that the sums were to be classified as such) and has invoked a proposition of company law and of the practice of HMRC without substantiating either with authority or a statement of practice, or hearing the parties on either proposition.

91. Mr Gracie's pleaded case in the arbitration in relation to the classification and entitlement to the sums received by him (if not as remuneration) was opaque. His Points of Defence admitted that Mrs Rose was entitled to equal distributions of dividends but also said "[I]t is unclear why the Claimant believes that remuneration may not include dividends or payments on account of dividends." As he denied the entirety of the Mrs Rose's dividends claim (and not just the part which could be classified as remuneration which she could not be said to have earned) the gist of his defence seemed to be that all of the monies received by him should be treated as remuneration.

92. The evidence which it is said the Arbitrator overlooked took the form of an email from Mr Tim Stockley (of the Company's accountants) dated 29 November 2017. He had provided, by reference to the Company's accounting records, a "Report of Gross Salary, Dividends and Drawings for 2015, 2016 and 2017 for Richard Gracie" in tabular form. The table showed that, after Mr Rose's death, "dividends" had ceased to be paid (it showed Mr Rose and Mr Gracie each receiving dividends for the first 7 months of the 2015 accounting year) and been replaced by "drawings" equivalent to £3,000 per month. Mr Stockley's email explained that "drawings" referred to monies taken out of a company by a director for his personal use which were neither a salary nor a dividend but were to be treated as a loan (or the repayment of any lending by the director to the company). Mr Gracie's solicitors submitted the email to the Arbitrator

for his consideration. Mr Newington-Bridges' written closing submissions quoted from it.

93. Mr Newington-Bridges' skeleton argument before me also said that the evidence on the dividends issue included Mr Gracie's own evidence that he had repaid the monies to the Company, an act only consistent with them having been advanced by way of loan rather than dividend. In circumstances where his written closing submissions before the Arbitrator made no reference to their repayment I was anxious to establish whether that evidence had been produced to him before the date of his Award. It is not clear that it was.

94. For the reasons explained in the context of Ground 1, however, I am not concerned with the merits of the Arbitrator's decision on the dividends issue but whether there has been some failure of due process with regard to it.

95. In my judgment, Mr Gracie has not established Ground 2. It cannot be said that the Arbitrator has failed to address the dividends issue or some key aspect of it for the purposes of section 68(2)(d). So much is clear from the fact that Mr Gracie's real complaint is about the fact that he did so by rejecting the conclusion advanced by Mr Stockley's email. I have already noted above, in addressing the legal principles, how the emphasis had shifted to the alternative ground of challenge.

96. As to the suggestion that the Arbitrator was only able to do so by exceeding his powers – section 68(2)(b) – the decision in *Lesotho Highlands* (paragraph 46 above) makes it clear that this ground of challenge cannot be used to challenge what is said to be an erroneous exercise of a decision-making power. It is clear that the Arbitrator was entrusted with the power to decide the dividends issue and the Stockley email was submitted to him and relied upon by Mr Gracie on that basis. Again, Mr Gracie's real complaint is not that the Arbitrator had no power to decide the dividends issue (a contention that might put the two alternative statutory grounds he relies upon in conflict with one another) but that he reached the wrong result. That is not a proper basis for a ground "(b)" challenge.

97. Although section 68(2)(a) was not relied upon – an alleged failure to comply with section 33 – it is not clear to me that Mr Gracie's complaint about the Arbitrator meeting Mr Stockley's analysis by invoking company law and HMRC could be advanced otherwise than on a suggested point of law on an appeal under section 69. But that is a point I need not decide.

98. I therefore reject Mr Gracie's challenge to the Award under Ground 2.

Ground 3

99. Ground 3 is based upon the Arbitrator having exceeded his powers or, alternatively, failing to conduct the proceedings in accordance with the procedure agreed by the parties. He is said to have done so by addressing matters of quantum - i.e. fixing on the figures of £328,816 (the price for Mrs Rose's shares) and £45,000 (her dividend entitlement) – in circumstances where, Mr Gracie says, the parties had understood that issues of quantum would be put off to a separate hearing after 18 December 2017.

100. The basis of this complaint lies in what the Arbitrator said in a letter dated 6 September 2017 (and therefore more than two months before the hearings before him at the end of that year). That letter began with a reference to paragraph 26 of Mrs Rose's Reply and Defence to Counterclaim which took the point about reflective loss being irrecoverable by Mr Gracie (cf. the abandoned Ground 4). The Arbitrator's letter said that, having referred to his legal advisers and received responses from the parties, "I am now satisfied that such a Counterclaim can be made by the Company as a Party to this Arbitration." Having recognised that some delay had resulted from his consideration of the point, he went on to say:

> "I recognise that, were such a Counterclaim to be upheld there would be a consequent issue of quantum. At that point the Parties might want the opportunity to appoint Experts on this issue. In the interests of keeping time and expense to a minimum I propose that we defer any consideration of quantum until I have had an opportunity to consider the merits of the Counterclaim as part of the Arbitration."

101. On the basis of the last sentence quoted above, Mr Gracie now argues that the Arbitrator exceeded his powers and went against his own proposal (which appears to have been met with at least tacit approval by the parties) by proceeding to consider quantum. He says that he has been substantially prejudiced as a result in not being able to submit all his evidence and having full submissions made on his behalf. Although he had not sought to rely upon it in his Defence served two months before the Arbitrator's letter, he points to the fact that he had made a loan of £19,900 to the Company (the one mentioned at clause 2.3 and Schedule 9 of the Shareholders Agreement) which might have impacted upon the net asset value element of the price payable for Mrs Rose's shares.

102. In my judgment, there is nothing in Mr Gracie's Ground 3 which is entirely lacking in merit. It is as plain as it could be from the Arbitrator's letter of 6 September 2017 that it was only the quantum aspect of Mr Gracie's counterclaim (based upon Mrs Rose's alleged breach of the Shareholders Agreement through alleged disclosure of confidential information) that was potentially for another day. His pleaded Counterclaim (at paragraph 41) had flagged the need for expert accountancy or valuation evidence in relation to the reflective loss. In the event, the Award concluded that he was not entitled to make that claim for damages.

103. It is equally plain that the parties did not understand any other issues of valuation, or quantum, to have been put off for a later hearing. As I remarked to Mr Newington-Bridges, from the point of service of service of his client's Defence and Counterclaim (prior to that Mr Gracie had said he had an option but no obligation to buy Mrs Rose's shares) the whole reference was about "quantum", in the components of share price and dividend entitlement. No expert evidence was considered necessary to address those matters, identified in paragraphs 2.1 to 2.6 of the Award, though it is telling that Mr Gracie sought to rely upon Mr Stockley's email in influencing the Arbitrator on the dividends issue. I have already noted that his counsel's written closing submissions placed reliance on that email. They also addressed the quantum of the share price, both by advancing the variation/rectification arguments and by noting that it had been agreed that the sum of £100,000 fell to be deducted from the share price (by reason of

Mr Rose not having complied with his obligation to take out life assurance) "as per the valuation provided by the accountant".

104. It is therefore surprising that Ground 3 has been advanced. Even if there had been more in it, in the circumstances outlined above - including the failure to plead the suggested significance of the scheduled loan (which may or may not have credited against the repayment mentioned in paragraph 93 above) – I would not have been persuaded that consequence was one of substantial injustice.

105. I therefore also reject the challenge to the Award on Ground 3.

Disposal

106. I therefore dismiss the Claim. This judgment has been handed down in absence of the parties. I invite them to submit an agreed minute of order and/or proposals for the further determination of any matter which is not agreed.