Easter Term
[2021] UKPC 8
Privy Council Appeal No 0113 of 2019

JUDGMENT

RAV Bahamas Ltd and another (Appellants) *v* Therapy Beach Club Incorporated (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Hodge
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON

19 April 2021

Heard on 11 February 2021

Appellants	*Respondent*
Vernon Flynn QC Stuart Cribb (Instructed by Charles Russell Speechlys LLP (London))	Krystal D Rolle QC Wallace I Rolle (Instructed by Janes Solicitors)

LORD HAMBLEN AND LORD BURROWS:

1. Introduction

1. This appeal concerns the proper interpretation of section 90 of the Bahamas Arbitration Act 2009 ("the 2009 Act") under which challenges to an arbitration award may be made on the ground of serious irregularity. Section 90 is modelled on and is materially identical to section 68 of the English Arbitration Act 1996 ("the 1996 Act").

2. The main issue of interpretation which arises is whether section 90 requires there to be a separate and express allegation, consideration and finding of substantial injustice for a serious irregularity to be established.

2. Factual and procedural background

(i) The outline facts

3. The claimant and respondent, Therapy Beach Club Incorporated ("Therapy"), is a Florida company operating in the Bahamas. The defendants and appellants, RAV Bahamas Ltd and Bimini Bay Resort Management Ltd, are two Bahamian companies operating in the Bahamas. The latter company is a wholly owned subsidiary of the former company and acted as the agent and manager for the former company in relation to the lease to Therapy that is central to this dispute. The Board will refer to those two companies collectively as "RAV".

4. By a lease dated 31 December 2011, RAV leased certain land on the island of Bimini in the Bahamas to Therapy for the building and operation of a restaurant and beach club (together called the "Sakara Beach Club"). Therapy was to pay a percentage rent to RAV based on Therapy's gross revenue from the Sakara Beach Club plus a proportionate share of what was referred to in the lease as the "common area charge". By clause 5(t) of the lease, the term of the lease was three years with an option for the lessee, by giving six months' notice, to renew the lease for a further three years "subject to the parties agreeing to rents to apply to the renewal term."

5. Pursuant to clause 2(d) of the lease, Therapy was to pay $150,000 to RAV for the construction of the Sakara Beach Club which was to be completed within 120 days of the receipt of that payment. Therapy alleged that, in breach of contract, the building

work was not properly completed, that Therapy had to attempt to complete it at its own expense and that, even by July 2013, it was not fully complete.

6. On 18 March 2013, proceedings were commenced by RAV against Therapy in the Supreme Court of the Bahamas, alleging that the lease was void, illegal and of no effect, on the grounds that its terms violated the International Persons Landholding Act of the Bahamas. On 31 May 2013, that action came before Chief Justice Barnett, who reserved judgment at the end of that hearing.

7. On 18 July 2013, however, before that judgment was handed down and while the lease was still in the currency of its original three-year term, the Sakara Beach Club was demolished by RAV and Therapy was evicted from the land. Subsequently, in his judgment dated 12 September 2013, Chief Justice Barnett rejected RAV's claim that the lease was void, illegal and of no effect.

(ii) The arbitration award

8. By an "ad hoc" arbitration agreement, the parties' dispute arising out of the demolition of the Sakara Beach Club and the eviction of Therapy was referred to arbitration. A retired Bahamian judge, Justice Cheryl Albury, was appointed as the sole arbitrator.

9. Following a six-day hearing, the decision of the arbitrator, dated 21 August 2017, was, in outline, as follows:

> (i) The arbitrator held that Therapy had been wrongfully evicted from the Sakara Beach Club and granted its claims for breach of contract, trespass, conversion and unlawful interference with economic interests.
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> (ii) Therapy had claimed that there had been a variation of the lease with RAV so that, in addition to the Sakara Beach Club, it had a lease of a nearby restaurant known as "Atlantic Seafood". The arbitrator rejected that claim and held that there had been no such variation of the lease. Therapy's claims for damages in respect of Atlantic Seafood were therefore dismissed.
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> (iii) In assessing damages for Therapy's contractual and tortious claims for consequential loss of profits, the arbitrator accepted the approach of Therapy's expert witness, Mr Ocasio. He had estimated Therapy's loss of profits for a six-year period, which included a three-year renewal period, as being $12m. However, the arbitrator then discounted that figure in two ways: first, by one

third, to reflect the failure of the claim that the lease had been varied to include Atlantic Seafood; and, secondly, by a further 15%, to reflect the fact that Mr Ocasio's figures were based on his memory and not supported by documents. Therapy was therefore awarded $6.8m as general damages for consequential loss of profits.

(iv) The arbitrator also awarded Therapy special damages of $370,000, and exemplary damages of $2,500,000.

(v) The total sum awarded was, therefore, $9,670,000.00 plus interest from 18 July 2013 and costs.

(iii) RAV's challenge to the arbitration award in the Supreme Court of the Bahamas

10. By a notice of motion dated 15 September 2017, RAV applied to challenge the arbitration award in the Supreme Court of the Bahamas on the basis of, inter alia, section 90 of the 2009 Act which deals with "serious irregularity". The irregularities alleged by RAV fell into two main categories. They were as follows:

(i) By paragraphs 5 to 8 of the notice of motion, which have subsequently been referred to as "the paragraphs 5 to 8 ground", RAV complained that the period for which general damages for consequential loss of profits had been awarded should not have extended beyond the original term of the lease, which expired on 30 December 2014, and should not have included the three-year renewal period. RAV complained, in particular, that the arbitrator failed to deal with two issues that were put to her about that renewal. First, the arbitrator did not deal with the complaint that no notice (six months' notice was required) had been given by Therapy to exercise the option to renew the lease for a further three-year period. Secondly, the arbitrator did not deal with the complaint that the option clause in the lease was uncertain, illusory and unenforceable because it was subject to the parties agreeing the rents to apply in the renewal term.

(ii) By paragraph 10 of the notice of motion, which has subsequently been referred to as "the paragraph 10 ground", RAV complained that the expert evidence before the arbitrator failed to disaggregate the losses in respect of the claims the arbitrator had rejected (for the Atlantic Seafood restaurant) from the losses in respect of the claims which she had allowed (for the Sakara Beach Club); and that the arbitrator had herself disaggregated or discounted those losses on a basis (by a third and then by 15%, as described at para 9(iii) above) which was not supported by the evidence and was not canvassed with, or addressed by, the parties and in respect of which RAV had not been given the opportunity to make representations prior to the award.

