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Case Nos: HT-06-389, HT-06-390

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2007

Before :

THE HONOURABLE MR JUSTICE RAMSEY

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Between :

London Underground Limited	**Claimant/ Defendant**
- and -	
Citylink Telecommunications Limited	**Defendant/ Claimant**

- -
- -

Mr. R ter Haar QC, and Ms R Vella (instructed by **Lovells**) for the **Claimant**
Mr D Streatfeild-James QC, and Mr P Fraser (instructed by **Herbert Smith**) for the **Defendant**

Hearing dates: March 27, 28, & 29 2007

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Judgment

The Honourable Mr Justice Ramsey:

Introduction

1. These proceedings concern arbitration claims under sections 68 and 69 of the Arbitration Act 1996 arising from an arbitration award in relation to the Connect Project.

2. The Connect Project is a Private Finance Initiative project which, over a period of some 20 years, involves the replacement of the entire communication systems throughout London's underground rail network together with the continued operation of that new system. It is one of the most complex renewal projects ever undertaken on the London Underground network.

3. The project is intended to deliver a fully integrated communications system across the Underground network to provide radio communications between trains and control rooms and to provide, via hand portable units, radio communications for staff and emergency services across the Underground network and also telephone communications between various LUL assets.

4. The main parties involved in the Connect Project are Citylink Telecommunications Limited ("CTL") and London Underground Limited ("LUL"). CTL is a consortium with as its members Fluor Global Services, Thales Telecommunications Services Limited ("Thales"), Motorola Limited ("Motorola"), HSBC Investments and Hyder Investments Limited. LUL is ultimately owned by Transport for London ("TfL") which is a corporate body established under the Greater London Authority Act 1999.

5. To implement the Connect Project, LUL and CTL entered into a Contract ("the Connect Contract") made under Deed on 19 November 1999.

6. In the period up to 31 October 2001 there had been substantial claims for delay to the project which were settled by an Interim Claim Resolution ("ICR"). Further disputes arose between CTL and LUL as to extensions of time and financial compensation in relation to the period from 31 October 2001 to 31 December 2003 ("the Claim Period").

7. Those further disputes were dealt with under the multi-tier dispute resolution process in Schedule 28 of the Connect Contract, which provides, first, for a reference to the Contract Manager then, secondly, for an Adjudication and then finally an Arbitration.

8. These proceedings concern the Arbitration of those further disputes relating to the Claim Period. The Arbitrator made an award dated 1 December 2006, referred to as the Delay and Disruption Arbitration: Second Interim Award ("the Award"). In the Award the Arbitrator held, in particular, that CTL was entitled to an interim extension of time of 48 weeks under Clause 31.7 of the Connect Contract to reflect LUL's breach of the Corporate Power Obligation in respect of Edgware Road which he found caused 48 weeks of delay to the commissioning of the Corporate Line.

9. In these proceedings both CTL and LUL make arbitration claims arising out of the Award.

The Connect Project

10. The New System which is being designed, installed and operated under the Connect Contract consists of two systems: the New Radio System and the New Transmission System. The New Radio System comprises the Radio Network operated in conjunction with the Voice and Data Network. The New Transmission System comprises the Voice and Data Network and the Video Network.

11. A new cable network is common to the systems. This network is run along the track sections and through designated stations, depots and offices. It includes a fibre optic cable, a series of copper cables and a "Leaky Feeder" cable. The communications equipment is housed in Communication Equipment Rooms ("CERs") and Communication Equipment Cabinets ("CECs"). At the centre of the New System is a series of 11 core CERs connected by fibre optic transmission cable which forms the "Corporate Line".

12. The work of designing, constructing, installing, implementing and testing the New System, referred to as the "EPC work", was sub-contracted by CTL to Fluor Limited who, in turn, sub-contracted the work for the New Radio System to Motorola and for the New Transmission System to Thales.

13. Before the construction and installation of the EPC work could be performed, it was necessary for certain building and preparatory work to be carried out, particularly in relation to the CERs. That building and preparatory work was referred to as "Enabling

Works" or "EBW". Under the Connect Contract, EBW was the responsibility of LUL. Until early 2001 LUL used the Infracos (companies to whom it had transferred the Underground infrastructure and who now provide infrastructure services to LUL) to undertake the design and construction of the EBW. Subsequently, LUL used CTL to undertake this work under a variation to the Connect Contract, VN105.

14. The main ground for CTL's claims in the Arbitration was delay by LUL in carrying out the LUL Obligations under the Connect Contract, particularly related to EBW.

The Arbitration Claims

15. In this case there are applications by both parties under section 68 of the Arbitration Act 1996 and also an application for leave to appeal by CTL under section 69 of the Act. CTL's Application raises a number grounds under section 69 and also under section 68. LUL raises one ground under section 68.

16. In those circumstances, the parties were asked to make submissions as to the procedure to be adopted. The parties agreed that it would be sensible for the application for leave to appeal to be considered at the conclusion of the hearing of the section 68 applications of both parties. This course generally followed the procedure adopted by Colman J in Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd [2002] 2 Lloyd's Rep 681 where he said at 682:

> "*The logical approach to multiple applications of this kind is almost invariably to determine the application to set aside or remit for serious irregularity first and to consider the question of permission to appeal once it has been decided whether the award can stand. Although applications for leave to appeal under s. 69 are normally on paper without an oral hearing, the course adopted in the present case of hearing oral argument on the application for leave at the same hearing as for the S. 68 application is a sensible and more cost efficient approach, particularly having regard to the fact that the underlying facts and legal submissions relevant to both applications are so closely related.*"

17. As a result three days were set aside for hearing the applications and at the conclusion I gave a ruling refusing CTL's application for leave to appeal under section 69 of the Act. I reserved my reasons to this judgment.

18. In dealing with the hearing in this way and because of the overlap between CTL's grounds under sections 68 and 69 of the Act it has been particularly necessary to keep the two distinct processes of judicial analysis separate, as emphasised by Colman J in Alphapoint Shipping Ltd v Rotem Amfert Neper Ltd [2004] EWHC 2232 (Comm).

19. I now turn to consider the general principles for the determination of the applications under section 68 and under section 69 of the Act and also the particular matters that have been raised on the present applications.

Challenge on the Ground of Serious Irregularity under section 68

20. Under section 68 of the Act, a party may challenge an award on the grounds of serious irregularity, as that term is defined in sections 68(2)(a) to (i), which has caused or will cause substantial injustice to that party.

21. There are therefore two questions which have to be addressed in this case: was there an "irregularity" and is there or will there be "substantial injustice"?

22. As Lord Steyn pointed out in Lesotho Highlands v. Impregilo SpA [2005] 3 WLR 129, at paragraphs 28 and 29, the requirement of "serious irregularity" imposes a high threshold and it must be established that the irregularity caused or would cause substantial injustice to the applicant. He said that these requirements were "*designed to eliminate technical and unmeritorious challenges*". The irregularity must fall within the closed list of categories in section 68(2) and nowhere in that subsection is there any hint that a failure by the tribunal to arrive at the "correct" decision is a ground for a challenge under section 68.

23. LUL's application is based on the ground that there has been a failure under section 68(2)(a) to comply with section 33 of the Act, or under section 68(2)(c) on the ground that there has been a failure to conduct the proceedings in accordance with the agreed procedure.

24. Although CTL's grounds do not refer to the precise subsections, it is apparent that the application is also made under sections 68(2)(a) and/or (c) on the basis that CTL states that "*the Arbitrator reached a number of highly significant conclusions of fact and law in respect of matters not pleaded, not the subject of evidence and/or not raised or dealt with in the submissions to him*". In addition, part of the application is, it seems, brought under section 68(2)(d) on the basis that "*the Arbitrator did not deal with a significant issue raised before him.*"

25. I shall now consider the requirements for each of the grounds under sections 68(2)(a), (c) and (d).

Section 68(2)(a)

26. This ground relates to a failure to comply with section 33 of the Act which provides that:

> "*The tribunal shall -*
> *act fairly and impartially as between the parties, giving each a reasonable opportunity of putting his own case and dealing with that of his opponent, and 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.*"

27. In Interbulk Ltd v. Aiden Shipping Co Ltd [1984] 2 Lloyd's Rep 66 the Court of Appeal considered a case under the Arbitration Act 1979 in which the issue was whether a particular port was a safe port, it being alleged that there was a breach of the relevant warranty in a charter. The arbitrators held that the port was not safe but did so on the basis that there was insufficient space for turning the vessel at the entrance to the dock. In giving judgment, Goff LJ reviewed the pleadings, submissions and evidence at the hearing. He concluded at 74:

> *"Looking at the whole picture, I am satisfied that the issue of insufficient width of the turning area at the entrance to the dock never became an issue in the arbitration. It was unpleaded. It was never argued. Not only was it not supported by any evidence but it was expressly negatived by the two experts called by the owners, Captain Churchill and Captain Knott, and it was never put to the charterers' expert, Captain Warwick."*

28. He then summarised the position as follows:

> *"We are concerned with a case where the arbitrators appear mistakenly to have thought that the issue of the width of the turning place was one which*

had been raised before them and upon which they were entitled to decide the case, without drawing the point to the attention of the charterers."

29. He referred to two passages from previous decisions of the Court of Appeal:

(1) First, in Societe Franco-Tunisienne D'Armement-Tunis v. Government of Ceylon [1959] 1 W.L.R. 787, where Morris LJ said at 799-801:

> *"It seems to me that the point that occurred to the umpire was a point that would bring about a dramatic development of the case, and I am satisfied that the import of it was not communicated to Mr. Ellis in such a way as enabled him to deal with it. I have no doubt that something was said; but it was essential, in view of the way in which the case had been presented and the way in which it had proceeded for very nearly two years, that if some entirely new point, not taken by the charterers, and running quite counter to their willingness to pay a sum, was being taken, it should be made quite clear."*
> *and:*
> *"In my judgment, the umpire could not have made clear that he was proposing not to accept the starting time which both parties had accepted. Whether he was right in law is not for me to say in these proceedings. But the owners, in my judgment, ought to have had a real opportunity of dealing with the new point, and of putting forward reasons for submitting that it was wrong."*

(2) Secondly, in Fox v. Wellfair Ltd [1981] 2 Lloyd's Rep. 514, a case where an expert arbitrator took advantage of his own special knowledge without putting that knowledge to a party and so giving the party an opportunity of dealing with it Dunn LJ said at 529

> *"If the expert arbitrator, as he may be entitled to do, forms a view of the facts different from that given in the evidence which might produce a contrary result to that which emerges from the evidence, then he should bring that view to the attention of the parties. This is especially so where there is only one party and the arbitrator is in effect putting the alternative case for the party not present at the arbitration.*
>
> *Similarly if an arbitrator as a result of a view of the premises reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, then before incorporating that conclusion in his award he should bring it to the attention of the parties so that they may have an opportunity of dealing with it."*

and at 531:

> *". . . his views should have been clearly put to them. In failing to take that course, in my view the arbitrator was guilty of technical or legal misconduct in failing to observe the principles of natural justice."*

30. Goff LJ then said this at 75*: "In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. In my judgment, the arbitrators in the present case*

failed to give that opportunity to the charterers in respect of an issue not raised in the arbitration…."

31. Ackner LJ added this at 76: **"***If an arbitrator considers that the parties or their experts have missed the real point - a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced Counsel and solicitors - then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it."*

32. In Pacol Ltd v. Joint Stock Co Rossakhar [2000] 1 Lloyd's Rep 109, a decision under the 1996 Act, Colman J applied Interbulk and cited the following passages from textbooks:

(1) From Russell on Arbitration (21st Edition) at paragraphs 5-060 and 5-061 which stated:

"*The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal are minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point.*"

(2) From Mustill & Boyd on Commercial Arbitration (2nd Edition) at p.312 was cited in the following terms:

"*If the arbitrator decides the case on a point he has invented for himself, he creates surprise and deprives the parties of their right to address full arguments on the case which they have to answer.*"

33. In Pacol, the arbitrators re-opened the question of liability when the only remaining matter was quantum. Colman J held that there had been a serious irregularity. He said at 115 after analysing, in particular, questions put to the parties by the arbitrators that:

"In those circumstances, what has happened in this case is that an award has been made on a basis which the claimants never had a reasonable opportunity of making the subject of their submissions or the subject of evidence."

34. In Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd [2002] 2 Lloyd's Rep 681 Colman J said at 686 to 687:

"*In the present case the charterers rely on s. 68(2)(a) - failure by the tribunal to comply with s. 33 of the Act. In substance, their complaint is that the arbitrators made findings of fact of which they did not forewarn the parties and for which there was no evidential basis. They thereby unfairly deprived the charterers of the opportunity of addressing them on those matters and therefore failed to provide a fair means for the resolution of the matters in dispute.*

The arbitrators' duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there

had been no reasonable opportunity to address them during the hearings: see Interbulk Ltd. v. Aiden Shipping Co. Ltd. (The Vimeira), [1984] 2 Lloyds Rep. 66, per Lord Justice Robert Goff at pp. 74 to 75 and, in relation to s. 33 of the 1996 Act, Russell on Arbitration 21st ed., pars. 5-060 to 061 approved in Pacol v Rossakhar, [2000] 1 Lloyd's Rep. 109 at p. 114.

It has to be emphasized, however, that the duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings of fact. Thus, whereas it may normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration. Particularly where there are complex factual issues it may often be impossible to anticipate by the end of the hearing exactly what inferences of fact should be drawn from the findings of primary fact which have been in issue. In such a case the tribunal does not have to refer back its evidential analysis for further submissions. A typical situation is where arbitrators arrive at a conclusion on an issue of expert evidence which differs to some extent from that put forward by either opposing expert. In many cases, such as this, the arbitrators have been appointed because of their professional legal, commercial or technical experience and the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasized that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties."

35. In Checkpoint Ltd v. Strathclyde Pension Fund [2003] EWCA Civ 84, a case which concerned the question of whether the arbitrator's use of personal knowledge in a rent review arbitration constituted a procedural irregularity, Ward LJ said at paragraphs 28 and 31 in respect of the test to be applied:

"*28. The easy answer is when a right-minded observer would conclude that the information ought to be disclosed to the affected parties in order to give them the opportunity to assess it, comment upon it and if appropriate call further evidence to deal with it. Yet that is an answer which does not give much practical guidance. That it is not very helpful is perhaps unsurprising. As Lord Mustill observed in R. v Secretary of State for the Home Department Ex p. Doody [1994] 1 A.C. 531, 560, what fairness requires in any particular case is "essentially an intuitive judgment".*

31. The best I can do to provide an acceptable test is to reformulate the question in this way: is the information upon which the arbitrator has relied information of the kind and within the range of knowledge one would reasonably expect the arbitrator to have acquired if, as required by the terms of this lease, he is experienced in the letting and/or valuation of property which is of a similar nature to the premises, is situate in the same region as the premises and used for purposes similar to those authorised under the lease."

36. Some assistance can be gained from the decision of Fisher J in the New Zealand High Court in Methanex Motunui v. Spellman [2004] 1 NZLR 95 where he said at paragraph 161:

> "*To summarise, the scope of notice and response rights at common law can be stated in broad terms only, because each case must be tailored to the circumstances of the particular case. The overriding objective is to avoid surprise, and therefore lack of opportunity to respond in the way that the parties had envisaged when setting up the arbitration. The following are illustrations of that principle…: …*
>
> > *(b)In the absence of agreement to the contrary, non-expert arbitrators must confine themselves to the evidence provided by the parties unless judicial notice would have been possible in conventional courts. The same applies to the observations and knowledge of expert arbitrators concerning facts specific to the particular dispute, any general matters that fall outside their area of expertise, and any reports or opinions obtained from others.*
> >
> > *(c)An expert arbitrator is entitled to draw on his or her knowledge and experience to supplement the facts drawn from party-sourced evidence, and without prior notice to the parties, provided that the additional facts are ones of general application as distinct from those specific to the particular dispute.*
> >
> > *(d)In general an arbitrator must provide notice of, and an opportunity to respond to, issues ideas, methods, research, investigations and/or studies of the arbitrator that were not reasonably foreseeable in the light of the arguments traversed before the arbitrator.*"

37. From these decisions I derive the following propositions relevant to grounds under section 68(2)(a) :

(1) The underlying principle is that of fairness or, as it is sometimes described, natural justice.