11. The challenge was heard by Winder J. His judgment, dated 24 January 2018, is reported at CariLaw reference BS 2018 SC 7. While rejecting RAV's other complaints about the arbitration award, Winder J allowed its section 90 "serious irregularity" challenge on both the paragraphs 5-8 ground and the paragraph 10 ground. His central reasoning can be summarised as follows.

12. First, as regards the paragraphs 5-8 ground, there was a serious irregularity in the determination of the award of general damages because, contrary to section 90(2)(d) of the 2009 Act, the award did not deal with the issue put to the arbitrator of whether Therapy was legally entitled to the recovery of losses for the renewal period. That is, there was no explanation of why the general damages for consequential loss of profit were being awarded for the renewal period (of an extra three years) rather than just until the end of the initial term of the lease (30 December 2014). Winder J said, at para 21, that the importance of the issue as to whether the renewal term was illusory and unenforceable, because it was subject to agreeing rents, was shown by a passage from the decision of Hargrave J in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at para 69. Winder J went on in paras 22 and 24:

> "22. A review of the Award does not reflect that the Arbitrator considered the issue of whether Therapy would be entitled to damages during the renewal period. It seems to have proceeded on the basis that Therapy was entitled to these damages. Whilst not every argument of counsel demands consideration by the Tribunal this was an issue which turned out to be a central one. It was first raised by Therapy in paragraph 70 of the Statement of Claim and the said issue was joined by the Applicants in their Defences. The issue was also traversed in closing submissions.
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> …
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> 24. The Applicants were entitled to the consideration of the Tribunal on this issue and insofar as it was not provided I find that there was a serious irregularity and that part of the Award ought to be set aside and remitted pursuant to Section 90(2)(d)."

13. Secondly, as regards the paragraph 10 ground, there was a serious irregularity because, contrary to sections 44 and 90(2)(a) of the 2009 Act, the arbitrator acted unfairly in not affording RAV the opportunity to make representations prior to her decision, in assessing damages, to make a one third deduction, and a further 15% deduction, for, respectively, the profits attributable to Atlantic Seafood (which she was disallowing) and the inaccurate recall of Mr Ocasio. As Winder J held at paras 37-38:

> "37. The first time the method of adjusting Mr Ocasio's global figure, so as to arrive at a figure for the Sakara Beach Club was advanced, was in the Award itself. It does, as argued by the Applicants, appear to represent the Arbitrator's entirely impressionistic way of adjusting a global figure. Regrettably, the Applicants (or Therapy) were not afforded an opportunity to make representations prior to her decision to make adjustments/deductions and allowances for: (1) the removal of sums attributable to claims which she had disallowed (in relation to the varied lease agreement); and (2) the inaccurate recall of the Respondent's expert witness.
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> 38. Having regard to the authorities therefore, the decision of the Arbitrator at paragraph 165 of the award was unfair and contrary to section 44 of the [Arbitration Act] and I am satisfied that this ground ought to prevail."

14. Winder J therefore remitted the matter to the arbitrator, in part, for reconsideration of the general damages for consequential loss and, at para 52, he directed that she should: (i) permit RAV to make submissions on the proposed adjustments to the evidence of the expert witnesses' projections prior to her reconsideration of the consequential damages award; and (ii) consider the issue of whether the award could properly reflect any losses in the option or renewal period, on which she was permitted to receive further submissions.

15. Winder J made no finding of any serious irregularity in relation to the arbitrator's treatment of the exemplary damages claim, but held, at para 54, that that award must also be reconsidered because it was based on the amount awarded as general damages. He also stated that the arbitrator could make a fresh award for exemplary damages after the determination of the general damages claim.

(iv) Therapy's appeal to the Court of Appeal of the Bahamas

16. Therapy appealed to the Court of Appeal of the Bahamas against that decision of Winder J. By a majority, the Court of Appeal allowed Therapy's appeal and ordered that Winder J's remittance orders be set aside and that the arbitration award be upheld. The leading judgment was given by Sir Hartman Longley P with whom Mr Justice Isaacs JA agreed. Sir Michael Barnett JA (Acting) dissented. The judgment is dated 16 August 2018 and is reported at SCCivApp No 23 of 2018 and CariLaw reference BS 2018 CA 117.

17. The essential reasoning of the majority was that, as regards both the paragraphs 5-8 ground and the paragraph 10 ground (although the Court of Appeal did not explicitly use those shorthand expressions), Winder J's decision should be reversed because he did not expressly and separately consider and find that substantial injustice had been caused to RAV by the irregularity he had found; and similarly RAV had failed expressly and separately to plead and establish any such substantial injustice. Having considered several English law authorities, such as *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd* [2002] EWHC 2292 (Comm), [2002] 2 Lloyd's Rep 681; *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43; [2006] 1 AC 221; *Transition Feeds LLP v Itochu Europe plc* [2013] EWHC 3629 (Comm), and *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm); [2015] 2 All ER (Comm) 350, Longley P said the following at paras 34-37 and 44-45:

> "34. To my mind these authorities all support the position advanced by the appellant that the learned judge was required to do a separate investigation, pursuant to section 90, to determine if the serious irregularity found caused or was likely to cause substantial injustice to the applicant/respondent before remitting the matter for reconsideration. The issue is simply one of due process…
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> 35. I cannot say having reviewed the minute or judgment of Winder J that he duly adverted his mind to this issue or that if he had what his conclusion would have been.
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> 36. What is most significant in this regard is that the respondent failed to reference this requirement in its Notice of Motion to set aside the award or to adduce any evidence to support it even though one gleans that in the Notice they alleged irregularities without necessarily specifying the section under which their complaints fell.
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> 37. What clearly emerges from all the authorities is that the burden is on the applicant seeking to set aside an arbitration award on the basis of serious irregularity to prove that he has either suffered or will in the future suffer substantial injustice.
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> 44. The respondents appear to argue in … their skeleton arguments that a finding of serious irregularity must mean that substantial injustice has been shown or was shown to exist. That

> argument to my mind is fatally flawed. Were that the case the section would not have been drawn in terms which require the judge to 'consider' whether there has been substantial injustice.
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> 45. The House of Lords decision in *Lesotho* makes clear that an applicant cannot succeed before first showing as a precondition that there has been substantial injustice. It cannot be assumed as Lord Steyn pointed out. It must be proved."