(2) There must be a sensible balance between the finality of an award and the residual power of a court to protect parties against the unfair conduct of an arbitration.

(3) It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity.

(4) In relation to findings of fact:

(a) A tribunal should usually give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings.

(b) A tribunal has an autonomous power to make findings of fact which may differ from the facts which either party contended for. This will

often be related to inferences of fact which are to be drawn from the primary facts which are in issue. Such findings of fact will particularly occur where there are complex factual or expert issues where it may be impossible to anticipate what inferences of fact might be drawn. In such a case the tribunal does not have to give the parties an opportunity to address those findings of fact.

(c) Where a tribunal has been appointed because of its professional legal, commercial or technical experience, the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning.

(5) In each case whether there is a procedural irregularity and whether it is serious is a matter of fact and degree which requires a judgment to be made taking into account all the relevant circumstances of the arbitration including an analysis of the substance of the arbitration and its conduct viewed as a whole.

Section 68(2)(c)

38. Section 68(2)(c) relates to applications where there has been a "failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties".

39. In this case the Arbitration was conducted by reference to a procedure directed by the Arbitrator. That included the familiar procedure of pleadings, submissions and evidence. In my judgment, the requirement of s. 68(2)(c), in the context of this arbitration, requires the Arbitrator to conduct the proceedings fairly by reference to the pleadings, submissions and evidence. I do not consider that there is anything in that procedure which requires separate consideration under this subsection, other than the matters which arise under section 68(2)(a). Indeed neither party contended that any separate consideration was necessary.

Section 68(2)(d)

40. Section 68(2)(d) provides for situations where there has been a "failure by the tribunal to deal with all the issues that were put to it."

41. This ground was considered by Morison J in Fidelity Management SA v. Myriad International Holdings BV [2005] EWHC 1193 (Comm) at paragraph 9 where he summarised the following propositions which were extracted from the decision of Colman J in World Trade Corp v. Czarnikow Sugar [2005] 1 Lloyd's Rep 422:

"*1. Section 68(2)(d) is "designed to cover those issues the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference".*
2. HH Judge Humphrey Lloyd was correct in Weldon Plant Ltd v The Commission for New Towns [2001] 1 All ER (Comm) 264 to state that Section 68(2)(d) is not to be used as a means of launching a detailed enquiry into the manner in which the tribunal considered the various issues. It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case of a party so that substantial injustice has resulted, eg where a claim has been overlooked or where the decision cannot be justified as a particular key issue has not been decided that is crucial to the result. It is not concerned with a failure to arrive at the right answer to an issue.
3. Arbitrators do not have to deal with every argument on every point raised; they should deal with essential issues.

4. "Deficiency of reasoning in an award is. . .the subject of a specific remedy under the 1996 Act [section 70(4) of the Act]. It is accordingly self-evident that:
(1) failure to deal with an "issue" under section 68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it;
(2) Parliament cannot have intended to create co-extensive remedies for deficiencies of reasons one of which (section 68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (section 70(4)) was designed to provide a specific remedy for a specific problem;
(3) the court's powers under section 68(2) being engaged only in a case where the serious irregularity has caused substantial injustice, the availability of the facility to apply for reasons or further reasons under section 70(4) would make it impossible to contend that any "substantial injustice" has been caused by deficiency of reasons."
5. Accordingly, section 68(2)(d) is confined in its application to essential issues, as distinct from the reasons for determining them.
6. "If one simply approaches that provision by asking whether that which has not been dealt with is capable of being formulated as an essential issue of the nature of what would be included in an agreed list of issues prepared for the purpose of a case management conference if instead of an arbitration the matters were to be determined in court, the answer should normally be obvious."

42. I respectfully accept that summary as setting out the relevant considerations. In the context of this case, section 68(2)(d) is not to be used as a means of launching a detailed inquiry into the manner in which various issues were determined. Neither is it concerned with a failure to deal with every argument on every point, or with deficiency of reasoning. It is concerned with essential issues in the case, and not the reasons for their determination.

Substantial Injustice

43. Paragraph 280 of the DAC Report, the last sentence of which was quoted with approval by Lord Steyn in paragraph 27 in Lesotho, states that:

> "*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 longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.*"

44. In this case, one of the main grounds is the failure of the Arbitrator to comply with the requirements of section 33 of the Act. In that context the question arises whether a failure to adhere to those requirements of fairness is, in itself sufficiently serious or whether it has to be shown that the award would have been different if those requirements had been complied with.

45. In Cameroon Airlines v. Transnet Limited [2004] EWHC 1829 (Comm) Langley J stated at paragraph 102:

> "*I do not think that it needs to be shown that the outcome of a remission will necessarily or even probably be different but it does need to be established that the applicant has been unfairly deprived of an opportunity to present its case or make a case which had that not occurred might realistically have led to a significantly different outcome.*"

46. In Vee Networks Ltd v. Econet Wireless International Ltd [2005] 1 Lloyd's Rep 192 at paragraph 90, Colman J said this about substantial injustice in a case where he held that the arbitrator was in breach of section 33:

> "*It is unnecessary and in the circumstances undesirable for me to express a view as to whether the arbitrator came to the right conclusion, even if by the wrong route, or whether, had he ignored the 2003 amendments, he should have reached the same or a different conclusion. The element of serious injustice in the context of s.68 does not in such a case depend on the arbitrator having come to the wrong conclusion as a matter of law or fact but whether he was caused by adopting inappropriate means to reach one conclusion whereas had he adopted appropriate means he might well have reached another conclusion favourable to the applicant. Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.*"

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

48. Further, as Colman J said in Bulfracht at 690:

> "*I further reject the submission that, even if none of these matters represented a serious irregularity, when taken in isolation, they do in aggregate amount to a serious irregularity. This argument is misconceived. Once it is concluded that none of the matters alone amount to an irregularity, it is logically untenable to derive an irregularity from those same matters in aggregate. Had I concluded that all of these matters taken separately represented an irregularity, albeit not a serious one, it is improbable that I should have concluded that there was an overall serious irregularity. However, it is not necessary to express a concluded view on this hypothesis.*"

49. I respectfully adopt that analysis. If a particular procedural irregularity is not serious, it is difficult to see why a second procedural irregularity would make the first one more serious. Equally, if a procedural irregularity does not lead to substantial injustice, it is difficult to see why a second irregularity would cause more substantial injustice. Of course, there may be facts which show that the irregularities combine to become serious or contribute to cause a substantial injustice but absent such facts, I do not consider that a party can use multiple non-serious irregularities or multiple irregularities which do not cause serious injustice to arrive at a serious irregularity or

substantial injustice by aggregation. Indeed, otherwise it would encourage multiple grounds which would not themselves succeed but which would be put forward to see whether they were sufficient because of their number. I do not consider that this reflects the purpose or the approach of s. 68 of the 1996 Act.

Challenge by Way of Appeal on Point of Law under section 69

50. For a party to pursue an appeal under section 69, they require leave to appeal under section 69(2)(b). That leave will only be granted where the court is satisfied that the requirements in s69(3) have been met and, in particular:
    (1) The determination of the question of law must substantially affect the rights of one of the parties (s69(3)(a)).
    (2) The question of law must be one which the tribunal was asked to determine (s69(3)(b)).
    (3) On the basis of the findings of fact in the award, the decision of the tribunal on the question of law is "obviously wrong" (s69(3)(c)(i)). It is common ground in this case that there is no issue of public importance under s.69(3)(c)(ii).
    (4) Despite the agreement of the parties to resolve their disputes in arbitration, it must be "just and proper in all the circumstances" for the Court to determine the question of law (s69(3)(d)).

51. In exercising the discretion, the following principles must be borne in mind:

    (1) As a matter of general principle, the courts strive to uphold arbitral awards: they should be read in a reasonable and commercial way expecting that there will be no substantial fault to be found with them: see per Bingham J in Zermalt Holdings SA v. Nu-Life [1985] 2 EGLR 14*: "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye, endeavouring to pick holes, inconsistencies and faults in awards, and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."*

    (2) In Fidelity Management Morison J, albeit in the context of a section 68 application, referred to dicta of Lord Hoffmann in Piglowska v Piglowska [1999] 1 WLR 1360 at 1372 concerning the care with which an appellate court must approach a first instance judgment, and continued:

> "*The need for caution when a commercial court judge is dealing with an arbitral award is that much greater, because the parties have chosen an autonomous process under which they agree to be bound by the facts as found by the arbitrators and from whose findings there is no appeal. I approach the Award on the basis of an assumption that the arbitrators understood their function and knew how to perform it.*"

52. The test to be applied in this case under section 69(3)(c)(i) is whether "*on the basis of the findings of fact in the award…the decision of the tribunal on the question [of law] is obviously wrong*". In the DAC Report at paragraph 286, it was stated that the right of appeal is limited in several ways:

> " *i The point of law must substantially affect the rights of one or more of the parties. This limitation exists, of course, in our present law.*

ii *The point of law must be one that was raised before the tribunal. The responses showed that in some cases applications for leave to appeal have been made and granted on the basis that an examination of the reasons for the award shows an error on a point of law that was not raised or debated in the arbitration. This method of proceeding has echoes of the old and long discredited common law rules relating to error of law on the face of the award, and is in our view a retrograde step. In our view the right to appeal should be limited as we suggest.*

iii *There have been attempts, both before and after the enactment of the Arbitration Act 1979, to dress up questions of fact as questions of law and by that means to seek an appeal on the tribunal's decision on the facts. Generally these attempts have been resisted by the Courts, but to make the position clear, we propose to state expressly that consideration by the Court of the suggested question of law is made on the basis of finding of fact in the award.*

Iv *We have attempted to express in this Clause the limits put to the right to appeal by the House of Lords in Pioneer Shipping Ltd v. BTP Tioxide Ltd (The Nema) [1982] AC 724.*"

53. In The Nema Lord Diplock referred to what Lord Denning MR had said in the Court of Appeal in that case and stated at 738H: "*What he said on the issue of frustration was that the judge should have accepted the decision of the arbitrator as final unless it was shown "either (i) that the arbitrator misdirected himself in point of law or (ii) that the decision was such that no reasonable arbitrator could reach." With this I entirely agree and shall explain briefly my reasons for doing so later.*"

54. He then said at 742:

> "*The right of appeal to the High Court, on the other hand, under the substituted procedure for challenging an arbitrator's award which is provided by section 1 (2), viz. "an appeal ... to the High Court on any question of law arising out of" an award, is given in terms which expressly confine the appeal to questions of law; and, ever since the decision of this House 25 years ago in Edwards v. Bairstow [1956] A.C. 14, have been understood (at least where the tribunal from which such appeal lies is not itself a court of law) as bearing the precise meaning as to the function of the court to which an appeal on a question of law is brought that is stated in the classic passage to be found in the speech of Lord Radcliffe, at p. 36:*
>
> > *"If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law."*"

55. Later on, Lord Diplock expressed the test in this way at 742 to 743:

> "*Where, as in the instant case, a question of law involved is the construction of a "on-off" clause the application of which to the particular facts of the case is*

an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance."

56. As pointed out in the DAC Report, given the wording of section 69(3)(c)(i), the test must be applied on the basis of the findings of fact in the award. It is on that basis that the court must assess whether the decision of the tribunal on the question of law was one which was obviously wrong because the tribunal misdirected itself in law or reached a decision on the question of law which no reasonable arbitrator could have reached.

57. The analysis of Mustill J in Vinava Shipping Co Ltd v. Finelvet AG (The "Chrysalis") [1983] 1 QB 503 is, I consider, of relevance. Like The Nema this was a case where the provisions of the 1979 Act applied. That Act, like the 1996 Act, referred to an appeal "*on any question of law arising out of an award*". In a passage dealing with the hearing of the appeal, rather than the question of leave, Mustill J at 507 divided the process of the arbitrator's reasoning into three stages. I consider that this analysis is also relevant on the application for leave:

"*(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.*
(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.
(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision."

58. Mustill J then added:

"*In some cases, the third stage will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, the third stage involves an element of judgment on the part of the arbitrator. There is no uniquely "right " answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.*

The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another: and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct -- for the Court is then driven to assume that he did not properly understand the principles which he had stated.

Whether the third stage can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case. The Nema and The Evia show that where the issue is one of commercial frustration, the Court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. But once the Court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award."

59. This makes it clear that the fact finding stage and the stage of the applying the law to the facts are separate from the stage of ascertaining the law. It is only the stage where the arbitrator ascertains the law and, by inference from the application of the law, properly understands the law that may be the proper subject of a question of law under section 69.

60. The grounds put forward in these proceedings also raise a question of the extent to which a question of law might be raised so as to impeach a finding of fact. In particular, CTL puts forward grounds under section 69 on the basis that "there was no evidence to support" a particular conclusion or contends that a finding was reached which "was contrary to the evidence" or submits that on the basis of certain findings of fact the arbitrator failed to reach certain other factual conclusions.

61. In this context paragraph 286(iii) of the DAC Report refers to the position under the 1979 Act. I consider that the judgment of Steyn LJ in Geogas SA v. Trammo Gas Ltd (The Baleares) [1993] 1 Lloyd's Rep 215 is of relevance, although based on the 1979 Act. At 228 he said:

"*The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the Courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact.*

From time to time attempts are made to circumvent the rule that the arbitrators' findings of fact are conclusive. Such attempts did not cease with the enactment of the Arbitration Act 1979. Subsequently, attempts were made to argue that an obvious mistake of fact by arbitrators may constitute misconduct. It is clear that such a challenge is misconceived. See Moran v. Lloyd's [1983] 1 Lloyd's Rep. 472; K/S A/S Bill Biakh v. Hyundai Corporation [1988] 1 Lloyd's Rep. 187. Then an attempt was made to argue that an

obvious mistake of fact may amount to an excess of jurisdiction which would enable the Court to intervene. Again, the manoeuvre to outflank the cardinal rule that the arbitrators are the masters of the fact failed. See Bank Mellat v. GAA Development and Construction Co., [1988] 2 Lloyd's Rep. 44, at p. 52; Mustill and Boyd, Commercial Arbitration, 2nd ed., 558. Since 1979 a number of unsuccessful attempts have been made to invoke the rule that the question whether there is evidence to support the arbitrators' findings of fact is itself a question of law. The historical origin of the rule was the need to control the decisions of illiterate juries in the 19th century. It never made great sense in the field of consensual arbitration. It is now a redundant piece of baggage from an era when the statutory regime governing arbitration, and the judicial philosophy towards arbitration, was far more interventionist than it is today. Another transparent tactic is a submission that there is an inconsistency in the arbitrators' findings of fact. That is not a valid ground for an attack on an award. See Moran v. Lloyd's, sup., at p. 475. Parties sometimes resort to a more oblique way of challenging arbitrators' findings of fact: the Court is asked to draw reasonable inferences from the arbitrators' findings of fact. The purpose is often to put forward a new legal argument which was never advanced before the arbitrators. But it is contrary to well established principle for the Court to draw inferences from findings of fact in an award on the basis that it would be reasonable to do so. The only inferences which a Court might arguably be able to draw from arbitrators' findings of fact are those which are truly beyond rational argument. It is, however, by no means clear that it is permissible even in such a seemingly clear case for a Court to draw inferences of fact from the facts set out in the award. See Mustill and Boyd, op. cit. 600. This catalogue of challenges to arbitrators' findings of fact points to the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged."

62. There have been some decisions which have indicated that a limited exception may apply where the arbitrator has made a finding of fact on the basis of no evidence. In Demco v. SE Banken Forsakring [2005] 2 Lloyd's Rep. 650 Cooke J considered a submission that a question of whether the tribunal was right to find a fact on the basis of the evidential material before it, was a question of law. He relied on the judgment of Steyn LJ in the Baleares. He referred to paragraph 286(iii) of the DAC Report and to Mustill & Boyd on Commercial Arbitration (2nd edn) 2001 Companion at page 357, to Russell on Arbitration (22nd edn) at pages 394 to 395 and to Merkin on Arbitration Law. He also referred to section 34(2)(f) of the 1996 Act which leaves to the tribunal the decision of "*whether to apply the strict rules of evidence as to the admissibility, relevance or weight of any material (oral, written or other)…*". He concluded that the challenge to findings of fact on the basis of a question of law was not available under the 1996 Act, particularly given the opening words of section 69(3)(c) that the decision on the question of law had to be viewed "*on the basis of the findings of fact in the award.*"

63. CTL relied on the decision of Jackson J. in *Surefire Systems Ltd v Guardian ECL Ltd* [2005] I Lloyd's Rep. 534 at page 539 as supporting a submission that a question of law arises where there was no satisfactory evidence. The relevant passage was:

> "*33. I turn now to the second ground of appeal set out in the claim form. As formulated, this ground is hopeless. It does not satisfy any of the requirements set out in section 69 of the Arbitration Act 1996. This ground of appeal has, however, been reformulated and burnished by Mr Brown in his oral submissions, as*

summarised in part 3 above. That is the formulation upon which I must focus. In relation to this ground, it should be noted that the arbitrator directed himself correctly concerning the burden of proof. In para 15(1) of his award, the arbitrator said this:

> *I accept that Guardian bears the burden of proof in establishing first, that a variation under the contract has occurred and second, what is its entitlement to extra payment.*

34. Nevertheless, Mr Brown argues, the arbitrator did not proceed thereafter in accordance with his own correct direction of law. Mr Brown relies upon the decision of the House of Lords in Rhesa Shipping Co SA v. Edmunds [1985] 1 WLR 948. In that case the House of Lords held that where there was no satisfactory evidence on a particular point, the party bearing the burden of proof should fail in respect of that point. See the speech of Lord Brandon at pages 955 to 956. It should be noted that Lord Fraser, Lord Diplock, Lord Roskill and Lord Templeman all expressed agreement with Lord Brandon's speech.

35. I accept, of course, the propositions of law established in Rhesa Shipping.."

64. In Rhesa Shipping Lord Brandon was, however, dealing with a case where the judge at first instance had concluded that a shipping casualty had occurred by a cause which he had held to be improbable but did so on the basis that he had ruled out the alternative cause. Lord Brandon said at 955H:

> "*…the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.*"

65. Neither that passage nor the passage in Surefire supports the proposition that the Court can interfere with the finding of fact made by an arbitrator on an appeal under the limited grounds provided for in section 69 of the Act. I respectfully adopt the reasoning in Demco, in particular because the findings of fact made by the arbitrator are taken as being the accepted basis for the appeal under section 69(2)(c) and because the admissibility, relevance or weight of any material (oral, written or other) is a matter wholly for the arbitrator under section 34(2)(f). The ground of challenge against a finding of fact of the first instance judge in Rhesa Shipping is therefore simply not available in relation to an award in an arbitration under s. 69 of the Act. There is, of course, no ground based on a mis-application of the burden of proof in this case.

66. I now turn to consider the applications: LUL's application under section 68; CTL's application based on a number of grounds under section 68 and finally CTL's application for leave to appeal under section 69, again based on several grounds.

LUL's Application under Section 68

67. LUL's application under section 68 is, as set out above, made under section 68(2)(a) on the basis that there has been a failure of the tribunal to comply with section 33 of the Act; alternatively under section 68(2)(c) on the basis that there has been a failure to conduct the proceedings in accordance with the procedure agreed by the parties.

68. LUL challenges the Arbitrator's findings on CTL's extension of time claim. In summary, CTL's claim for an extension of time was a claim where the overall extension of time was based on a large number of alleged breaches of contract by LUL which were said to have caused delay. It was to that extent what is commonly described as a "global claim" in the terminology of construction claims. LUL submits that the Arbitrator correctly dealt with the global claim by rejecting CTL's evidence on causation of delay. However, LUL challenges the award which the Arbitrator then made by which he granted CTL an extension of time of 48 weeks. In making that award the Arbitrator indicated that he was following a process in relation to global claims which was contemplated by the decision of the Inner House of the Court of Session in Laing Management (Scotland) v. John Doyle Construction Ltd [2004] BLR 295.

69. LUL does not contend that what the Arbitrator did gave rise to any ground for an appeal under section 69. Rather, LUL submits that the Arbitrator proceeded to determine a claim based on a case which was not pleaded nor addressed in evidence nor argued by the parties and that common fairness required that LUL should be given notice of the case and an opportunity to deal with it.

70. It is therefore necessary to consider in some detail the course taken by the arbitrator and the way in which the arbitration proceedings developed, as well as reviewing the underlying decision in Laing v. Doyle.

The progress of CTL's Claim

71. Under the dispute resolution process in the Connect Contract, there was first a reference to the Contract Manager who, on 11 November 2004, gave a decision adverse to CTL.

72. CTL then pursued Adjudication. In a decision published on 10 January 2005 the Adjudicator said that he considered CTL's Claim to be a global claim and rejected it because he did not consider that CTL had "made good the claim in all but the most trivial respects." He added :

> "*The evidence, generally does establish further breaches of LUL's obligations after 31 October 2001. The evidence also shows that those breaches caused both further delay and disruption… I have a strong suspicion that the more exhaustive process of arbitration may conclude that the extension of time already granted…is not, for Delay Events occurring after 31 October 2003, sufficient.*"

73. CTL next pursued Arbitration. They gave a Notice of Arbitration on 4 February 2005. The Arbitrator gave directions which adopted the familiar procedural steps, including pleadings, disclosure of documents and exchange of witness statements and experts' reports.

74. A hearing then took place from 2 May 2006 to 15 June 2006. CTL served written opening submissions on 25 April 2006 and LUL served its written opening submissions on 27 April 2006. Witnesses of fact and experts were called to give evidence and were cross examined.

75. During the course of the hearing the Arbitrator sought clarification from CTL on a number of aspects of its case, including CTL's allegations of breach and the correct approach to be adopted given the "global" nature of the claim.

76. In relation to breach, on 5 June 2006 the Arbitrator raised at the hearing the need to have a list of the legal categories of claim on which CTL relied for its claims in respect of delays. On 6 June 2006 CTL set out its response which identified CTL's case in respect of alleged breaches of LUL's Obligations.

77. In relation to the global nature of the claim, the Arbitrator sent a fax to the parties on 22 June 2006 in which he raised the question of cause and effect and asked whether paragraphs 14 to 19 of Laing v. Doyle offered any assistance. This was responded to at Appendix T to CTL's written Closing Submissions and by LUL in its Closing Submissions.

78. On 7 July 2006, after the end of the hearing, the parties exchanged written Closing Submissions and a further hearing for oral submissions was held on 13 and 14 July 2006.

79. The Arbitrator made the Award, running to 252 pages, with appendices, on 1 December 2006. Following his award the parties applied under s 57 of the Arbitration Act 1996 for correction of the award. On 25 January 2007 the Arbitrator issued a document "Corrections to the Second Interim Award" and then in a letter dated 31 January 2007 dealt with one further matter related to that document.

80. I now consider the way in which CTL's claim for an extension of time was dealt with in the Arbitration.

The Re-Amended Consolidated Statement of Claim

81. As set out above, disputes arose between CTL and LUL as to further extensions of time and financial compensation as a result of events which occurred in the Claim Period from 31 October 2001 to 31 December 2003. As finally pleaded, CTL's case was set out in the Re-Amended Consolidated Statement of Claim ("the Statement of Claim")

82. In paragraphs 63 to 98 of the Statement of Claim CTL set out its delay claim by which it sought an 81 week extension of time under Clause 31 of the Connect Contract.

83. In establishing the claimed entitlement to an extension of time, CTL relied on a level 3 (P3) programme which was current at the start of the Claim Period on 1 November 2001 and was known as Update No7 ("UD07").

84. CTL referred to Delay Events which formed the grounds for its claim for an extension of time. Delay Events are defined in the Schedule to the Connect Contract and CTL particularly relied on "*(c) a failure by LUL to provide or comply with an LUL Obligation or any negligent act or omission of LUL or any Connected Person (LUL) or any exercise by LUL of any of the LUL Rights*".

85. CTL identified LUL's Obligations and Rights and at paragraph 74 of the Statement of Claim stated: "*In the Claim Period, LUL were repeatedly in breach of the LUL Obligations, and exercised the LUL Rights, as set out below, so that the CTL was prevented or delayed from complying with each of the extended Milestone Dates set out in the ICR, and prevented from achieving the Target Dates in Schedule 6 of the Contract.*"

86. CTL then pleaded at paragraph 75 that, amongst other things:

"*LUL were in breach of the LUL obligations in that they:*

(a) failed to carry out EBW in accordance with the requirements of programme UD7, or within any reasonable time scale.

...

(h) failed to provide power supplies when required."

87. CTL then pleaded that breaches of Obligations and exercises of Rights by LUL entitled CTL to extensions of time as pleaded in paragraphs 82 to 98. In summary, CTL sought an interim extension of time for each of the Milestone Dates contained in the Connect Contract, as set out in Appendix 11A to the Statement of Claim. That appendix set out different extensions of time for the Milestone Dates for the Transmission Network and for the Radio System. For both the Transmission Network and the Radio System, extensions of time were sought in relation to each of the familiar London underground lines (District, Piccadilly, East London, Metropolitan, Hammersmith & City, Waterloo & City, Victoria, Bakerloo, Central, Jubilee and Northern) and also in respect of the Corporate Line.

88. In paragraph 82A of the Statement of Claim CTL referred to Appendix 31 to demonstrate that the overriding cause of the delays was the Enabling Works. CTL also pleaded in paragraph 82B that Appendix 31 showed *"that LUL had failed to provide a supply of electricity to the locations on each line as late as the end of the Claim Period*". Appendix 31 referred under "Power On Date" to "not in Claim period".

89. CTL referred to an analysis in Appendix 9A and 9B as showing that critical delays were caused by breaches of Obligations and exercises of Rights by LUL. Appendix 10 gave a summary of events for each station. In particular, for Edgware Road, it referred to enabling work delays and "further delays in supply of power". It contained a reference to LUL having delayed installation of permanent power but by 18 July 2003 it referred to "power installed". It sought the further extensions of time which were set out in Appendix 11A.

90. In addition to the main basis for CTL's claim, CTL also pleaded at paragraph 95A to 98 of the Statement of Claim further exercises in support of the claim for extension of time. One exercise was based on a claim by Thales, which was attached as Appendices 25 and 25A, and there were further exercises in Appendix 12 and Appendix 13.

The Re-Re-Amended Defence

91. In LUL's Re-Re-Amended Defence ("the Defence"), LUL pleaded that the delay to the completion of the Enabling Works was caused by various matters set out in paragraphs 8.20(i) to (ix) of that pleading, all of which were CTL's responsibility.

92. In paragraph 8.30B of the Defence LUL denied that "*CTL have been caused any critical delay by any non-availability of power*". LUL also responded to the case which had been pleaded by CTL in paragraphs 81 to 98 of the Statement of Claim.

The Re-Amended Reply

93. In CTL's Re-Amended Reply ("the Reply") at paragraph 40B(b) CTL pleaded:

"*(b) A supply of electricity is essential to (inter alia) commissioning of the EPC works. Appendix 31 shows that no power was available by the end of 2003, so that no commissioning could have possibly taken place in the Claim Period, although the Corporate Line should have been commissioned and completed by November 2003*.
(c)…The actual date on which power was supplied is irrelevant since the breach complained of is that power was not made available at all in the Claim Period."

94. At paragraphs 56 and 57 of the Reply, CTL set out the following response to LUL's defence to the delay claim:

> "*In any complex project with thousands of activities and multiple end dates, the assessment of the impact on an end date of any given event or series of events is necessarily a matter of judgment. LUL correctly note in paragraph 8.27 of the Amended Defence that the Amended [Consolidated Statement of Claim] contains four approaches to the assessment. The four approaches are different but all demonstrate the validity of CTL's claim for an extension of time. LUL criticises the methods put forward by CTL for not being scientific but they nowhere say that the methods do not produce a reasonable assessment of the extensions due.*
>
> *Furthermore a principal point relied upon by LUL appears to be that CTL cannot succeed in its claim for extension of time unless it proves the effect of individual delay events on CTL's ability to comply with its obligations, and unless a separate notice has been given in relation to each individual delay event (see paragraph 8.74 of the Amended Defence). If that is LUL's case it is denied. On the true construction of the contract as a matter of law, the Arbitrator is entitled to make an assessment of the composite effect of multiple events, which are the responsibility of LUL, on the ability of CTL to perform its obligations and, further to apportion liability for delay between those events for which LUL is responsible and those for which CTL is responsible*".

CTL's Opening Submissions

95. In his oral opening submissions Mr Timothy Elliott QC, on behalf of CTL, referred to Appendix 31 to the Statement of Claim and said:

> *"This is a simple, but I submit a powerful point. No line could be commissioned unless the Corporate Line had been commissioned. The Corporate Line, and indeed every other line, could not have been commissioned without permanent power being supplied by LUL. That was part of the EBW. No permanent power was supplied during the claim period"*

96. Later, referring to LUL's oral opening submissions, Mr Roger ter Haar QC, on behalf of CTL, also said to the Arbitrator:

> *"It is very important at this stage to be clear about your role and the way in which the evidence should be viewed. Your role, as both parties recognise, at the end of the day, is to decide whether or not on an interim basis it would be*

fair and reasonable to grant an extension of time, and if so, what extension of time.
It is perfectly possible that at the end of the evidence you might say, "I do not much like any of the four ways in which the case is put", to use Mr White's characterisation of it, "but there are elements of truth in each one". It seems to us highly probable that you will say, "I do not accept Ms Ramey's approach because she has made a number of factual errors", but you may say that there are some merits in some parts of what she says.
But you might, for example say "If she understood truly what the obligation was in relation to EBW, she would have come to a different conclusion in this window or that window, and therefore, accepting her methodology, I come to a completely different conclusion from which she urges upon me."
It is also possible that you may, at the end of the hearing, take a broad view as to how the matter should be judged."

and Mr ter Haar added this as to approach of LUL:

"Mr White's approach makes it quite clear that if you do not accept one of the five approaches put forward, then you give no award whatsoever. That is what his list of issues is targeting. In our submission, it is simply a wrong approach."

LUL's Opening Submissions

97. Mr Andrew White QC, on behalf of LUL, responded:

"*...CTL tend to elide two separate questions. The first is whether analysing a pleaded claim for an extension of time, taking into account the evidence that is relied upon to support that, it is open to you to reach any other conclusion than the pleaded period of delay is made out or not.*

The second question, which is having reached the conclusion that each and every pleaded basis of claim, and the facts which are relied upon to support that claim, fail and you are not in a position to award any extension of time on any of those bases, it is open to you to create, by reference to the evidence, some other basis.

In relation to the first and quite distinct proposition, we wholly accept that when you are considering a pleaded claim, the analysis contained in paragraphs 87 to 95 of the amended consolidated statement of claim, when you are working through the critical locations, you may say: this delay was caused by a delay event in the period alleged or a lesser period, and arrive at a conclusion on that basis.

It is equally possible that you may look at Ms. Ramey's analysis and say: well having rejected CTL's analysis, there are some parts of Ms Ramey's analysis that have attraction.

But what you cannot do is embark upon a wholly new separate and different inquiry. The restriction that we seek to impose is a restriction upon the second exercise which I have identified, which is having rejected all and reached the conclusion that none are sustainable, it is open to you to consider the case on some hitherto un- pleaded basis.
It is important to keep those two points quite separate."

98. In summary, CTL was trying to convince the Arbitrator to take a broad view of the evidence and submissions in coming to a conclusion on the appropriate extension of time and LUL was trying to persuade the Arbitrator that he should not do so.

Global Claims and the decision in Laing v. Doyle

99. During the course of the hearing the Arbitrator raised certain questions with the parties. In a fax dated 22 June 2006 he raised a number of points including: "*Cause and Effect: Whether Laing Management (Scotland) Ltd v John Doyle Construction Ltd [2004] BLR 295, paragraphs 14 to 19 offer any assistance.*"

100. That case, familiar to those practising construction law, deals with certain aspects of global claims. In Laing v. Doyle the Scottish Inner House was concerned with an application challenging John Doyle's pleading of its loss and expense claim. John Doyle were works contractors under a management contract.

101. The essential basis of challenge in Laing v. Doyle was that the global claim was based on grounds which included matters which did not give rise to a claim for loss and expense. At first instance, in the Outer House, the Lord Ordinary held that the challenge should not preclude the claim from going to trial.