18. The majority also held that, first, there was no evidential basis for the judge to find that there was an irregularity as regards the paragraphs 5-8 ground (para 67); secondly, that there was no irregularity as regards the paragraph 10 ground because the parties knew that the relevant central issue was the amount of damages for consequential loss and "the parties had the opportunity to make whatever representation they may have wished to make at the closing stage of the arbitration" (para 72); and thirdly, that the real complaint made by RAV was that the arbitrator had made errors of law in which case the challenge should have been brought by way of appeal on a point of law pursuant to section 91 of the 2009 Act and not under section 90 (paras 58-60, 79).

19. The dissenting judge, Barnett JA (Ag), considered that Winder J had been correct to find that there had been an irregularity under section 90(2)(d) (as regards the paragraphs 5-8 ground) and that, in this case, there was no need for Winder J to have set out separately why the requirement of "substantial injustice" was satisfied because it was self-evident. He cited extensively from the judgment of Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) and went on to say at paras 147 and 151:

> "147. In this case it is, in my view, unarguable that the failure to consider whether the renewal option was efficacious must lead to substantial injustice. If the option was not efficacious, then any award which took into account lost profits during the three-year renewal period would cause substantial injustice. The injustice caused by the failure to consider that issue is self-obvious and no evidence would, in my judgment, be required.
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> …
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> 151. Whilst it was perhaps prudent for the judge to have spelt this out in his judgment, I do not think he should be criticised for failing to state the self-obvious proposition. Further still, I do not think it would be a proper exercise of our appellate jurisdiction to set aside his decision when we are ourselves satisfied that on the

> material the irregularity ie the failure to consider such an important issue will cause substantial injustice."

20. Although not explicitly considering the paragraph 10 ground, Barnett JA (Ag) made further comments that can be regarded as applicable to that ground. He said, at para 152, that it was unclear how the sum of $6.8m (as general damages for consequential loss) had been determined and "that the respondents ought to know the basis upon which the sum was arrived at by the arbitrator". He went on at para 154:

> "…The sum is so high that no arbitrator acting reasonably could properly have come to the conclusion that it was a fair reflection of the loss suffered by the appellant. The arbitrator could not have properly considered all of the issues that she was obliged to consider."

3. A preliminary question on jurisdiction

21. Therapy invited the Board to dismiss the appeal on the basis that the judgment of the Court of Appeal of the Bahamas (dated 16 August 2018) was final, it being the determination of a second appeal (on a point of law). The Court of Appeal therefore had no jurisdiction to grant permission to appeal to the Board (which it did in a fully reasoned judgment of the court, given by Sir Michael Barnett JA (Ag), with whom Sir Hartman Longley P and Mr Justice Isaacs JA agreed, dated 11 January 2019); and the only way in which this appeal could have properly come before the Board was if this Board had been asked for, and had given, special leave.

22. The relevant sections of the Bahamian Court of Appeal Act are as follows:

> "21(1) Any person aggrieved by any judgment, order or sentence given or made by the Supreme Court in its appellate or revisional jurisdiction, whether such judgment, order or sentence has been given or made upon appeal or revision from a magistrate or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature may, subject to the provisions of the Constitution and of this Act, appeal to the court on any ground of appeal which involves a point of law alone but not upon any question of fact, nor of mixed fact and law nor against severity of sentence:
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> Provided that no such appeal shall be heard by the court unless a Justice of the Supreme Court or of the court shall

> certify that the point of law is one of general public importance.
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> …
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> 23(1) An appeal shall lie to Her Majesty in Council from any judgment or order of the court upon appeal from the Supreme Court in a civil action in which the amount sought to be recovered by any party or the value of the property in dispute is of the amount of four thousand dollars or upwards, and with the leave of the court but subject nevertheless to such restrictions, limitations and conditions as may be prescribed in relation thereto by Her Majesty in Council, in any other proceedings on the Common Law, Equity, Admiralty or Divorce and Matrimonial sides of the jurisdiction of the Supreme Court.
>
> (2) Save as is provided in this section the decision of the court in any civil proceedings brought before it on appeal shall be final.
>
> (3) Nothing in this section contained shall be deemed to restrict or derogate from the right of Her Majesty in Council in any case to grant special leave to appeal from the decision of the court in any cause or matter."

23. The wording of section 23 makes plain that the submission of Therapy is misconceived. This is because there is nothing in section 23 that prevents an appeal going to the Privy Council (ie Her Majesty in Council), or which requires special leave from the Privy Council, where the appeal would constitute a third appeal on a point of law. The crucial words are the opening words of section 23(2), "Save as is provided in this section …".

24. Indeed, section 23(1) lays down that there is an appeal "as of right" to the Privy Council, without any need for permission from the Court of Appeal of the Bahamas or the Privy Council, if the claim is for at least $4,000. However, it has long been established that, even where there is an appeal "as of right" to the Privy Council, permission must still be sought from the relevant Court of Appeal which can determine whether there is such an appeal as of right and may be able to impose conditions in relation to the appeal: see *Ross v Bank of Commerce (Saint Kitts and Nevis) Trust and Savings Association Ltd* [2010] UKPC 28; [2011] 1 WLR 125; Lord Mance and Jacob Turner, *Privy Council Practice* (2017) paras 3.03 - 3.14.

25. In its judgment of 16 August 2018, the Court of Appeal of the Bahamas rejected this jurisdictional submission of Therapy because an application to challenge an arbitration award under the Arbitration Act 2009 sections 89-90 (which are respectively headed "Challenging the award: substantive jurisdiction" and "Challenging the award: serious irregularity") does not fall within section 21(1) of the Court of Appeal Act. This was on the ground that a section 90 application involves the exercise of an original statutory jurisdiction and is not an "appeal or revision from a … court, board, committee or authority exercising judicial powers …". The Board agrees with that reasoning. But as has been said, even if that reasoning were wrong, so that the hearing before Winder J was a first appeal, there would still be no objection to the Privy Council hearing a third appeal (on a point of law). In this case, therefore, the reasoning of the Court of Appeal on jurisdiction merely provides an additional reason (ie additional to that given in para 23) for rejecting Therapy's submission on jurisdiction.

4. The relevant law: section 90 of the 2009 Act

(i) Section 90 in general

26. The 2009 Act is similar in structure and content to the 1996 Act and many of its provisions are materially identical. It was common ground that the policy underlying the two Acts was similar and that it was appropriate to have regard to the English law authorities when interpreting materially identical provisions.