102. In the Inner House Lord MacLean at paragraph 4 defined a global claim as "*a claim in which the individual causal connections between the events giving rise to the claim and the items of loss making up the claim are not specified but the totality of the loss and expense is said to be a consequence of the totality of the events giving rise to the claim.*"

103. Lord Drummond Young cited paragraphs 36 to 39 of the judgment of the Lord Ordinary where he said:

> "*36. The logic of a global claim demands, however, that all the events which contribute to causing the global loss be events for which the defender is liable. If the causal events include events for which the defender bears no liability, the effect of upholding the global claim is to impose on the defender a liability which, in part, is not legally his. That is unjustified. A global claim, as such, must therefore fail if any material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability ... The point has on occasion been expressed in terms of a requirement that the pursuer should not himself have been responsible for any factor contributing materially to the global loss, but it is in my view clearly more accurate to say that there must be no material causative factor for which the defender is not liable.*
>
> *37. Advancing a claim for loss and expense in global form is therefore a risky enterprise. Failure to prove that a particular event for which the defender was liable played a part in causing the global loss will not have any adverse effect on the claim, provided the remaining events for which the defender was liable are proved to have caused the global loss. On the other hand, proof that an event played a material part in causing the global loss, combined with failure to prove that that event was one for which the defender was responsible, will undermine the logic of the global claim. Moreover, the defender may set out to prove that, in addition to the factors for which he is liable founded on by the pursuer, a material contribution to the causation of the global loss has been made by another factor or other factors for which he has no liability. If he succeeds in proving that, again the global claim will be undermined.*

38. The rigour of that analysis is in my view mitigated by two considerations. The first of these is that while, in the circumstances outlined, the global claim as such will fail, it does not follow that no claim will succeed. The fact that the pursuer has been driven (or chosen) to advance a global claim because of the difficulty of relating each causative event to an individual sum of loss or expense does not mean that after evidence has been led it will remain impossible to attribute individual sums of loss or expense to individual causative events. The point is illustrated in certain of the American cases. The global claim may fail, but there may be in the evidence a sufficient basis to find causal connections between individual losses and individual events, or to make a rational apportionment of part of the global loss to the causative events for which the defender has been held responsible.

39. The second factor mitigating the rigour of the logic of global claims is that causation must be treated as a common sense matter ... That is particularly important, in my view, where averments are made attributing, for example, the same period of delay to more than one cause."

104. Lord Drummond Young then went on to review the Australian decision by Byrne J in John Holland Construction & Engineering Pty Ltd v. Kvaerner RJ Brown Pty Ltd (1996) 82 BLR 81 and the American Court of Claims decision in Boyajian v. United States 423 F 2d 1231 before concluding at paragraphs 14 to 19 as follows:

(1) In paragraph 14: "*It is accordingly clear that if a global claim is to succeed, whether it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer. This requirement is, however, mitigated by the considerations discussed by the Lord Ordinary at paras 38 and 39 of his opinion. In the first place, it may be possible to identify a causal link between particular events for which the employer is responsible and individual items of loss.*"

(2) In paragraph 15: "*In the second place, the question of causation must be treated by 'the application of common sense to the logical principles of causation': John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd (per Byrne J at p 84I); Alexander v Cambridge Credit Corp Ltd; Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd (per Lord Dunedin at p 362).*"

(3) In paragraph 16: "*In the third place, even if it cannot be said that events for which the employer is responsible are the dominant cause of the loss, it may be possible to apportion the loss between the causes for which the employer is responsible and other causes.*"

105. In paragraphs 16 to 19 Lord Drummond Young dealt with in more detail with the basis on which apportionment might be made.

The Arbitrator's Question

106. Returning then to the Arbitrator's question in the present case, raising the decision in Laing v. Doyle, CTL responded by saying:

"*CTL do not suggest that their claim is a "global" or "total cost" claim of the type discussed by the Court. However CTL's claim has similarities because on CTL's case the delays in the Claim period were overwhelmingly caused by one major factor, namely the late completion of EBW. The issue between the parties identified by paragraph 8.20 of the Defence is whether the late completion of EBW (which is prima facie the contractual responsibility of LUL) was in fact caused by matters for which CTL is contractually responsible.*

CTL say that on the evidence paragraph 8.20 is not made out. However it might be that the Arbitrator will conclude that matters for which CTL is contractually responsible were a contributory cause of late completion of EBW-if so paragraph 17 of the judgment would justify an apportionment to be carried out on a percentage basis (as indeed LUL's internal assessments contemplated)."

107. LUL responded by saying that the claim should fail and no apportionment should be made.

CTL's Closing Submissions

108. In closing submissions, CTL put its case in this way:

(1) CTL relied on Appendices B and C to its written Closing Submissions and stated that it had "*analysed the facts relating to the vast majority of the stations*". It stated that these analyses demonstrated that EBW was the cause of delay in the claim period and that there was nothing to support LUL's contention in paragraph 8.20 of the Defence that CTL was to blame for delay in the EBW.

(2) CTL referred to Appendix C as establishing the delays suffered to each location as a result of the causes of delay in the Claim Period. It then stated that the delays to each location shown in Appendix C were collected in the Delay Table at Appendix H.

(3) CTL stated that the delays in individual locations shown in the Delay Table did not necessarily equate to a delay of the same length to the line as a whole and that the best guide to a delay to the line as a whole caused by late EBW was to be found in a comparison of the date for completion of EBW for the last location planned in UD07 and the date for the last location planned in UD15. UD15 was the relevant P3 programme at the end of the Claim Period.

(4) CTL stated that it did not contend for larger extensions of time than those set out in Appendix 11A to the Statement of Claim.

(5) CTL stated that "*the current project, in particular during the Claim Period, is not best suited to analysis by the Critical Path Method*".

LUL's Closing Submissions

109. LUL's case, in summary, was that CTL had failed to prove its entitlement to an extension of time because:

(1) CTL had failed to provide any clear formulation of the contractual basis for the claim.

(2) CTL had failed to identify and particularise the breaches of contract on which it relied.

(3) CTL's "quantification" of its extension of time claim depended on various alternative methods which relied on different facts and breaches.

(4) The factual evidence adduced in support of CTL's case was severely flawed and was not supportive of the claim.

(5) Each of CTL's approaches to quantification of its claim should be rejected.

110. In addition, LUL advanced a positive case that the progress and completion of the EBW was delayed by CTL, relying on the matters pleaded in paragraph 8.20 of the Defence.

The Award

111. In the Award the Arbitrator came to the following conclusions:

(1) That LUL's Obligations were not "absolute" in the sense that they had to be performed at the outset.

(2) That LUL's Obligations did not have to be performed at the dates in UD07 because those dates were not agreed.

(3) That LUL's Obligations were obligations to act with due diligence.

(4) That UD07 could not be used as a "yardstick"; that is, it could not be used to represent dates by which LUL could reasonably have been expected to fufil the relevant LUL Obligations, except for the Corporate Power Obligation.

(5) That LUL was in breach of its obligations as set out in Appendix E to the award.

(6) That in relation to delay:

(a) The Connect Project was not best suited to analysis by the Critical Path Method and there was therefore no satisfactory means of measuring delay by reference to critical path analysis.

(b) The other analyses pleaded by CTL based on Appendix 31, Dr Barnes' charts, Appendix 12 and the Thales Claim did not produce a reliable or satisfactory basis for measuring delay.

(7) That it was possible to identify a causal link between LUL's breach of the Corporate Power Obligation at Edgware Road and 48 weeks of delay to progress on the Corporate Line.

(8) That CTL was entitled to an interim extension of time under Clause 31.7 of the Connect Contract to reflect the 48 weeks of delay. Since the progress of commissioning on the Corporate Line governed everything that followed, it was appropriate to extend time by postponing all of the Milestone Dates to dates which fell 48 weeks after the date fixed for the relevant Milestone in the Connect Contract, as extended by the ICR.

112. I now turn to the submissions made in these proceedings.

LUL's submissions under section 68

113. In summary LUL contends that the Arbitrator's award should have ended at the findings set out in paragraph 111(6) above and that what the Arbitrator then did as set out in paragraphs 111(7) and 111(8) was to deal with a case which was neither pleaded nor argued and represented a departure from the procedure adopted.

114. The essence of LUL's case is that CTL's pleaded case failed entirely and it was no part of CTL's case that the Corporate Line had been delayed by 48 weeks by events at Edgware Road or that delays to the Corporate Line had caused the same amount of delay to all of the other lines. LUL submits at paragraph 54 of its written submissions:

> "*What the arbitrator did was construct a case on his own initiative, which was different from and inconsistent with the case which CTL had advanced, and wrote his Award on this basis without giving LUL any warning that he was adopting this course, or any opportunity to address him on it. This amounts to a serious irregularity from which LUL has suffered and will continue to suffer substantial injustice. That injustice includes not just the amounts which were awarded in the arbitration, but further sums consequential upon it as a result of increased payments which will amount to a sum running to tens of millions. CTL rendered an invoice for £23m following the Award.*"

CTL's Response to LUL's section 68 application

115. CTL on the other hand submits that:

(1) For the reasons set out in its own applications under section 68 and section 69, the Arbitrator fell into error in many findings up to and including those set out in paragraph 111(6) above.

(2) CTL had pleaded a case based on delay to the provisions of power at Edgware Road and the Arbitrator was entitled to award at least the minimum of 48 weeks extension of time which he recognised by reference to Edgware Road. CTL relied on the material referred to in the first witness statement of Ms Downey dated 2 February 2007 as showing that the case had been pleaded, argued and dealt with in evidence.

(3) The Arbitrator's award of 48 weeks was appropriate except that:

(a) In relation to the credit of 13 weeks based on the Thales Claim, CTL submitted that "*the Arbitrator never asked whether if he accepted CTL's case that delays to the provision of a supply of electricity at Edgware Road caused delay to commissioning there until the 18th July 2003, he should then in assessing delay caused over a different period at a different location caused by different breaches give a credit of 13 weeks simply because it had appeared in the Thales claim*".

(b) For the East London Line CTL's pleaded case was for an extension of time of less than 48 weeks and therefore the period awarded should be reduced. This was subsequently corrected by the Arbitrator and no issue arises on it.

116. The issues raised are therefore:

(1) Whether and to what extent a case was pleaded or argued upon which the Arbitrator could base his findings.

(2) Whether in making those findings there was a serious irregularity and whether there was substantial injustice.

The case on breach of the Corporate Power Obligation

117. At paragraph 82B of the Statement of Claim CTL pleaded that LUL had failed to supply electricity to locations set out in Appendix 31 in breach of paragraph 12.1 of Schedule 40 to the Connect Contract within the Claim Period. In paragraph 8.30B of the Defence LUL pleaded to that allegation and at paragraph 40B of the Reply CTL pleaded that no power was available by the end of 2003, so that no commissioning could have taken place in the Claim Period, although the Corporate Line should have been commissioned and completed by November 2003.

118. There was therefore a pleaded case that LUL was in breach of paragraph 12.1 of Schedule 40 of the Connect Contract in failing to supply electricity to any location by the end of 2003 and that this prevented any commissioning of the Corporate Line by the end of the Claim Period.

119. In his oral opening submissions in the Arbitration Mr Elliott had emphasised that no line could be commissioned unless the Corporate Line had been commissioned and no line could be commissioned without permanent power. Those submissions were evidently based on matters pleaded in paragraphs 56 and 60 of the Statement of Claim and Appendix 3 Tab A and Appendix 31 to the Statement of Claim.

120. The situation at Edgware Road Station was dealt with in Appendix 10 to the Statement of Claim which identified LUL delays in supply of power and stated that power was installed on 18 July 2003.

121. In her witness statement Ms Downey identifies the CTL witnesses who dealt with the issue of a failure to provide power and she also refers to and exhibits those statements and the supplemental witness statements of Andrew Smart dated 22 February 2006 which responded, on behalf of LUL, to the CTL evidence. Ms Downey also identifies passages in the oral evidence of Mr Howard, Mr Smart and Mr Bilham. In addition I was taken to further passages in the evidence of Mr Howard.

122. From that evidence it is clear that the issue of the date of supply of power to the various core CERs was raised both generally and in relation to Edgware Road: see Mr Smart's evidence on Day 18 at page 172. In addition, the issue of delay to the commissioning of the Corporate Line was also raised: see Mr Howard's evidence on Day 18 at pages 43-44.

123. In CTL's written Closing Submissions in the Arbitration, the position in relation to the Corporate Line was summarised in this way:

> "*Corporate Line: Commissioning was held up throughout most of the Claim Period by lack of a permanent power supply to most of the stations. Where a power supply was provided in the middle of 2003, commissioning could not be completed because of foundation problems at Liverpool Street and because of the late completion of EBW at Brixton….*"

124. In Appendix B to those Closing Submissions, in relation to the Corporate Line CTL stated:

> "*In the event, commissioning of the Corporate Line was held up throughout most of the Claim Period by the lack of a permanent power supply (the dates on which LUL forecast power would be provided progressively slipped). In mitigation, CTL began installing the equipment before the EBW was complete.*"

125. In Appendix C to those Closing Submissions, in relation to Edgware Road under "Breach", CTL stated the following:

> "*In breach of the Corporate Power obligation LUL failed to supply power to Edgware Road for the Corporate Line until 18 July 2003, holding up completion of work, including commissioning, until after that date. Power should have been available for the Contract duration; alternatively by the date for power at this location in UD07; alternatively to the reasonable requirement of CTL (Clause 59.1).CTL reasonably required power so that it could complete its work at Edgware Road by 18 January 2003.*"

126. In Appendix D to those Closing Submissions, CTL quoted an LUL e-mail of 11 November 2003 from Mr Hooper to Mr Amparano which had been the subject of a number of questions during evidence in the arbitration hearing. In that e-mail, referring to the Corporate Line, it was stated "*Power to the CERs was an uncontrolled disaster with the last site not resolved until September 2003. The second supply is still outstanding at several sites.*"

127. CTL then submitted that: "*On any view, and as reluctantly accepted by Mr Howard, it was clear that the commissioning of the corporate line could not have been carried out as at 11 November 2003*", that is the end of the Claim Period.

128. Having reviewed the evidence and submissions before me, I accept what Ms Downey says at paragraph 38 of her witness statement, that is:

> "*…it was CTL's case, well known to LUL and clearly placed before the Arbitrator:*
>
> *a) That LUL were in breach of the Corporate Power obligation;*
> *b) That commissioning [of the Corporate Line] could not take place until power had been supplied to all Core CERs;*
> *c) That commissioning of the Corporate Line was on the critical path for the project in respect of all lines;*
> *d) That provision of power to the Core CER at Edgware Road did not take place until the 18th July 2003.*"

The award in respect of breach of the Corporate Power Obligation

129. In his Award, the part which is challenged by LUL commences at para 317. The Arbitrator cited Laing v. Doyle and at paragraph 321 set out his approach in this way:

> "*In these circumstances, it seems to me to be right that I should consider whether it may be possible, as was contemplated in the John Doyle case, to identify a causal link between some of the events for which LUL is responsible and the delays which were encountered. In doing so, I think it right to confine myself to breaches of obligation and exercises of right on the part of LUL*

which remain open to CTL in the light of my rulings on the pleading point set out above. I also think it right to confine myself to aspects of the progress of the work which LUL have had a reasonable opportunity to investigate and explore in the evidence."

130. The Arbitrator then quoted paragraphs 75 and 82B of the Statement of Claim and Appendix 10. He referred to what Mr Elliott said in opening. In relation to Mr Elliott's comment that the delay to commissioning of the Corporate Line caused by lack of power was "another building block" and not "a separate and independent. application for an extension of time", the Arbitrator stated at paragraph 326: "*Nevertheless, in the light of the John Doyle case, I take the view that it is open to me to consider whether the absence of power accounts for part of the delay.*"

131. The Arbitrator then referred to question 12 which he had posed to the parties by reference to Appendix 31 and his comments raised at the hearing. That question was: "*Whether, within the claim period, there was any work which was ready for commissioning but could not be commissioned and therefore was delayed due to an absence of power.*"

132. He referred to the response to that question by CTL which was set out in Appendix T to its written Closing Submissions and the response by LUL at paragraph 186 of its written Closing Submissions.

133. The Arbitrator then referred to the following findings which he had made and which, otherwise and in themselves, are not challenged by LUL:

(1) That the commissioning sequence for the various lines had the effect that the achievement of Milestone Dates was dependent on the supply of power to the various CERS at the 11 core sites on the Corporate Line (paragraph 68 of the Award).

(2) That commissioning of core site CERs could not be undertaken for lack of permanent power which, in the case of Edgware Road, was not made available until 18 July 2003 (paragraphs 102, 103 of the Award).

(3) That this caused delay to the commissioning of the Corporate Line (paragraph 104 of the Award).

(4) That CTL made changes to the sequence and timing for the Corporate Line commissioning and handover which resulted in a time saving of as much as 13 weeks (paragraph 104(6) of the Award).

(5) That the first permanent power supply for Edgware Road should have been made available by 4 March 2002 but that it was not available when the pre-fabricated unit was put in place on 18 January 2003 (paragraph 240 of the Award).

134. On that basis the Arbitrator came to the conclusion that LUL's breach of the Corporate Power Obligation in respect of Edgware Road delayed Corporate Line Commissioning.

.

135. He made these further findings:

(1) That, based on the Thales delay claim (Appendix 25A to the Statement of Claim), at Edgware Road the pre-fabricated CER unit was originally intended

to be put in place for 4 days from 4 to 8 March 2002, followed by 10 weeks of installation work. This period of 10 weeks and 4 days meant that commissioning would not have started until 17 May 2002. As commissioning at Edgware Road could not have commenced until 18 July 2003 because of lack of power, this gave a period of delay of 61 weeks.

(2) That, based on the findings in paragraph 104(6) of the Award, a period of 13 weeks should be allowed for the time saving resulting for changes made to the sequence and timing of the Corporate Line commissioning.

(3) That, in the absence of LUL establishing that there was effective delay for which Thales was responsible, the lack of power was one of at least two concurrent delays up to 18 January 2003 and it then continued until 18 July 2003.

(4) That, although the Critical Path Method analysis was inconsistent with the proposition that delay to the core CER commissioning was caused by a lack of power: "*the case on power was pleaded, it was explored in evidence and was treated as a live issue throughout the hearing and in closing submissions. In these circumstances, approaching the case in a commonsense way, it seems to me to be right to have regard to it.*"

136. The Arbitrator then concluded at paragraph 333 of the Award:

> "For these reasons, I think it right to hold that LUL's breach of the Corporate Power Obligation at Edgware Road had the effect of delaying progress on the Corporate Line by 48 weeks."

137. At paragraph 337 he considered whether delay had been caused by breaches other than the Corporate Power Obligation. He said:

> "*Apart from that breach, I have in Section (E) above, held that LUL was in breach of a number of the other obligations upon which CTL relies. I refer to the summary in Appendix E. I have reviewed those breaches in the light of my findings earlier in this Section (F). The breaches in question were, in my view, such as were likely to give rise to delay. But on the material before me and in the light of my findings about the critical path analysis, it is difficult to assess whether such delay would, or could have been critical. In looking at this aspect of the case, I have taken into account the fact that the various activities with which I am concerned were, in the main, such as could be carried out in any order. I have also taken into account that, on the conclusions which I have reached, the evidence before me offers no satisfactory basis for measuring how much delay was occasioned by the breaches in question. I have sought to apply to this aspect of the case a commonsense approach, as proposed by the Inner House of the Court of Sessions in the John Doyle case. Nevertheless, I am driven to the conclusion that the material before does not establish further delay arising out of the breaches in question beyond the 48 weeks to which I have already referred.*"

138. At paragraphs 368 to 369 he considered the question of extension of time. After summarising certain aspects of the background to which he had regard, he continued:

"368. *Were the background different, it seems to me that I should have to think long and hard before concluding that it was fair or reasonable to grant CTL a long extension of time of as much as 48 weeks merely on the basis of the single breach related to Edgware Road to which I have referred, even though there were other breaches which may have given rise to concurrent delay. However taking the background into account, I have no hesitation in concluding that it is fair and reasonable to grant a substantial extension. I hold that CTL is entitled to an interim extension of time under Clause 31.7 of the Contract to reflect the 48 weeks of delay to which I have referred.*

369. I refer to my findings in Section (C) above under the heading "Sequence of Work and Commissioning". Since the progress of commissioning on the Corporate Line governed everything which followed, it seems to me appropriate to extend time by postponing all of the Milestone Dates to dates which fall 48 weeks (or 336 days) after the date fixed for the relevant Milestone in LUL's letter dated 18th March 2002, which gave effect to the ICR. Attached to this Award as Appendix F is a schedule setting out the revised Milestone Dates appearing in LUL's letter dated 18th March 2002 (Column 2), together with the Revised Milestone Dates resulting from this Award (Column 4) and the net extension of time (in days) beyond the last extension date in December 2003 (Column 6) which I think it is right to grant."

Decision on LUL's application

139. I now turn to consider LUL's challenge to the Arbitrator's award of an extension of time of 48 weeks. I consider that there can be no possible criticism of the Arbitrator's findings at paragraph 330 of the Award that LUL's breach of the Corporate Power Obligation in respect of Edgware Road delayed Corporate Line commissioning. As set out above, I consider that the case put forward and argued by CTL was that LUL was in breach of the Corporate Power Obligation at Edgware Road; that commissioning at Edgware Road was delayed because of a breach of the Corporate Power Obligation; that commissioning of the Corporate Line could not take place until commissioning had taken place at Edgware Road.

140. The focus of LUL's challenge has therefore been on two aspects. First, the Arbitrator's findings in relation to the 48 week period of delay at Edgware Road and secondly, the Arbitrator's finding that the 48 week period of delay entitled CTL to a extension of time of 48 weeks for each of the other lines (subject to the limitation of the pleaded case in respect of the East London Line).

141. In deciding whether there was serious irregularity, I consider that the proper approach to global claims is relevant. The approach set out in the decision in Laing v. Doyle is not challenged on this application and I accept that approach.

142. The essence of a global claim is that, whilst the breaches and the relief claimed are specified, the question of causation linking the breaches and the relief claimed is based substantially on inference, usually derived from factual and expert evidence.

143. As Lord Drummond Young said in relation to pleading of causation at paragraph 20 of Laing v Doyle :

> *"All that is required is that a party's averments should satisfy the fundamental requirements of any pleadings, namely that they should give fair notice to the other party of the facts that*

are relied on, together with the general structure of the legal consequences that are said to follow from those facts. In doing that, the pleadings of one party should disclose sufficient to enable the other party to prepare its own case and to enable the parties and the court to determine the issues that are actually in dispute. The relevancy of pleadings must always be tested against these fundamental requirements. In a case involving the causal links that may exist between events having contractual significance and losses suffered by the pursuer, it is obviously necessary that the events relied on should be set out comprehensively. It is also essential that the heads of loss should be set out comprehensively, although that can often best be achieved by a schedule that is separate from the pleadings themselves. So far as the causal links are concerned, however, there will usually be no need to do more than set out the general proposition that such links exist. Causation is largely a matter of inference, and each side in practice will put forward its own contentions as to what the appropriate inferences are. In commercial cases, at least, it is normal for those contentions to be based on expert reports, which should be lodged in process at a relatively early stage in the action. In these circumstances there is relatively little scope for one side to be taken by surprise at proof, and it will not normally be difficult for a defender to take a sufficiently definite view of causation to lodge a tender, if that is thought appropriate. What is not necessary is that averments of causation should be over-elaborate, covering every possible combination of contractual events that might exist and the loss or losses that might be said to follow from such events."

144. The consequence of the undermining of a global claim in one of a number of ways, including those suggested by the Lord Ordinary at first instance in Laing v. Doyle at paragraphs 36 and 37, is that the claim will fail as a global claim. As in this case, within the global claim there may remain pleaded events for which a party is responsible which, on the evidence, have caused delay. Necessarily there will be no specific pleaded case that the remaining pleaded events caused a particular element of the delay. As Lord Drummond Young said at paragraph 20 of Laing v. Doyle the pleading of causation need not be over elaborate covering every possible combination of contractual events that might exist or, as applied to this case, covering the delay that might be said to flow from every possible combination of such events. Instead as the Lord Ordinary put it in paragraph 38

> *"there may be in the evidence a sufficient basis to find causal connections between individual losses and individual events, or to make a rational apportionment of part of the global loss to the causative events."*

145. The surviving or remaining claim will therefore emerge from the evidence which has been adduced to establish or deal with the global claim. There will clearly be a need for analysis of the existing evidence to see if there is a sufficient basis for establishing causation. Where the case has proceeded on the basis of a global claim, it will be at

the stage when the tribunal has determined what events can be relied upon that it will be possible to carry out that analysis. Necessarily, in such a case, as in many cases where there is partial success, neither party will have a specific opportunity to deal with a case based on the tribunal's particular findings. Tribunals frequently have to deal with cases where a claim or a defence has not wholly succeeded and it is necessary to determine what result flows from the partial success or failure. Provided that the result is based on primary facts which have been in issue in the proceedings, there can in principle be no objection to a tribunal taking such a course. There will, though, be limits and it will be a matter of fact or degree in a particular case whether the findings made by the Arbitrator fall outside the limits and fairness requires the Arbitrator to seek further submissions from the parties. In this case, the question is whether the Arbitrator's findings fell outside those limits.

146. With those observations in mind, I now turn to consider the two main allegations made by LUL. First, the finding that the Corporate Line had been delayed by 48 weeks by events at Edgware Road.

147. LUL refers to the way in which the period of delay in relation to the Corporate Line was dealt with in CTL's Closing Submissions. By then, LUL submits that based on section 32 of CTL's Closing Submissions CTL's primary case was based the period of delay in Appendix 31 to the Statement of Claim but that the extension of time was limited to the period claimed in Appendix 11A.

148. Appendix 31 went through a number of changes. One version (F1-265) showed a claimed period of delay for the Corporate Line of 104 weeks. However, amended Appendix 11A (F1-59) presented as part of CTL's Closing Submissions showed, as an amendment to Appendix 31, a period of 109 weeks for delay to the Corporate Line. It showed an "overall post ICR EoT claimed" of 65 weeks. When an 18 week extension of time awarded in April 2003 had been deducted, the claim was for a further Extension of Time of 47 weeks for the Corporate Line.

149. Appendices H and I to CTL's Closing Submissions elaborated on CTL's case in relation to particular locations. Appendix H set out a 109 week delay to the Corporate Line. In relation to the Corporate Line it showed a delay to Edgware Road CER of 60 weeks, with varying periods at other locations on the Corporate Line.

150. CTL's claim was accurately described as a global claim. The claim was made on the basis that a large number of breaches of LUL's Obligations had caused delay to individual locations and to the various lines. The case on causation was based largely on inferences drawn from factual and expert evidence. The particular claim, relevant to present considerations, was that breaches of LUL's Obligations had caused a delay to the Edgware Road CER of 60 weeks and a delay to the Corporate Line of 109 weeks. The extension of time sought, based on this delay and because of mitigation, was limited to a 65 week period for the Corporate Line.

151. To use the phraseology of Laing v. Doyle the averments of causation were not, as can be seen, over-elaborate and did not cover every single possible combination of breach of LUL's Obligation and the delay that might be said to follow from such events singly or in any number of possible combinations of events. In my judgment, the pleaded case comprehended a claim that any breach of LUL's obligations might have caused a delay of up to 60 weeks to the Edgware Road CER and to the Corporate Line of up to 109 weeks but that because of mitigation the extension of time sought was reduced to a maximum 65 week period.

152. CTL relied on expert evidence and various exercises to establish the necessary causation. As set out in paragraphs 304 to 316 of the Award, the Arbitrator rejected those approaches and held that the project did not lend itself to critical path analysis. Causation was therefore a matter which, if at all, could only be established from the facts, drawing such inferences as were appropriate. Those facts would be limited to the facts which were already in evidence in the proceedings. I consider that this is the approach which the Arbitrator adopted.

153. If, on the facts which had been in evidence in the arbitration the Arbitrator were able to find, as a matter of inference or otherwise from those facts that a particular breach had caused a delay of less than 60 weeks to the Edgware Road CER and/or a delay to the Corporate Line of less that 109 weeks and/or gave rise, after considering mitigation, to an extension of time up to 65 weeks, then I consider that the Arbitrator would be entitled to make such a finding on the pleaded and argued case, subject to being satisfied that the findings were within the limits of that case and that fairness did not require further submissions to be made.

154. In this case, the Arbitrator's finding of 48 weeks was based on the following:

(1) The date when power should have been provided to the Edgware Road CER was 4 March 2002 but the earliest date on which CTL could have started commissioning was 17 May 2002. These were findings of primary fact derived from the evidence.
(2) Power was only available at Edgware Road on 18 July 2003. That is a finding of primary fact from the evidence.
(3) The period of delay was therefore 61 weeks from 17 May 2002 to 18 July 2003.
(4) A period of 13 weeks was the time which had been saved by changes to the sequence and timing of the Corporate Line commissioning. LUL does not challenge this but seeks to uphold it. I deal below with CTL's challenge to this finding, which I reject.
(5) The period of delay was therefore 61 weeks less the period of 13 weeks making 48 weeks.

155. The finding of a delay of 61 weeks delay to the provision of power to the Edgware Road CER was, I consider, fully comprehended within the Claim pleaded, argued and dealt within evidence.

156. A major contention put forward by LUL was that the "Arbitrator's New Delay Case" was based on a case that delay to the Corporate Line had been caused by difficulties at Edgware Road and that this was not part of CTL's case. LUL pointed to its Closing Submissions, where it had stated that although Edgware Road had been alleged to be critical, in Appendix 9B to the Statement of Claim this was in respect of the District Line, not the Corporate Line.

157. CTL dispute that this accurately represents its case. It refers to paragraph 56(c) of the Statement of Claim where it pleaded that "*before the Corporate Line can be commissioned, all the new Core CERs and associated track and fibre sections must have been completed.*" I consider that it was clearly CTL's case that until the core CERs, which included Edgware Road, had been completed, commissioning of the Corporate Line could not take place.

158. CTL also pointed to Appendix C to its Closing Submissions where it stated, under the heading "Edgware Road" and "Corporate Line": "*LUL failed to provide power to Edgware Road for the Corporate Line until 18 July 2003, holding up completion of*

work including commissioning until after that date." Appendix B to CTL's Closing Submissions, dealing with the Corporate Line said "*The Corporate Line was held up throughout most of the Claim Period by the lack of permanent power supply.*"

159. On this basis, I am also satisfied that a case that any delay to the CER at Edgware Road would cause critical delay to the Commissioning of the Corporate Line was fully comprehended within the Claim pleaded, argued and dealt within evidence. On the finding, set out above, that the delay to the Edgware Road CER was 61 weeks, the Arbitrator's finding of 61 weeks delay to the Corporate Line was similarly comprehended within the claim. The 13 week mitigation period was not challenged by LUL and I have rejected CTL's challenge. The resulting delay is 48 weeks, as a matter of arithmetic.

160. I therefore consider that the finding that the Corporate Line had been delayed by 48 weeks by events at Edgware Road was well within the case dealt with in the pleadings, submissions and evidence. There is nothing, in my judgment, by way of fairness which required the Arbitrator to seek further submissions from the parties before making his findings. LUL's first ground of challenge therefore fails.

161. LUL's second ground of challenge is that the Arbitrator's finding that the 48 week period of delay entitled CTL to a extension of time of 48 weeks for each of the other lines, was not part of CTL's case.

162. CTL submits that LUL is in error and again refers to paragraph 56 of the Statement of Claim which in general was not admitted in the Defence. In paragraph 56 CTL pleaded:

> "*The overall sequence leading to completion of the Milestone Event for each line is:*
> (a) *before a line can be commissioned, all rings for that line must be commissioned;*
> (b) *before a ring can be commissioned, ...*
> *(iii) the Corporate Line must have been commissioned*
> (c) *before the Corporate Line can be commissioned, all the new Core CERs and associated track and fibre sections must have been completed.*"

163. CTL says that its case was that a delay to the Corporate Line would cause a delay to the completion of each line. I accept that. The Arbitrator held at paragraph 68 of the Award that "*Importantly, however, the commissioning sequence for the various lines had the effect that the achievement of milestone dates was dependent on the supply of power to the various CERs at the 11 core sites on the Corporate Line.*" That was a finding based on the pleadings, submissions and evidence and did not require the Arbitrator to seek further submissions. I therefore reject LUL's second ground for challenge.