27. An important aim of the Acts was to be supportive of arbitration and to limit the intervention of the courts. As Lord Steyn stated of the 1996 Act in *Lesotho* at para 26: "A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process".

28. Section 90 of the 2009 Act is integral to the achievement of that purpose. Under the predecessor Arbitration Acts the courts were able to intervene and remit matters to the arbitrators on generalised grounds and in a broad category of cases. Under section 90 such intervention is only possible where there is a "serious irregularity", which means an irregularity of one or more of the kinds listed in section 90 and "which the court considers has caused or will cause substantial injustice".

29. Section 90 provides as follows:

> "90. Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(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 44;

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);

(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 the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award;

or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any

> arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

30. As was explained in the 1996 *Report on the Arbitration Bill* (which became the 1996 Act) of the Departmental Advisory Committee on Arbitration Law ("the DAC"), the test of serious irregularity was intended to limit intervention to "extreme" cases where it could be said that "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected". As set out at para 280 of the DAC Report:

> "280. Irregularities stand on a different footing. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing 'substantial injustice' before the court can act. The court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that *what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action*. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 is really designed as *a long stop*, 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*." (Emphasis added)

31. In accordance with this guidance the test of serious irregularity has been recognised as imposing a "high threshold" or "high hurdle" - see, for example, *Lesotho* at para 28 (Lord Steyn); *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm); [2006] 1 All ER (Comm) 529 at para 63 and the cases there cited (Tomlinson J).

32. The focus is on due process, not the correctness of the decision reached: see, for example, *Petroships Pte Ltd v Petec Trading and Investment Corpn (The Petro Ranger)* [2001] 2 Lloyd's Rep 348 at 351; *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm); [2012] 1 Lloyd's Rep 461, at para 49; *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm); [2014] 1 All ER (Comm) 813 at para 6. As Lord Steyn stated in *Lesotho* at para 29, referring to section 68 of the 1996 Act which is equivalent to section 90 of the 2009 Act:

> "… nowhere in section 68 [90] is there any hint that a failure by the tribunal to arrive at the 'correct decision' could afford a ground for challenge."

33. Even if a case is shown to fall within one or more of the kinds of irregularities listed in section 90 this will only amount to a serious irregularity if the court considers that it "has caused or will cause substantial injustice". This means more than some injustice. As Colman J explained in *Bulfracht* at p 687:

> "… those who framed the bill contemplated that the courts' intervention would be engaged not merely in those cases where some injustice has been caused to the applicant by the incidence of the serious irregularity but where the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration."

34. There will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different: see, for example, *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 All ER (Comm) 303 at para 90 (Colman J). It is not necessary to show that the outcome would "necessarily or even probably be different": *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm); [2006] TCLR 1, at para 102 (Langley J). As stated by Akenhead J in *Raytheon* at para 33(i):

> "(i) For the purposes of meeting the 'substantial injustice' test, an applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it [is] necessary only for him to show that (i) his position was 'reasonably arguable', and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award …"

35. Some irregularities may be so serious that substantial justice is "inherently likely" or "likely in the very nature of things" to result. As Toulson J stated in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 at pp 284F-285A:

> "Since the whole process of arbitration is intended as a way of determining points at issue, it is more likely to be a matter of serious irregularity if on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or

> an important issue is not addressed, than if the complaints go simply to procedural matters.
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> …
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> It is *inherently likely* to be a source of serious injustice if irregularities occurred of the kind to which I have referred. Since the purpose of arbitration is to determine central issues between the parties, if there has been a flaw in that this has not been done, that is *likely in the very nature of things* to be a matter of serious injustice." (Emphasis added)

36. In such cases substantial injustice may be inferred from the nature of the irregularity and that inference may be so strong that "it almost goes without saying": see *Raytheon* at para 61. In that case the arbitrators had failed to deal with "key issues" which may well have impacted on an award of some £126m.

37. In general, there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity - see, for example, *Raytheon* para 33 (last sub-paragraph).

(ii) Section 90(2)(d)

38. Section 90(2)(d) sets out that an irregularity occurs where there is a "failure by the tribunal to deal with all the issues that were put to it". This is the irregularity alleged by RAV in relation to the paragraphs 5-8 ground, which was focussed on first in the submissions and hearing, and it shall therefore be addressed before looking at section 90(2)(a). Section 90(2)(d) can be broken down into three questions. What is an issue? Has the issue been put to the arbitrators? Have the arbitrators failed to deal with it?

39. As regards all three questions the relevant authorities, on the equivalent section (section 68(2)(d)) in the Arbitration Act 1996), were helpfully drawn together and summarised by Akenhead J in *Raytheon* at para 33(g).

40. In relation to the first question of what is an issue, Akenhead J said the following in para 33(g):

> "(ii) There is a distinction to be drawn between 'issues' on the one hand and 'arguments', 'points', 'lines of reasoning' or 'steps' in an argument, although it can be difficult to decide quite where

> the line demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a 'high threshold' that has been said to be required for establishing a serious irregularity (*Petrochemical Industries v Dow* [2012] 2 Lloyd's Rep 691, para 15; *Primera v Jiangsu* [2014] 1 Lloyd's Rep 255, para 7).
>
> (iii) While there is no expressed statutory requirement that the section 68(2)(d) issue must be 'essential', 'key' or 'crucial', a matter will constitute an 'issue' where the whole of the applicant's claim could have depended upon how it was resolved, such that 'fairness demanded' that the question be dealt with (*Petrochemical Industries*, at para 21).
>
> (iv) However, there will be a failure to deal with an 'issue' where the determination of that 'issue' is essential to the decision reached in the award (*World Trade Corpn v C Czarnikow Sugar Ltd* [2005] 1 Lloyd's Rep 422 at para 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd v The Commission for the New Towns* [2000] BLR 496 at para 21)."

41. While one must be astute to avoid "definitional gloss[es] upon the statute" (see Andrew Smith J in *Petrochemical Industries Co (KSC) v Dow Chemical Co* [2012] EWHC 2739 (Comm); [2012] 2 Lloyds Rep 691, at para 16), one here sees Akenhead J usefully distinguishing between issues and arguments; and making clear that the arbitrators should deal with an issue that is essential or crucial to the determination of a claim or defence upon which the resolution of the dispute or disputes depends, such that fairness demanded that the issue be dealt with.

42. Turning to whether the issue has been "put to" the arbitrators, Akenhead J continued in para 33(g) of the *Raytheon* case as follows:

> "(v) The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the section 68(2) application (*Primera* at paras 12 and 17)."