164. In considering these challenges, it is important to bear in mind certain matters, First, as the Arbitrator held, he was awarding an interim extension of time under Clause 31.7. Under clause 31.7 the obligation, upon LUL initially or upon the arbitrator in arbitration, is to "grant an interim extension of time as is fair and reasonable in the circumstances". The trigger for that provision is that a Delay Event which "will prevent or delay it from complying with its obligations in the timescale provided by this contract". The question of what is fair and reasonable in the circumstances indicates that the remedy is not tied to a particular analysis nor is the arbitrator bound

to follow the contentions of the parties. The assessment is one which necessarily has a subjective element and is based on an assessment of the circumstances.

165. Secondly, whilst analysis of critical delay by one of a number of well-known methods is often relied on and can assist in arriving at a conclusion of what is fair and reasonable, that analysis should not be seen as determining the answer to the question. It is at most an area of expert evidence which may assist the arbitrator or the court in arriving at the answer of what is a fair and reasonable extension of time in the circumstances. As the Arbitrator found at paragraph 310 of the Award: "I therefore regard CTL's submission that the Connect Project is not best suited to analysis by the Critical Path Method as being well-founded."

166. Thirdly, this is not a case where the Arbitrator was unaware of the limits of the exercise which he was performing. The Award shows that he was conscious that the Award had to be based on the pleadings, submissions and evidence before him in the Arbitration. Whilst this does not prevent an arbitrator from going outside the limits or acting in a manner which is unfair, it is less likely to happen when the Arbitrator consciously approaches the question with the relevant considerations in mind.

167. Having reviewed the voluminous material by way of pleadings, written submissions and transcripts of oral submissions and evidence placed before the Arbitrator this is not a case where something can be said to have gone wrong with the process or to have led to unfairness. Rather, on my analysis, the Arbitrator's finding were based on the case pleaded, argued and dealt with in evidence, taking account of the failure of the global claim. I do not consider that there was anything which required the Arbitrator to seek further submissions from the parties.

168. I therefore dismiss LUL's application under s. 68.

Substantial Injustice

169. If I had come to a different view on the question of irregularity then I would have had to consider whether the irregularity had caused or would cause substantial injustice. My initial reaction would be that an award which granted 48 weeks extension of time and payment to CTL of significant sums of money would have caused substantial injustice to LUL if there had been an irregularity in the procedure. There is however an important consideration which must be taken into account.

170. At paragraph 362 of the Award, the Arbitrator held that he was granting the extension of time under Clause 31.7 and not Clause 31.6 of the Connect Contract. As dealt with in argument, the effect of the Award being an interim extension of time under Clause 31.7 is that the extent of the extension of time can be reviewed and revised in a further arbitration when the relevant extension of time is determined, not on an interim, but on a final basis. Thus whilst arguments may be made as to the effect of other findings by the Arbitrator, the question of the length of the extension of time which is "fair and reasonable in the circumstances" is not something which has finally been determined by this Arbitration.

171. If I had come to the conclusion that there was an irregularity in this case, I consider that any injustice arising from the length of the extension of time could be cured by the process which is laid down under the Connect Contract and I would not have been minded to find that there was substantial injustice. There will, of course, be the need for a financial adjustment but this has to be viewed in the context of necessary accounting forming part of the long running relationship between the parties. In the

circumstances, I do not consider that an irregularity in the determination of an extension of time by this arbitrator would give rise to substantial injustice.

CTL's Application under Section 68

172. CTL relies on the following grounds under s.68:

(1) That the Arbitrator held that the meaning of a letter relating to the agreement of dates in UD07 was something not suggested by either party: paragraph 7 of the Grounds ("UD07 Dates").
(2) That if the Arbitrator found that delays in the first 12/priority 20 stations were the responsibility of CTL, that was not an issue placed before him: paragraph 12 of the Grounds ("First 12/Priority 20 stations").
(3) That the Arbitrator failed to make a decision on CTL's submission that there was no evidence that delays to EPC design by CTL in fact caused delay to EBW design and/or construction: paragraph 12 of the Grounds ("Evidence of Delay by CTL").
(4) That the point taken by the Arbitrator on the Claim Period was not pleaded, raised in submissions, relied upon by LUL or raised by the Arbitrator for submissions from either party: paragraph 14 of the Grounds ("Bank/Monument")
(5) That the Arbitrator wrongly rejected CTL's case in relation to delay in production of the Network Rail GWA on the basis that CTL did not put its case on a particular basis when it did: paragraph 15 of the Grounds ("Network Rail").
(6) That the Arbitrator gave credit for a 13 week period in relation to his award of an extension of time when LUL did not put forward that case on its pleadings, evidence or submissions: paragraph 20 of the Grounds ("13 week credit").

UD07 Dates

173. As set out above, CTL placed heavy reliance on UD07 to establish, in a number of alternative ways, that the dates for completion of EBW in UDO7 were the dates by which LUL's obligation to complete EBW was to be judged. This ground relates to CTL's contention that those dates were agreed.

174. CTL pleaded in paragraph 65 of the Statement of Claim that UD07

> "*was agreed in the ICR … to be the basis of the new Milestone Dates set out in Attachment 4 to the ICR. Its status was confirmed by LUL's letter to CTL of 10 May 2002 reading:*
>
> > *"Update No 7 and its logic and dependencies were agreed with you in the claim resolution reflected in your letter of 14 December 2001".* "

175. At paragraph 75 of the Statement of Claim CTL pleads that LUL was in breach of the LUL Obligation under the Connect Contract in that LUL "*failed to carry out EBW in accordance with the requirements of programme UD07, or within any reasonable timescale*".

176. In paragraph 8.13(v) of the Defence LUL admitted that in the ICR the parties agreed a 41 week extension of time and that Attachment 4 to the ICR contained revised Milestone Dates. LUL also admitted the quotation from the letter of 10 May 2002 but otherwise denied paragraph 65 of the Statement of Claim.

177. At the end of the hearing, the Arbitrator expressly asked the parties to deal with the question of whether UD07 was agreed and, if so, the extent to which it was agreed (I9-117).

178. In its Closing Submissions, CTL submitted at paragraph 4.15 that the "*dates for EBW in UD07 were put forward by LUL, and agreed as part of the ICR.*" At paragraph 4.16 CTL quoted from Mr Brockbank's letter of 10 May 2002 and the following passage was emphasised: "*Update No 7 and its logic and dependencies were agreed with you in the claim resolution reflected in your letter of 14 December 2001 [i.e. the ICR].*"

179. In LUL's Closing Submissions at paragraph 55 to 66, LUL set out that the Milestone Dates in Attachment 4 were agreed but there was no agreement beyond that. They did not deal otherwise with the letter of 10 May 2002

180. In the Award at paragraph 120 the Arbitrator dealt with CTL's submissions that the dates for completion of EBW set out in UD07 were agreed. He said:

> "*(1) Even though they no doubt represented LUL's proposed dates, there is no obvious reason to suppose that LUL was offering to become contractually bound by them.*
> *(2) Whilst it is clear that the revised Milestones Dates in UD07 were agreed between the parties as part of the ICR, there is nothing in the ICR to suggest that any of the other dates in UD07 were agreed.*
> *(3) As I have already indicated, when read in context, the passage from Mr Brockbank's letter dated 10th May 2002 relates, in my view, not to the programming of the EBW installation but to the programming of the EPC installation.*
>
> *Having regard to these matters, I am unable to accept CTL's submission that the dates for the completion of the EBW set out in the UD07 were agreed.*"

181. In relation to section 68 of the Act, CTL contends that

> *"the Arbitrator was in breach of sections 33 and/or 68 of the Act in holding that in a letter written by Mr Brockbank of LUL to Mr Mercer of CTL, the reference to "logic and dependencies" was a reference only to the logic and dependencies in UD07 relating to the installation of the EPC works. This was not a construction of the letter suggested by either party in the pleadings: CTL referred to the letter in paragraph 65 of the Re-Amended Consolidated Statement of Claim. LUL's Defence at paragraph 8.12(vi) admitted the terms of the letter without suggesting it should be read in the way found by the Arbitrator. Nor was this was a construction of the letter suggested by either party in their submissions or evidence. It was a point taken by the Arbitrator of his own motion and without inviting submissions from either party on the point."*

182. It can be seen that this relates to the letter of 10 May 2002 which is the third of three reasons relied on by the Arbitrator in coming to the conclusion that the dates for completion of the EBW in UD07 had not been agreed.

183. This is a case where CTL relied on a letter written some 6 months after the ICR and which expressed a view on matters dealt with at the time of the ICR. It was relied on by CTL to support a contention that the dates for completion of the EBW within UD07 were agreed as part of the ICR. It is clear that, whilst LUL admitted what had been written in the letter of 10 May 2002, it did not accept that the EBW dates were agreed as part of the ICR.

184. In those circumstances, as one of three arguments, the Arbitrator had to decide whether the letter of 10 May 2002 supported CTL's contention that the dates for completion of the EBW within UD07 were agreed. On reading the letter the Arbitrator held at paragraph 81 of the Award that, for the reasons he gave, "*when read in context, Mr Brockbank's reference to such logic and dependencies having been agreed must be a reference to that part of UD07 which related to the programming of the installation of the EPC works rather than a reference to the programming of the EBW*." It therefore did not support CTL's contention.

185. The issue of whether UD07 was agreed was raised expressly by the Arbitrator and addressed specifically by each party. The Arbitrator was faced with an issue of whether the letter of 10 May 2002 supported CTL's case. On his reading of the letter it did not. I consider that this is exactly the sort of finding that the Arbitrator must make as part of the process of reaching a decision on the parties' contentions. I accept, as LUL submits, that the Arbitrator's consideration of the letter as a piece of evidence relied on by CTL to establish an agreement was something that was well within the scope of the autonomous fact finding which the Arbitrator was entitled to carry out. I also agree that it is impossible to suggest that the Arbitrator had to revert to CTL because he disagreed with CTL's construction of the letter.

186. I do not consider that there was an irregularity, let alone a serious one. In any event, as LUL submits, the issue here was whether the dates for completion of the EBW in UD07 were agreed as part of the ICR. The Arbitrator considered the aims and genesis of the EBW dates and the terms of the ICR and decided for two other reasons that the EBW dates were not agreed. Interpreting the ICR by reference to views expressed 6 months after the ICR may, in any event, give rise to difficulty. However, at the very least, the existence of the other unchallenged reasons means that, even if there had been cause to criticise the process of arriving at the third reason, I would not have been persuaded that any irregularity has caused or will cause substantial injustice to CTL. In addition, given the Arbitrator's findings on causation, it seems that even if the dates in UD07 had been agreed, CTL would have faced similar problems in proving causation. Again this makes it difficult for CTL to establish substantial injustice.

Evidence of Contract Delay on the part of CTL

187. In paragraph 12 of the Grounds of Appeal CTL contends that

> *"the Arbitrator was in breach of sections 33 or 68 of the Act in that if and insofar as he implicitly found that delays in the first 12 and then the 20 "priority" stations are in some respects the responsibility of CTL, that issue was not placed before him in LUL's Closing Submissions and/or he failed to consider and make a decision upon CTL's submission to him in its oral closing submissions (transcript day 29 pages 129 to 131) that there was no evidence before him that any delays in respect of EPC design <u>in fact</u> caused delays to EBW design and/or EBW construction."*

188. As formulated, this ground of appeal has two parts:

(1) That the Arbitrator was in breach of Sections 33 or 68 of the Act insofar as he implicitly found that delays in the first 12 and then the 20 "priority" stations were in some respects the responsibility of CTL when this issue was not placed before him in LUL's closing submissions.

(2) That the Arbitrator was in breach of Sections 33 or 68 of the Act in that he failed to consider and make a decision upon CTL's submissions that there was no evidence before him that any delays in respect of EPC design in fact caused delays to EBW design and/or EBW construction.

(1) The issue of responsibility for delays in the "first 12/priority 20 Stations"

189. In CTL's submissions of 29 December 2006 it submitted at paragraph 130 "*that the Arbitrator simply failed to consider whether any delay in the EBW in the first 12 and then the 20 priority stations were in any respect the responsibility of CTL*". That same position was maintained in CTL's submissions served on 20 March 2007.

190. However, in CTL's Reply Submissions served on 23 March 2007 at paragraphs 70 and 71 CTL submit:

> "*At the time of drafting the Grounds of Appeal, it appeared that the Arbitrator might have intended to hold that the cause of departures from UD07 was in some way the responsibility of CTL - hence paragraphs 11(c) and 12 of the Grounds of Appeal. However in the "Corrections to the Second Interim Award" the Arbitrator has not suggested that this was in fact his intention. The natural inference from his silence and from the absence of any evidence to support such a finding is that he did not intend to find and did not find that the CTL were in any way responsible for:*
>
> *a) the delays to the first 12;*
> *b) the decision to enable the Priority 20 in 2002;*
> *c) the delays to the Priority 20.*
>
> *On this basis it appears that paragraph 12 of the Grounds of Appeal is unnecessary unless it be suggested by LUL that the Arbitrator should be understood to have decided that delays to the First 12 and to the Priority 20 Stations were in some way the responsibility of CTL. No such suggestion is made in the Submission served by LUL last Tuesday (20th March).*"

191. CTL instead seeks to submit that without a finding that delays to the first 12 and priority 20 stations were in some way the responsibility of CTL there are two consequences:

(1) Paragraph 235 of the Award becomes "meaningless" as justifying the Arbitrator refusing CTL relief because the departure from the UD07 programme would have been as a result of matters for which LUL was contractually responsible namely the failure to ensure that EBW was carried out and in accordance with UD07.

(2) The Arbitrator's reasons rejecting the use of UD07 "falls apart" because that was based on the proposition that CTL prevented LUL from meeting the UD07 dates.

192. CTL's case on this ground, as formulated is no longer relied upon. The attempt to revive an argument based on the "first 12/priority 20" stations was maintained at the hearing in an attempt to challenge the finding in paragraph 226 of the Award that, because of the delays caused by CTL "*it was not reasonable to expect LUL to complete the EBW by the dates set out in UD07.*"

193. In essence what CTL was saying was that there was other evidence which the Arbitrator should have taken into account relating to the "first 12/priority 20" stations and that, had he done so, he would, on CTL's submissions have come to a different answer. However, the fact that there may have been other reasons why the dates in UD07 could not be achieved does not, in my view, detract from the reasoning in the Arbitrator's award and, in any event, is not a ground which gives rise to a challenge under section 68.

194. I therefore do not consider that the recasting of this issue raises a matter which can be challenged under s. 68 or that there was any irregularity in what the Arbitrator did.

(2) Failure to consider or decide on CTL's submission that there was no evidence that EPC design caused delays to EBW

195. CTL contends that the Arbitrator failed to consider or make a decision upon CTL's submissions that there was no evidence before him that any delays in respect of EPC design in part caused delays to EBW design and /or EBW construction.

196. The submissions relied upon by CTL are those made in the oral hearing on day 29 (I9/226).

197. LUL relies on its submissions at section 7 of its written Closing Submissions in the Arbitration. In particular LUL submitted at paragraph 17 (J3-275): "*As explained earlier CTL has suggested that this positive case cannot succeed because LUL has not analysed progress at a particular station or stations to demonstrate the effect which the EPC design has on the EBW. But such a comment is to mis-characterise this positive case. The positive case pleaded in paragraph 8.20 is a much more general point and does not depend upon demonstrating the progress of EBW was delayed at specific locations.*"

198. As CTL's claim was formulated, delay to EBW design or construction caused by CTL's EPC design was relevant to the issue of whether the EBW dates in UD07 were the dates on which CTL reasonably required the EBW. The Arbitrator dealt with this issue at paragraphs 221 to 236 of the Award under the heading of "UD07 as a Yardstick". Whilst he did not expressly refer to the submissions made by CTL, the way in which he dealt with the issue showed that he accepted that, on the basis of the matters considered in his Award, there was sufficient evidence of delay by CTL to undermine the dates for completion of EBW in UD07 for use as a yardstick.

199. In my judgment, the Arbitrator dealt with the submission of the parties and came to the conclusions set out at paragraph 236 of the Award. I do not consider that there is any irregularity in what he did. In addition, given the Arbitrator's findings on causation, it seems that even if the dates in UD07 could have been used as a yardstick, CTL would have faced similar problems in proving causation. This makes it difficult

for CTL to establish that any irregularity had caused or would cause substantial injustice.

Bank/Monument

200. In paragraph 14 of the Grounds of Appeal CTL says that the point taken by the Arbitrator was not pleaded or raised in submissions by LUL or relied upon in any other way by LUL and the Arbitrator did not seek any submissions from either party on the point.

201. This ground of challenge arises out of paragraphs 267, 268 and 298 of the Award where at paragraph 268 the Arbitrator said "*As regards Bank/Monument, I hold that approval to the SDP was revoked on 30th October 2001 but that was before the commencement of the claim period. The revocation was withdrawn on 10th June 2002.*" At Appendix E to the Award the Arbitrator summarised his findings on breach and rejected this claim.

202. The Arbitrator therefore declined LUL's claim in respect of the EBW at Bank/Monument station upon the ground that a hold had been put on approval of a Service Delivery Point at that station by a letter dated 30 October 2001, which was before the Claim Period.

203. CTL submits that the point about the revocation falling outside the Claim Period was not pleaded or raised in submissions by LUL or relied on by LUL and the Arbitrator did not seek any submissions on the subject.

204. LUL does not seek to suggest that it had contended that this claim should fail on the basis that it fell outside the Claim Period. Rather, LUL contends that, given the way in which CTL pleaded its case, CTL cannot complain about the fact that LUL did not plead to the allegation. In particular, LUL objected to the fact that the claim had not been pleaded and the Arbitrator set out at paragraph 217 of the Award the basis on which he would permit CTL to rely on matters. At paragraph 219(11) of the Award, the Arbitrator held that the alleged SDP revocation claim at Bank/Monument was "foreshadowed" in the location summaries document attached to CTL's opening submission and in Appendix 10 to the Statement of Claim. LUL submits that, given the way the matter was pleaded, CTL cannot complain about the lack of pleading by LUL.

205. LUL however contends that the matter is within the Arbitrator's autonomous fact finding role and, in any event, there is no substantial injustice.

206. It seems to me that this was a case where there was an irregularity because the Arbitrator rejected a claim on the basis of a matter which was not argued or pleaded by LUL. However the way in which CTL's claim was raised meant that, in practical terms, LUL's opportunity to deal with the revocation claim was limited. In addition, it is evident from CTL's pleading that it accepted that it had to take into account the ICR and was only making claims in respect of the Claim Period, as set out in paragraph 21 and following of the Statement of Claim. In his previous award the Arbitrator had, of course, dealt with issues arising from the ICR.

207. In terms of the requirement for substantial injustice, the way in which the claim is pleaded by CTL does not allow the effect of the Arbitrator's finding to be assessed so as to see what degree of injustice has been caused by that finding. I am therefore not satisfied that there was substantial injustice caused by this irregularity. In addition, given the Arbitrator's findings on causation, it seems that even if the claim at

Bank/Monument were allowed, CTL would have faced similar problems in proving causation. Again this makes it difficult for CTL to establish substantial injustice.

208. In these circumstances whilst there was an irregularity, I do not consider that, when considered in context, it was sufficiently serious to give rise to a challenge under s. 68 or caused substantial injustice.

Network Rail

209. In paragraph 16 of the Grounds of Appeal, CTL states that, in paragraph 278 of the Award "*the Arbitrator wrongly rejected any case based upon delay in production of the General Works Agreement upon the basis that CTL did not put its case in respect of Network Rail approvals on the basis of failure to implement the GWA or even upon failure to conclude the GWA earlier. This was simply wrong. CTL will refer to paragraphs 26.7, 26.13, 26.17(ii) and 26.18 of CTL's written Closing Submissions.*"

210. This concerns a challenge to paragraph 278 of the award where the Arbitrator, in dealing with the "Network Rail Obligation", said:

> "*CTL is highly critical of LUL's performance in relation to Network Rail's Approvals. In its closing submissions, CTL points out that the GWA by Clause 4.33 obliged Network Rail to respond to technical proposals submitted by LUL on behalf of CTL (called "Works Documents" on receipt. The submissions include the following passage:*
>
> > *LUL took no steps to persuade Network Rail to comply with its obligations either before or after the GWA was entered into. Had the GWA been executed more quickly LUL might have had greater power to do so.*
>
> *However, despite these criticisms, CTL does not put its case in respect of Network Rail approvals on the basis of a failure to implement the GWA or even upon failure to conclude the GWA earlier.*"

211. CTL relies on paragraphs 26.7, 26.13(a), 26.17(ii) and 26.18 of CTL's written Closing Submissions as demonstrating that, contrary to the Arbitrator's statement, it did put forward a case based upon "failure to conclude the GWA earlier".

212. LUL submits that the Arbitrator evidently considered the claim made by CTL in those paragraphs of CTL's closing submissions, together with paragraphs 152 to 159 of LUL's submissions. LUL contends that the Arbitrator correctly summarised and dealt with CTL's case and there are no grounds for challenge under s. 68.

213. The case which was put forward by CTL was based on a breach of LUL's obligations in Schedule 5 to the Connect Contract which provided at paragraph 4.2 that "*LUL shall coordinate and obtain any and all Third Party Approvals so as to give any such Approval required in a timely manner or, where in respect of those matters referred to below, as set out below.*" It then sent out that, for matters which involved LUL and Network Rail (formerly RailTrack), there was provision for an 8 week period for a safety case and a 4 week period for a non-safety case. CTL also relied on a breach of LUL's obligation properly to liaise with Network Rail and to manage the approval process.

214. It is correct that CTL also referred to the terms of the GWA and raised the issue of delay in LUL entering into the GWA until 27 October 2003. However, on analysis,

that delay was relied upon as explaining why LUL did not comply with its obligations under Schedule 5. It did not found an independent cause of action.

215. The Arbitrator clearly considered the GWA and the paragraphs of the Closing Submissions relied on by CTL. In particular, he referred in terms to the relevant part of paragraph 26.7 of CTL's closing submissions at paragraph 278 of the Award; he referred to paragraph 26.14 of the submissions at paragraph 279 of the Award and he referred to paragraph 26.17(ii) of the submissions at paragraph 280 of the Award.

216. In my judgment, the Arbitrator correctly identified the two limbs of CTL's case at paragraph 280(1) and (2) of the Award. The delay in entering into the agreement formed part of CTL's case that LUL was in breach of Schedule 5 and this was fully dealt with by the Arbitrator.

217. I do not consider that there is any irregularity. The Arbitrator properly analysed CTL's case and dealt with it. In addition, given the Arbitrator's findings on causation, it seems that even if CTL could have established that some claim had not been dealt with by the Arbitrator, CTL would have faced similar problems in proving causation relating to any breach. Again this makes it difficult for CTL to establish that substantial injustice was or would have been caused.

The 13 week period

218. In paragraph 20 of the Grounds of Appeal CTL state that "*LUL did not put forward the case for the credit in its pleadings, evidence or submissions. The Arbitrator did not seek submissions on the point. In the circumstances CTL rely upon sections 33 and 68 of the Act.*"

219. LUL submits that there was no irregularity in the Arbitrator finding that there was a 13 week period to be allowed because of mitigation. Although in its s. 68 application LUL contends that there was an irregularity in the Arbitrator's findings on delay, it submits that the 13 week period adopted by the Arbitrator was properly taken from CTL's pleaded case and evidence.

220. LUL submits that the Arbitrator's findings at paragraphs104(4) to (6) were taken from one of CTL's pleaded cases advanced in the Arbitration, that is the claim by Thales referred to at paragraph 122 of the Statement of Claim and contained in Appendices 25 and 25A to that pleading. LUL submits that the Arbitrator has adopted and relied on part of CTL's pleaded case and there is no serious irregularity in what the Arbitrator did.

221. CTL submits that the 13 week period has to be read in the context of the Thales' claim which related to a delay caused to the start to video testing and commissioning of the Corporate Line caused by delays at Brixton. CTL submits that the Arbitrator failed to ask whether, if he accepted CTL's case that delays to the provision of a supply of electricity at Edgware Road caused delay to commissioning there until the 18th July 2003, he should then in assessing delay caused over a different period at a different location caused by different breaches give a credit of 13 weeks simply because it had appeared in the Thales claim.

222. I do not consider that there is any merit in the distinction which CTL seeks to draw in relation to Thales' claim being in respect of Brixton and not Edgware Road. The relevant part of the claim in Appendix 25 was exhibited as Appendix C to CTL's Responsive Submissions on this application. It is evident from paragraph 4.2.1.5 and the table that although steps were taken to mitigate delays at Brixton, the mitigation

was not limited to Brixton. Rather it is pleaded that "*the sequence and timing for Corporate Line Commissioning and Handover has been changed in programme [UD15 Rev 3] from that planned in [UD07]*" and that the activity of "*Foreshortening of Commissioning and System Proving*" reduced the delay by 13 weeks. I accept, as LUL submits that this is a case where the Arbitrator adopted and relied on CTL's pleaded case and there was no irregularity in what the Arbitrator did.

Summary

223. For the reasons set out above I reject CTL's application under s. 68.

CTL's Application under Section 69

224. CTL seeks permission to appeal under s. 69 of the Act in respect of a number of challenges to the Award. That application raises some general points as well as specific issues relating to the individual grounds.

225. First, there is the question of the way in which CTL has chosen to phrase its application. As examples, CTL has phrased one issue in these terms: "*was the Arbitrator wrong in law in failing to hold that the dates in "UD07" were agreed by LUL?*" and another: "*did the Arbitrator err in law in holding in paragraph 137 of the Award that the "CMS obligation" only amounted to an obligation on the part of LUL to act with due diligence in providing the requisite cable mounting infrastructure?*". LUL submits, with justification, that the question of law has not been properly identified. This, in my view, is more than a formalistic objection. Under s. 69 of the Act, there has to be a question of law "*which the tribunal was asked to determine.*" In addition, one of the main issues on an application for leave is whether "*on the basis of the findings of fact in the award, the decision of the tribunal on the question is obviously wrong*".

226. Secondly, there is a question of whether a party can challenge findings of fact on the basis that there is an error of law in arriving at that finding of fact. I have dealt with that issue at paragraphs 60 to 65 above.

227. Thirdly, there is a general difficulty in CTL being able to show that the determination of the question of law would substantially affect the rights of the parties, as required by s. 69(3)(a). As dealt with in the application under s. 68, this difficulty arises because the Arbitrator held that CTL had not proved its pleaded global case on causation but, rather, as set out in Laing v. Doyle found that it was possible to find some delay had been established. In those circumstances, particularly given my conclusions on the s. 68 applications, the question is whether the question of law would substantially affect CTL's rights given the other findings in the Award.

228. Fourthly, there is the question raised by s. 69(3)(d). This requires the court to consider whether, despite the agreement of the parties to resolve their disputes in arbitration, it is "just and proper in all the circumstances" for the Court to determine the question of law. This requirement in s. 69(3)(d) was commented on at paragraph 290 of the Report of the DAC as follows:

> "*The Court should be satisfied that justice dictates that there should be an appeal; and in considering what justice requires, the fact that the parties have agreed to arbitrate rather than litigate is an important and powerful factor.*"

229. In this case there are three factors raised by LUL which, it says, does not make it just and proper in all the circumstances for the court to determine any question of law.

230. First, LUL relies on the nature of the dispute resolution process in the Connect Contract. It says that CTL and LUL agreed a detailed dispute resolution procedure in Schedule 28 to the Contract which did not include provision for the court to resolve matters. Instead they agreed a three tier process of referring the dispute to the Contract Manager then, if necessary, to adjudication and finally arbitration.

231. Secondly, LUL relies on the qualifications of the Arbitrator and the means of appointing him. The Arbitrator is a distinguished construction silk who is expressly listed in the Connect Contract as one of the 15 individuals whom the parties have agreed would be acceptable to act as Arbitrator.

232. Thirdly, LUL relies on the fact that Clause 15 of Schedule 28 of the Connect Contract makes express provision for the Award to be final and binding.

233. Taking those factors together, LUL submits that it is most unlikely to be just and proper in all the circumstances for the Court to grant leave to appeal within a complicated and detailed dispute resolution procedure, where a named individual who is a senior and well-known QC has been chosen to resolve the parties' disputes in a manner which they have agreed to be final and binding.

234. I consider that there is much in those arguments. Evidently, as identified in the DAC Report, s. 69(3)(d) requires that the court should be satisfied that justice dictates that there should be an appeal and in considering that, the fact that the parties have agreed to arbitrate rather than litigate is an important and powerful factor. The three features of the particular terms of Schedule 28 reinforce that factor. It seems to me that I would need compelling reasons to grant leave in the light of those considerations.

235. I now turn to consider the various grounds under the application for leave to appeal.

UDO7 Dates: Agreed Dates

236. I have already dealt with CTL's challenge under Section 68 above. In this ground CTL seeks to challenge the finding that the dates for completion of the EBW in UD07 were not agreed, by way of an appeal under Section 69.

237. In paragraph 6 of the Grounds of Appeal, CTL poses this question "*was the Arbitrator wrong in law in failing to hold that the dates in "UD07" were agreed by LUL?*". This, in itself, does not identify a question of law. Whether something is agreed may depend on a question of fact or law or a mixed questions both of fact and law.

238. The grounds state that the only reasonable inference from the primary facts found by the Arbitrator is that the dates were agreed and that a construction that the Milestone Dates in UD07 were binding but that the enabling works dates were not is a commercially improbable result. In addition, CTL contends that the Arbitrator's construction of the letter of 10 May 2002 was erroneous.

239. The issue is whether the UD07 dates were agreed as part of the ICR. It is quite clear from Attachment 4 to the ICR that it was only the Milestone Dates based on UD07 which were agreed. There is nothing to show that the parties intended any other dates to be agreed or intended to agree the EBW dates in programme UD07. On analysis, CTL's submissions based on inferences or commercial purpose seek to, but cannot, impose obligations which are simply not there. There is no basis for saying that the Arbitrator's construction of the ICR was wrong or obviously wrong.

240. Equally, the Arbitrator's reasons for rejecting CTL's construction of the letter of 10 May 2002, based on an analysis of CTL's change to the logic and dependencies of the EPC work in the following programme, UD08, cannot be faulted. He found that Mr Brookbank was referring to EPC work rather than EBW. There is nothing wrong or obviously wrong with the Arbitrator's construction of the letter of 10 May 2002 based on his findings of fact. Further, I do not consider that the determination of the meaning of this letter would substantially affect the rights of the parties. It would only be evidence and the Arbitrator held, for two further reasons, at paragraphs 120(1) and (2) of the Award, that the EBW dates in UD07 were not agreed.

UD07 Dates: Reasonable Dates

241. In paragraph 8 of Grounds of Appeal CTL poses the question "*did the Arbitrator err in law in failing to hold that the dates in UD07 were reasonable dates by which LUL should have completed the Enabling Works ("EBW") for which LUL was responsible save to the extent that LUL was in fact prevented from achieving such completion by reason of matters for which CTL was responsible?*". This does not identify a question of law. Whether dates are reasonable is essentially a question of fact but could amount to a mixed question of fact or law.

242. The grounds raise two reasons why CTL say that the dates were reasonable dates. First it is said that the EBW dates were reasonable dates because they were dates proposed by LUL. Secondly, it is said that they were reasonable dates because unless LUL achieved those dates and in particular the last date for EBW on each line, CTL would be unable to achieve the Milestone Dates contained in UD07.

243. It is then said by CTL that the Arbitrator's "construction" was contrary to paragraph 65(6) of LUL's Closing Submissions where it stated that "*LUL also accepts that UD7 illustrated a reasonable and realistic programme showing how CTL intended to achieve completion of the EPC Works by the revised Milestone Dates*".

244. Finally, CTL contends that the Arbitrator arrived at his construction by construing the contract in the light of subsequent actions by the parties. It states this: "*Having decided that CTL failed to keep to dates in UD07 for the production of designs, he should have decided that to the extent that that prevented LUL from doing their enabling works, LUL was not in breach; but instead he decided that CTL's failure had the effect that there was no obligation on LUL to do its enabling works in accordance with UD07.*"

245. CTL's alternative case, that the EBW completion dates in UD07 were reasonable dates, arose from CTL's alternative case as to the LUL Obligations. As set out in CTL's closing submissions at section 6, CTL's alternative case as to LUL's Obligations was essentially in terms that LUL should with due diligence comply with the Obligation when CTL reasonably required it. CTL's case was that the EBW completion dates in UD07 were the "yardstick" which showed the dates when CTL reasonably required LUL to provide the EBW.