There is a degree of overlap between the considerations relevant to whether there is an "issue" and whether it has been "put to" to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to

consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it.

43. Finally, as regards whether the arbitrators have failed to deal with the issue, Akenhead J continued in the following way

> "(vi) If the tribunal has dealt with the issue in any way, section 68(2)(d) is inapplicable and that is the end of the enquiry (*Primera* at paras 40-41); it does not matter for the purposes of section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.
>
> (vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length (*Latvian Shipping v Russian People's Insurance Co* [2012] 2 Lloyd's Rep 181, para 30).
>
> (viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (*Fidelity Management v Myriad International* [2005] 2 Lloyd's Rep 508, para 10, *World Trade Corpn*, para 19). A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it (*Hussman v Al Ameen* [2000] 2 Lloyds Rep 83).
>
> (ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences (*World Trade Corpn* at para 45). The fact that the reasoning is wrong does not as such ground a complaint under section 68(2)(d) (*Petro Ranger* [2001] 2 Lloyd's Rep 348, *Atkins v Secretary of State for Transport* [2013] EWHC 139 (TCC), para 24).
>
> (x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an 'issue'. It can 'deal with' an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (*Petrochemical Industries* at para 27). If the tribunal decides all those issues put to it that were essential to be dealt with

> for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (*Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), para 30).
>
> (xi) It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the tribunal has followed for the purposes of arriving at its conclusion, section 68(2)(d) will be engaged.
>
> (xii) Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (*Ascot Commodities v Olam* [2002] CLC 277 and *Atkins*, para 36). The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard."

44. One can therefore here see Akenhead J helpfully clarifying that, while the arbitrators must deal with an issue, it does not matter for these purposes that they have dealt with the issue badly; and that a court must be very careful not to be hypercritical in determining whether the issue has been dealt with by the arbitrators.

(iii) Section 90(2)(a) and section 44

45. Section 90(2)(a) lays down that an irregularity occurs where there is a "failure by the tribunal to comply with section 44". Section 44 (which is materially identical to section 33 of the Arbitration Act 1996) provides as follows:

> **"44. General duty of the tribunal**
>
> (1) The tribunal shall -

> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

The irregularity set out in section 90(2)(a) and section 44(1)(a) is relied on by RAV in relation to the paragraph 10 ground.

46. Albeit dealing with where an arbitrator had "misconducted himself or the proceedings" under section 23 of the old Arbitration Act 1950, there is a classic statement by Bingham J of the need to act fairly, by allowing the parties to put their case in relation to a finding by the arbitrator or in relation to a matter on which the arbitrator's decision is based. This was in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14. Bingham J said, at p 15:

> "[T]he rules of natural justice do require … that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him."

The last point merits emphasis. An arbitrator will not have acted fairly if a party is learning for the first time in the award about findings and matters in the decision of the arbitrator which that party has not had the opportunity to address.

47. Having cited all but the first sentence of the above passage from Bingham J, Langley J in *Cameroon Airlines v Transnet Ltd* [2004] EWHC 1829 (Comm), [2006] TCLR 1 went on to apply it in relation to a challenge under sections 68 and 33 of the Arbitration Act 1996; and he found that there was a serious irregularity in relation to a decision reached by the arbitrators on a matter of quantification of the value of services under a contract. He said, at para 111:

> "the Tribunal went its own way to a conclusion which neither [party] had contended for and did so unheralded. That, in my judgment, was fundamentally unfair."

48. Similarly, in *The Republic of Kazakhstan v World Wide Minerals Ltd* [2020] EWHC 3068 (Comm) HH Judge Pelling QC, sitting as a judge of the High Court, partly set aside an arbitration award, and remitted back to the arbitral tribunal the relevant issues, because of serious irregularity under sections 68 and 33 of the 1996 Act. The tribunal had awarded damages to the defendants (WWM) on a basis that had not been advanced by the defendants and on which the claimant (TRK) had not had any fair opportunity to respond. The tribunal had rejected the defendants' "global claim to damages for expropriation of its investment brought about by the totality of the breaches alleged" (para 43). Instead it had found particular breaches of the relevant treaty. Yet, although no attempt had been made by the defendants to identify which losses were caused by each particular breach, the tribunal went on to assess the damages. In the words of HH Judge Pelling QC, at para 48:

> "What [the tribunal] could not do without breaching the section 33 duty was to proceed to assess damages in the manner set out … without having published an Award setting out its findings in relation to the breach issues and giving both parties the opportunity to adduce evidence and/or advance submissions as to what damages could be held recoverable for those breaches found proved. This was so because the award of damages for loss alleged to have been caused by particular breaches simply were not 'in play' in the sense that phrase is used in *Reliance Industries Ltd v Union of India* …"

49. This last reference is to the judgment of Popplewell J in *Reliance Industries Ltd v Union of India* [2018] EWHC 822 (Comm); [2018] 2 All ER (Comm)1090, at para 32, in which he decided that there had been no serious irregularity under sections 68(2)(a) and 33. Popplewell J said at para 32:

> "It is enough if the point is 'in play' or 'in the arena' in the proceedings, even if it is not precisely articulated. To use the

> language of Tomlinson J, as he then was, in *ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1 at para 72, a party will usually have had a sufficient opportunity if the 'essential building blocks' of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under section 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case."

50. The decision and reasoning of Popplewell J makes clear that a court needs to be careful in determining that the parties have not had an opportunity to put their case on a finding or matter. Another good example of this is provided by *Weldon Plant Ltd v Commission for the New Towns* [2001] 1 All ER (Comm) 264 HH Judge Humphrey Lloyd QC was there confronted with an allegation that an adjustment made by the arbitrator in relation to a particular measurement of gravel had not been one that Weldon Plant Ltd had had an opportunity to address. He said the following at para 35:

> "[This] raises a point that frequently arises: is an arbitral tribunal obliged to confront a party with a proposed finding when it is not one that a party has sought? Obviously the tribunal should inform the parties and invite submissions and further evidence before making an award if the finding is novel and was not part of the cases presented to the arbitral tribunal. On the other hand in many arbitrations, especially those in the construction industry, there are many findings other than those which the parties have invited the tribunal to make. Matters of quantification and valuation frequently lead to the tribunal taking a course which is not that put forward by either party, but which lies somewhere between. 'Doing the best one can on the material provided' almost inevitably produces such a result. Provided that the finding is not based on a proposition which the parties have not had an opportunity of dealing with the arbitral tribunal will not be in breach of its duties under section 33 … if it makes such a finding without giving the parties a chance of dealing with it. In many such cases the tribunal will have been appointed for its expertise so that in addition there would be no obligation to consult the parties…. In my judgment the arbitrator was entitled to arrive at his decisions that the agreed measurement did not cover gravel left behind and that there should be an adjustment of 770 m3 on that account, without specifically informing Weldon of his intentions and inviting submissions from it. There was no breach of section 33 …"

5. RAV's appeal on the paragraphs 5-8 ground

51. The complaint made by the paragraphs 5-8 ground of appeal concerns the additional three-year period for which general damages for consequential loss of profits were awarded by the arbitrator. It is alleged by RAV that there was a serious irregularity because the arbitrator failed to deal with the issues of no notice of renewal (beyond the original term of three years) having been given and of the renewal option being uncertain, illusory and unenforceable. These two issues can be conveniently drawn together, and will be referred to below as the "lease renewal issue" or "lease renewal point".

52. The burden is on the applicant to establish a serious irregularity under section 90 of the 2009 Act and, as the authorities make clear, that is a "high" threshold. In order to cross that threshold, the applicant needs to show both that there has been an irregularity of one or more of the kinds listed in section 90 and that that has caused or will cause substantial injustice to the applicant. The relevant words in section 90(2) are:

> "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."

It is therefore clear that, for there to be a serious irregularity both of these matters need to be established, since that is what a serious irregularity "means".

53. The Board agrees with the majority of the Court of Appeal that it is good practice for an applicant challenging an arbitration award under section 90 to set out in its notice of motion, or other originating document, both (i) the listed irregularity relied upon and the grounds for contending that there has been such an irregularity and (ii) that the irregularity has caused or will cause substantial injustice. The Board also agrees that any written evidence relied upon should be provided at the same time. Further, the Board agrees that it is good practice for the judge who is determining the section 90 application to deal, expressly and separately, with each of these elements of what constitutes a serious irregularity. Therapy put before us numerous authorities in which this practice has been followed.

54. The central question which arises on the appeal is whether this good practice is a mandatory requirement of section 90 so that an application will fail if such practice is not followed, even if, as RAV contends, as a matter of substance, substantial injustice has been established and found.

55. The majority of the Court of Appeal held that there was no serious irregularity in relation to the paragraphs 5-8 ground of appeal. They held that the ground did not concern an "issue" since it had not been pleaded; that, for essentially the same reason, it had not been "put to" the arbitrator; that it was therefore not a matter which the arbitrator was required to deal with; that it had not been raised by the notice of motion since the only complaint made thereby was one of excess of power; and that, in any event, it was a point of law for appeal rather than a complaint of serious irregularity.

56. In order to address whether there was a serious irregularity and, if so, whether as a matter of substance substantial injustice has been established and found, it is necessary to trace through the history of the proceedings in so far as it relates to the lease renewal issue.

(i) The arbitration

57. At the arbitration Therapy pleaded a claim for damages for loss of profits for a six-year period, including the three-year renewal period. In its pleading RAV denied any entitlement to damages but said nothing specific in relation to the lease renewal period.

58. During oral opening submissions counsel for RAV disputed that there was any entitlement to damages for the renewal period on the grounds that the option for renewal had not been exercised as no notice of renewal had ever been given. This point was repeated during closing submissions, but the further legal submission was also made that no damages could be claimed for the renewal period because the renewal option was void for uncertainty, unenforceable and illusory. In this connection reliance was placed on the *Crown Melbourne* decision (see para 12 above). In answer to a question from the arbitrator, counsel confirmed that his argument was that the renewal option was illusory. Later on, the arbitrator clarified her understanding that RAV's case was that, at best, Therapy was entitled to damages up until December 2014. RAV's counsel confirmed this and explained: "because our argument is that the option period doesn't apply because it's illusory and secondly notice was never given".

59. In oral reply submissions, counsel for Therapy objected to the point that the option was illusory being raised at such a late stage of proceedings. No ruling on this was made by the arbitrator either at the time or in her award.

60. Although the lease renewal issue was not specifically pleaded, this is not determinative of whether it was an "issue" for the purposes of section 90(2)(d), contrary to the decision of the majority of the Court of Appeal (para 56). It was expressly raised in oral submissions and the arbitrator acknowledged that it had been so raised and that, if correct, it meant that no damages could be claimed for the period after December

2014. Although the argument that the renewal option was illusory was only raised in closing submissions, this was a purely legal argument and, despite objection, the arbitrator never ruled that it could not be raised. The lease renewal point was essential and crucial to the determination of Therapy's entitlement to damages as, if accepted, it would mean that it would not be entitled to damages for three years of the six-year claim period. As the Sakara Beach Club needed to be built at the start of the first three-year period, before any profits could be made, the effect of the lease renewal point, if successful, would potentially be to more than halve an award of substantial damages in respect of the Sakara Beach Club. The importance of the issue was such that fairness demanded that it be dealt with. For all these reasons, it was an "issue". Having regard to the conduct of the arbitration proceedings as a whole, rather than just the pleadings, it is also apparent that the arbitrator's attention was sufficiently clearly drawn to the issue, as one which she was required to determine, and that she would reasonably be expected to deal with it. It was therefore "put to" the arbitrator.

(ii) The award

61. The arbitrator awarded damages for loss of profits over a six-year period, including the three-year renewal period. After adjustments, this amounted to $6.8m. She made no reference to or ruling upon the lease renewal point. It cannot be inferred that she rejected the point in circumstances where she did not refer to it at all, still less provide any reasons for its rejection. She therefore failed to deal with an "issue" which had been "put to" her. Her failure to do so was an irregularity under section 90(2)(d).

(iii) The notice of motion

62. The award was challenged on various grounds. One of the declarations sought by the notice of motion was that "the Tribunal exceeded its powers *and* failed to deal with all the issues put to it" (emphasis added). In the context of an application which was being made under section 90, this would naturally be read as referring to section 90(2)(b) ("the tribunal exceeding its powers") and section 90(2)(d) ("failure by the tribunal to deal with all the issues that were put to it"). The declaration sought tracks the language of those two subsections. The grounds upon which the declaration is sought is set out in paragraphs 5-8 of the notice of motion, and the failure to deal with all the issues put to the tribunal is set out in paragraph 7, where reference to the lease renewal point is made in the following terms:

> "Further, the Applicants contend that the Tribunal did not deal with the issue put to it, namely, (i) that the term of Lease expired on 30th December 2014 as no notice had been given to exercise the option period for a further three (3) year period and (ii) that the

> option clause was uncertain, illusory and unenforceable as it required the parties to agree the rents to apply to the renewal term."

63. Although section 90(2)(d) is not expressly referred to (as it should have been), and although there is some conflation between the excess of powers complaint and the failure to deal with an issue complaint, the Board agrees with Barnett JA (Ag) that paragraphs 5 to 8 set out the grounds of both a complaint of excess of power under section 90(2)(b) and a failure to deal with an issue put to the tribunal under section 90(2)(d), particularly when construed in the context of the declaration being sought. Indeed, in its skeleton argument before Winder J, Therapy acknowledged that RAV's "arguments relative to the option clause" were advanced as a "Section 90(2)(d) Challenge". Nothing, however, was said expressly and separately in the notice of motion about substantial injustice.

(iv) The hearing of the notice of motion and Winder J's judgment

64. Therapy's skeleton argument in response to the notice of motion contended that none of RAV's complaints amounted to a serious irregularity but did not state that RAV was required to make, but had not made, an allegation of substantial injustice.

65. RAV's skeleton argument similarly made no reference to substantial injustice, but it did contend that the arbitrator had never addressed the issue of whether the lease had been renewed and the "critical issue" of whether the renewal clause was in any event unenforceable. These were said to be "critical failures", and "the fact that such a large portion of the award is attributable to this renewal period" meant that it should be set aside. It was thereby being said that the failure to deal with this "critical issue" affected the outcome of "a large portion of the award".

66. In oral argument, counsel for Therapy did briefly raise the issue of substantial injustice, to which counsel for RAV's response was that the injustice spoke for itself. Contrary to Therapy's written case, RAV did therefore assert that substantial injustice followed from the nature of the irregularity alleged.

67. Given the very limited attention given to the issue of substantial injustice in the parties' submissions, it is perhaps not surprising that Winder J did not expressly refer to it as an issue. He did, however, make it clear that he regarded the lease renewal point as being a "central" issue. For example, at paragraph 20, he summarised RAV's argument that the arbitrator did not "address the critical issue … to the effect that the renewal clause was in any event unenforceable". At paragraph 21 he referred to the case of *Crown Melbourne* as demonstrating "the importance of the issue". At paragraph 22, he expressly stated that "this was an issue which turned out to be a central one". As this was a "central" issue, he concluded at paragraph 24 that RAV was "entitled to the

consideration of the Tribunal on this issue and insofar as it was not provided I find that there was a serious irregularity".

68. The reason that the judge regarded the lease renewal point as a "central" issue is self-evident. It was central to the proper determination of Therapy's entitlement to damages for lost profits and would potentially at least halve the quantum of an award. As stated by Barnett JA (Ag) in his dissenting judgment: "If the option was not efficacious, then any award which took into account lost profits during the three-year renewal period would cause substantial injustice. The injustice caused by the failure to consider that issue is self-obvious" (para 147).

69. This is one of those cases in which the nature of the irregularity and failure of due process means that it is "inherently likely" (see para 35 above) that there has been substantial injustice. Failing to deal with an issue which was put to the tribunal which would potentially more than halve a $6.8m damages award is, on the face of it, obviously unfair and unjust.

70. It might be otherwise if it was shown that the point in issue was not reasonably arguable. This has not, however, been suggested and we are satisfied that it is so arguable. This is therefore a case in which it has been shown that, had the irregularity not occurred, the outcome of the arbitration might well have been different. As such, it is a case in which, as a matter of substance, substantial injustice has been established.

71. The Board also considers that this is a case in which, as a matter of substance, a finding of substantial injustice was made. Serious irregularity under section 90 "means" a listed irregularity which has caused or will cause substantial injustice. By finding that there was a serious irregularity Winder J was therefore necessarily finding that there had been substantial injustice. The judge also identified what gave rise to that injustice, namely the failure to deal with a "central" issue relating to damages. This was also set out in his finding of serious irregularity at para 50:

> "There was a serious irregularity in the determination of the award of general damages in that the award does not reflect that the Arbitrator considered the issue of whether Therapy could claim losses occurring not only in the remaining term of the Sakara Lease but also in the renewal period."

In finding that this issue was "central" to the determination of the award of damages Winder J was recognising that the failure to deal with it might well affect the outcome of the award and thereby cause substantial injustice.

72. The Board is therefore satisfied that this is a case in which, as a matter of substance, substantial injustice has been both established and found. Does it make any difference that there has not been an express and separate allegation, consideration and finding of substantial injustice? In our view, this should not, and does not, make any difference. In this context, substance is more important than form. Undue formalism should not be required.

73. The fact that there is no express and separate allegation of substantial injustice is not fatal to an application under section 90. It is implicit in any section 90 application that substantial injustice is being alleged and, provided that there is, when required, the necessary evidential material to support that allegation, it will generally be an issue which is properly before the court. There may be cases requiring evidence in which the failure to make such an allegation clearly causes prejudice to the other party with the consequence that it is held that the allegation is not open to the applicant. That does not, however, arise here where the evidence related to the irregularity and consisted of the available pleadings and hearing transcripts and the argument on the lease renewal point was essentially one of law.

74. That there is no express and separate consideration and finding of substantial injustice in a judgment does not mean that the issue has not been considered and determined, as the present case illustrates. For the reasons given above, on a fair reading of his judgment, Winder J did consider and find that there was substantial injustice, although he did not use those words. Counsel for Therapy, Krystal Rolle QC, realistically accepted that the words "substantial injustice" do not have to be used. What is important is whether, as a matter of substance, substantial justice has been considered and found, not the precise language used.

75. Ms Rolle accepted that it is open to a judge to conclude that substantial injustice follows from the nature of the irregularity established, but, if so, she submitted that this should be expressly addressed. That is no doubt preferable, but it is not essential, provided that that conclusion can properly be inferred, as it can be in this case.

76. Ms Rolle, in her written case and oral submissions, valiantly made a number of further arguments in support of the Court of Appeal majority decision on the paragraphs 5-8 ground. The Board has carefully considered all those arguments but must reject them. In circumstances where, as the Board has held, an irregularity causing substantial injustice has, as a matter of substance, been established and found, her arguments that this does not suffice for section 90 of the 2009 Act must be viewed as technical and unmeritorious, however well presented.

77. Finally, the Board should note its disagreement with the majority of the Court of Appeal that the challenge made in this case is properly to be regarded as a point of law

for appeal rather than a complaint of serious irregularity. Whilst RAV's application does raise arguments of law, its complaint is that the arbitrator failed to reach any decision on the lease renewal point, not that her decision on that point was wrong in law. There was no such decision. For the purpose of a section 90(2)(d) application relating to a point of law, all that the applicant needs to show is that the point of law which was not dealt with is reasonably arguable. Whether or not it is correct is a matter for the arbitrator, not the court.

78. For all these reasons the Board would allow RAV's appeal on the paragraphs 5-8 ground.

6. RAV's appeal on the paragraph 10 ground

79. The complaint made by the paragraph 10 ground of appeal concerns the assessment of the damages for the consequential loss of profits. It is alleged by RAV that there was a serious irregularity because the arbitrator disaggregated or discounted those losses on a basis (by a third and then by 15%) which was not supported by the evidence and was not canvassed with, or addressed by, the parties and in respect of which RAV had not been given the opportunity to make representations prior to the award. As has been explained in para 9(iii) above, the one third deduction was to reflect the failure of Therapy's Atlantic Seafood claim; and the 15% deduction was because Mr Ocasio's figures given in his expert evidence were based on his memory and unsupported by any documents.

80. In considering this paragraph 10 ground of appeal, it is convenient first to consider whether there was any irregularity within the meaning of section 90(2)(a) which itself cross-refers to the duty to act fairly in section 44. RAV relies on section 44(1)(a) under which the tribunal shall "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 …". RAV submits that it was not given any opportunity to address the arbitrator on the one third and 15% deductions.

81. The majority of the Court of Appeal held there was no irregularity as regards the paragraph 10 ground because the parties knew that the relevant central issue was the amount of damages for consequential loss and "the parties had the opportunity to make whatever representation they may have wished to make at the closing stage of the arbitration" (para 72).

82. The Board disagrees with that reasoning as regards the one third deduction. The case being put by Therapy - and hence the figures being put by its expert Mr Ocasio - did not disaggregate between the alleged lost profits from the Sakara Beach Club and those from the Atlantic Seafood restaurant. Global figures only were put forward. No

alternative figures were put forward to deal with the assessment if, as in fact occurred, the arbitrator should rule out any claim for the Atlantic Seafood restaurant. RAV was contending that the damages should be nominal only. It follows that the possibility of there needing to be a disaggregation between the profits of the Sakara Beach Club and those from Atlantic Seafood was simply not "in play" and was not "in the arena" (to use the words of Popplewell J in *Reliance Industries Ltd v Union of India* set out at para 49 above) and neither party addressed that possibility. As Ms Rolle accepted, after checking the transcript of the arbitration hearing, the one third deduction was not mentioned at the hearing. The first either party knew about it was when it appeared in the reasoning of the arbitrator in her award.

83. Applying the case law that has been set out in paras 46-50 above, this was an irregularity. To cite the words of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*, set out at para 46 above, it was "not right" that the decision should be based on specific matters that RAV had never had the chance to deal with and "nor [was] it right that [RAV] should first learn of adverse points in the decision against [it]." And in the words of Langley J in *Cameroon Airlines v Transnet Ltd* (see para 47 above) it was "fundamentally unfair" to [RAV] that "the Tribunal went its own way to a conclusion which neither [party] had contended for and did so unheralded." RAV was learning for the first time in the decision of the arbitrator about the one third deduction for disaggregation which RAV had not had the opportunity to address. Indeed, as correctly submitted by counsel for RAV, Vernon Flynn QC, the position here is indistinguishable from the finding of a (serious) irregularity by HH Judge Pelling QC in relation to the arbitrators' rejection of a claim for a global award of damages in *The Republic of Kazakhstan v World Wide Minerals Ltd* (see para 48 above).

84. For essentially the same reasons that have been set out above (see paras 69-72) in relation to the paragraphs 5-8 ground, the Board also considers that that irregularity was a serious irregularity because substantial injustice has been established by RAV and indeed was found by Winder J (because he referred to there being a "serious irregularity" which, by definition, requires that the irregularity has caused, or will cause, substantial injustice). It goes without saying and is self-evident that an arbitrary deduction of damages by a third (when it might be a much higher deduction) is seriously prejudicial to RAV. Although it would have been good practice to do so, there was no mandatory requirement for Winder J to set out, expressly and separately, why substantial injustice was here made out.

85. The Board also rejects the majority of the Court of Appeal's reasoning (see para 18 above) that the real complaint of RAV in relation to the one third reduction was that this was an error of law so that the challenge should have been brought by way of appeal under section 91 of the 2009 Act. It is clear to the Board that RAV's complaint was correctly identified as an irregularity.

86. The Board does not, however, accept RAV's submission that the 15% deduction by the arbitrator, because the figures given by Mr Ocasio in his expert evidence were based on his memory and unsupported by any documents, was an irregularity. It should have been obvious to RAV that Mr Ocasio's evidence was problematic and weakened in those respects and it had ample opportunity to address the arbitrator on that matter. In that sense, the issue was "in play" and "in the arena". The arbitrator cannot be faulted on procedural grounds for making an impressionistic deduction of 15% and, in essence, any complaint here is that she made an error of law in taking that percentage figure rather than another percentage figure. In contrast to the one third deduction, the deduction of 15% falls on the side of the line epitomised by decisions such as those in *Weldon Plant Ltd v Commission for the New Towns* and *Reliance Industries Ltd v Union of India* (see paras 49-50 above). In relation to that 15% deduction, therefore, the Board upholds the reasoning and decision of the majority of the Court of Appeal.

87. For all these reasons, the Board would allow RAV's appeal on the paragraph 10 ground as regards the one third deduction but dismiss its appeal as regards the 15% deduction.

7. Conclusion

88. In conclusion, while it is good practice and should be encouraged, it is not a requirement of section 90 of the 2009 Act that there be a separate and express allegation, consideration and finding of substantial injustice. It is sufficient that, as a matter of substance, substantial injustice be established and found.

89. The Board will accordingly humbly advise Her Majesty that the appeal be allowed and that an order for remittal be made that reflects the terms set out in paragraphs 50(1), 50(2), 51, 52 and 54 of the judgment of Winder J (save for paragraph 50(2)(2) relating to the inaccurate recall of Therapy's expert witness).