246. The ground of appeal in fact arises from the Arbitrator's findings as to "UDO7 as a Yardstick" which he dealt with in paragraphs 221 to 236 of the Award. Essentially, the Arbitrator made general findings of fact that CTL had failed to keep the dates in UD07 for the production of the EPC design information (paragraph 226) and this caused delay to the EBW design and installation and that because of this it was not reasonable to expect LUL to complete the EBW by the dates set out in UD07 (paragraph 236). This undermined the contention that UD07 could be used as a

satisfactory yardstick for measuring LUL's time for performance of the EBW (paragraph 236).

247. On analysis, CTL's complaint is that the Arbitrator should have found that the EBW dates in UD07 were reasonable dates and that, only if LUL established that any of those dates were not achieved because of matters for which CTL was responsible, then those particular EBW dates would not be reasonable dates. This would leave all other dates as reasonable dates.

248. At paragraphs 223 and 224 of the Award, the Arbitrator considered the question of how to approach the issue of "UD07 as a yardstick". LUL had submitted that CTL's reliance on the EBW dates in UD07 being reasonable dates would "*be undermined to the extent that events which are the responsibility of CTL itself prevented LUL from achieving those dates*". LUL drew the analogy with global claims and submitted that if it could show that there were matters for which CTL were responsible which delayed EBW then this would undermine the basis for asserting that the EBW dates in UD07 were reasonable dates. At paragraph 224 of the Award the Arbitrator accepted that analogy and applied that approach. At paragraph 226 he summarised his conclusion as follows: "*I therefore hold that LUL has made out many of the points put forward in support of its contention that it was not reasonable to expect LUL to complete the EBW by the dates set out in UD07.*"

249. I have considered the analysis by the Arbitrator which, essentially, was that the dates in UD07 were undermined because:

(1) LUL had established many of the points which it relied to show that it was not reasonable to expect LUL to expect EBW to complete the EBW by the dates in UD07 works (paragraph 226). They showed significant delays caused by CTL, running in some cases to many months (paragraph 235).
(2) CTL had not established that LUL could and should have completed all of the EBW on any line by the last date for EBW completion shown for any station on that line (paragraph 233).
(3) UD07 was a programme which contemplated an orderly sequence and "*Delay was liable to ensue if there was material departure from the programme*" (paragraph 235).

250. On the basis of those findings of fact, the Arbitrator concluded in paragraph 236 that the dates for completion of the EBW in UD07 could no longer be regarded as a satisfactory yardstick for measuring LUL's performance of those obligations. He was entitled to decide whether the dates in UD07 were reasonable in the light of the circumstances and he did so. That is essentially a question of fact. There is no question of the Arbitrator construing the contract by reference to subsequent conduct. He was assessing the reasonableness of the dates in UD07 in the light of the relevant circumstances.

251. There does not seem to be a question of law. The Arbitrator approached the question of whether the dates were reasonable in the correct fashion and there was nothing wrong or obviously wrong in his approach.

252. Whilst the finding that CTL could not rely on the dates in UD07 as a "yardstick" would substantially affect CTL's rights in terms of its ability to prove breaches of LUL's Obligations, as stated above the overall effect has to be considered in the context of the failure of CTL's global claim.

The Cable Management System ("CMS") obligation

253. In paragraph 9 of the Grounds of Appeal CTL puts forward the following question: "*did the Arbitrator err in law in holding in paragraph 137 of the Award that the "CMS obligation" only amounted to an obligation on the part of LUL to act with due diligence in providing the requisite cable mounting infrastructure?*"

254. The "CMS obligation" is a reference to paragraph 11.2 of Schedule 40 to the Connect Contract which provided that: "*LUL shall make available to the Contractor for the Contract Duration cable mounting infrastructure of sufficient structural integrity and capacity to carry cabling required by the New System save that the Contractor shall provide cable clips which attach to existing cable mounting infrastructure where sufficient capacity is not available.*"

255. The Arbitrator dealt with the meaning of this obligation at paragraphs 124 to 137 of the Award. At paragraph 124 he set out CTL's submission on the CMS obligation as follows:

> "*(b) This LUL obligation was absolute but was relaxed to the extent that dates for completion of EBW were provided in UD07. CTL would not hold LUL liable for not complying with this obligation before such date.*
>
> *(c) Alternatively the dates for the completion of EBW in UD07 were agreed dates. LUL would not be liable for failing to meet this obligation before such date.*
>
> *(d) Alternatively, LUL should have with due diligence complied with the said obligation when CTL reasonably required it (which would be after CTL had identified the cables and their proposed route under Clause 59.1).*"

256. At paragraph 137 he concluded: "*I hold that the CMS Obligation amounted to an obligation on the part of LUL to act with due diligence in providing the requisite cable mounting infrastructure.*"

257. In summary, CTL contends that the obligation in paragraph 11.2 should not be construed as a due diligence obligation which is only found in Clause 59.1 of the Connect Contract. Rather, CTL submits that the obligation is in absolute terms and that the Arbitrator's construction fails to take account of the expressions "Contract Duration" and "cable mounting infrastructure" or the word "required" in paragraph 11.2. Taking these matters into account, CTL contends that the obligation was absolute and that CMS had to be provided from commencement.

258. LUL says that cable mounting infrastructure could not be provided at the commencement and so CTL's submission that LUL was obliged to have in place the necessary CMS as from the contract date, 19 November 1999 was not tenable. The obligation therefore had to be construed against the interrelationship between the EPC design and the EBW design and installation and the Arbitrator was right in his construction.

259. I do not consider that the Arbitrator's construction can be said to be obviously wrong. The wording of the CMS obligation gives rise to various difficulties which the Arbitrator considered and dealt with in coming to his decision on the construction of paragraph 11.2 of Schedule 40.

260. If the obligation had been absolute, in the sense contended for by CTL, then CTL would not have had the problems which arose in establishing a date for the obligation. Causation would, however, have raised similar difficulties in establishing when the

breach caused delay. I do not therefore consider that a determination in favour of CTL's construction would substantially affect CTL's rights.

Heating, Ventilating and Air Conditioning obligations.

261. In paragraph 10 of the Grounds of Appeal, CTL pose the question: "*did the Arbitrator err in law in holding in paragraph 190 of the Award that the "Resolution Document" imposed HVAC/HV obligations only upon CTL EPC?*"

262. At paragraph 190 of the Award the Arbitrator set out the full terms of the relevant HVAC section of the Resolution Document which referred to CECs/CERs (Communication Equipment Cabinets/Communication Equipment Rooms) and included the following provision in one bullet point:

> "*LUL to procure, install and take ownership of all air conditioning units in all CEC rooms, existing CERs and CER conversions (other than core CERs)*"

263. The Arbitrator then held, referring to the whole of the Resolution Document which he had set out: "*Given that this wording imposes HVAC obligations only upon CTL EPC, I am unable to accept CTL's submission that LUL was to provide positive ventilation in CERs or to provide HVAC in all CECs, CERs and CER conversions.*"

264. In its oral submissions CTL put this challenge at the forefront. It submitted that the only possible construction of Resolution Document, particularly taking account of the provision in the bullet point set out above, was that it placed all responsibility for HVAC upon LUL except that HVAC and Building Services designs for 28 locations were to be provided by CTL's EPC team; that CTL's EPC team were to update the Canada Water CEC room to CER status and that CTL EPC had some obligations in respect of core CERs but no other CERs (except Canada Water).

265. I do not consider that a question of law has been properly formulated. It should have related to particular obligations under the Resolution Document rather than as a question "*did the Arbitrator err in law in holding in paragraph 190 of the Award that the "Resolution Document" imposed HVAC/HV obligations only upon CTL EPC?*".

266. The submission on behalf of CTL in the arbitration related to the obligation to provide heating, ventilation and air conditioning (HVAC) and hydrogen venting (HV) to SDP spaces. They relied on the obligations under paragraph 12.4 of Schedule 40 to the Connect Contract; item 4 of Schedule B of VN105 and references in the Resolution Document. LUL accepted the interpretation of the obligations in Schedule 40 and Schedule B. The question was what obligations were added by the Resolution Document.

267. In paragraph 12.4 of Schedule 40 it provided that "*LUL shall permit [CTL] to use air for the purposes of ventilation and shall not knowingly interfere with any facilities for the ventilation reasonably required by the Contractor.*" Item 4 of Schedule B of VN 105 referred to paragraph 12.4 of Schedule 40 and provided: "*Augment HVAC in existing CERs containing LUL equipment to maintain temperature limits to CER Standard.*" LUL accepted those obligations and the question was what additional requirements, if any, were added by the relevant part of the Resolution Document.

268. The issue for the Arbitrator was whether LUL agreed to provide positive ventilation and HVAC in all CECs, CERs and CER conversions.

269. At paragraph 190 of the Award, the Arbitrator said that the wording of the Resolution Document imposed HVAC obligations only on CTL EPC. That was a general statement which had to be read in context. In terms of a comprehensive heating, ventilating and air conditioning obligation that was correct. His finding that LUL were not obliged to provide positive ventilation in CERs under the Resolution Document is not obviously wrong, nor is his finding that LUL was not obliged to provide heating, ventilating and air conditioning in all CECs, CERs and CER conversions. There appears to be an obligation in respect of some air conditioning but this does not apply to Core CERs. As a result, I do not consider that the Arbitrator was obviously wrong in his conclusions in paragraph 190.

270. In terms of whether the question of law will substantially affect the rights of the parties, CTL relies on paragraph 24 of the second witness statement of Ms Downey where she exhibits a letter dated 15 January 2007 in which LUL cites paragraph 190 of the Award. She adds: "*The project is continuing and there is already a second arbitration which is to be heard later this year relating to events in 2004/2005. The errors which the Arbitrator has made are having and will have a substantial effect on CTL's rights to payment both in completion of the project and in the forthcoming arbitration.*" The letter of 15 January 2007 refers, amongst other things, to the need for CTL to reformulate its claim in the light of the Award and under "*HVAC*" simply states "*Please refer to paragraph 190 of the award.*" No information is provided as to the claim in the forthcoming arbitration. In terms of the claim made in the present arbitration, Mr ter Haar accepted in his oral submissions that there was no evidence that a breach of the HVAC obligation caused significant delay to any of the lines in the Claim Period.

271. I am not satisfied from the general statement in Ms Downey's statement or the letter of 15 January 2007 that the questions of law will substantially affect the rights of the parties. No claim was made in this arbitration and there is no proper evidence of any future claim which might be affected by these questions of law.

Delay: material departure from UD07.

272. At paragraph 11 of the Grounds of Appeal CTL poses this question: "*did the Arbitrator err in law in holding in paragraph 235 of the Award (in the context of the sequence in which the works were to be carried out) that "delay was liable to ensue if there was material departure from the [UD07] programme"?*"

273. CTL puts forward three grounds for contending that there was an error in law:

(1) There was no evidence to support this conclusion. It was contrary to the evidence of LUL's witnesses and was not even LUL's case;

(2) The conclusion was contrary to his own findings at paragraph 67 that "*prior to commissioning, the work at any one station could be progressed independently of the work at any other*" and at paragraph 234 that "*it is part of CTL's case and it is not in dispute that, prior to line commissioning, work could be undertaken on the stations in any order*";

(3) The Arbitrator wrongly found (implicitly) that departure from the sequence in UD07 was caused by matters which were CTL's responsibility. There was no evidence to support this finding and it was contrary to the evidence which was placed before him, and contrary to his own findings at paragraphs 85(2) and (3) of the Award in which he found that the departure from the sequence in UD07 was as a result of decisions made by LUL or CTL's EBW team acting under LUL's direction.

274. At paragraph 17.19 of CTL's submissions this ground is developed and CTL set out its submission that "*the Arbitrator's findings in paragraphs 82, 83, 84, 226 and 235 were wrong in law as not being based on any evidence before him.*"

275. LUL submits that the underlying basis of this issue appears to be that there is an error of law in a finding of fact made by an arbitrator because the finding was contrary to the evidence. LUL submits that this is not a valid ground for appeal under s. 69. In any event, LUL submits that there is nothing obviously wrong in what the Arbitrator decided.

276. First, there is the question of whether this provides a ground for appeal under section 69 of the Act. As set out above, I do not consider that CTL can challenge the Arbitrator's findings of fact in this way as a "question of law" under s.69 of the Act.

277. In any event, I do not consider that there is anything in CTL's analysis of the Award. The Arbitrator's finding in paragraph 235 of the Award that delay was liable to ensue if there was material departure from the UD07 programme was one which, as he said, took account of his finding that work could be carried out in any order. However, as he said, programme UD07 contemplated an orderly sequence. The fact that, as he found in paragraph 67 "*work at any one station could be progressed independently of the work at any other*" and at paragraph 234 that " *work could be undertaken on the stations in any order*" did not mean that a programme such as UD07 did not contemplate the work being carried out in an orderly sequence. Equally, the fact that work could be carried out in any order did not mean that if there were a material departure from that orderly sequence in the programme there would be no delay. There is no inconsistency between the findings in paragraphs 67 and 234 and those in paragraph 235 and there is nothing obviously wrong in the Arbitrator's conclusion.

278. In relation to the suggestion by CTL that there was an implicit finding that departure from the sequence in UD07 was caused by matters for which CTL were responsible, it seems that this is not now pursued. In any event, it misunderstands the purpose of the Arbitrator's enquiry which was to see whether UD07 could be treated as a "yardstick" to establish the dates for the performance of LUL's obligations. The fact that there was a departure from the sequence in UD07 because of the decision to work on the "first 12" or the "priority 20" stations does not affect the need for the Arbitrator to consider whether, as CTL contended, the dates in UD07 represented reasonable dates for LUL to comply with EBW obligations.

279. Accordingly, I do not consider that this ground raises a question of law and therefore it is not something that can be pursued under s. 69 of the Act. In any event, I do not consider that the Arbitrator was obviously wrong.

Revocation of approval of an SDP at Bank/Monument

280. I have already dealt with and rejected a challenge under s.68 above.

281. In paragraph 13 of the Grounds of Appeal CTL put forward this ground under s.69: "*did the Arbitrator err in law in paragraphs 267, 268 and 298 of the Award in declining to consider breaches on the part of LUL or to award any extension of time in respect of the EBW at Bank/Monument station upon the grounds that a hold put on approval of a Service Delivery Point at that station was contained in a letter dated 30 October 2001, before the Claim Period which was the subject of the arbitration?*"

282. In paragraph 268 of the Award the Arbitrator held that "*approval to the SDP was revoked on 30 October 2001 but that was before the commencement of the claim*

period. The revocation was withdrawn on 10th June 2002."

283. CTL contend that the Arbitrator was obviously wrong in his conclusion that CTL could not pursue this claim. They submit that, although the claim period commenced on 1 November 2001, paragraph 11 of Attachment 1 to the ICR provided that "*any further delays in performing the work including commissioning will be subject to additional Interim Notices of Delay and Disruption, and any future claims will be covered by the issue of a Part 1 Notice of Delay.*"

284. The claim being made by CTL was based on the revocation of the approval for the location of the SDP at Bank/Monument. The location was approved in part on 11 April 2001 and in part on 17 September 2001. However CTL were informed that the application for space had been "put on hold". The Arbitrator held that this was a revocation of approval.

285. From the Table provided by CTL on 15 June 2006 it appears that CTL based the claim for revocation on paragraph 3.3 of Schedule 5 to the Connect Contract which provided that "LUL shall not withdraw any LUL Approvals…". CTL submits that this is a continuing breach which continued after 1 November 2001, within the claim period and that paragraph 11 of Attachment 1 to the ICR permits CTL to bring the claim in the arbitration.

286. LUL submits that the issue raised by CTL in its grounds does not in terms raise any question of law on the ICR. In any event, LUL submits that this is a case of a breach in revoking the approval, which is a "one-off event" and not a continuing breach. It also submits that it does not substantially affect CTL's rights.

287. The question, which is not properly articulated in the ground of appeal, relates to the impact of the ICR on the revocation claim and, in particular, whether the revocation which occurred before the Claim Period could give rise to a claim which continued or whether the revocation was a single breach or "one-off event" which occurred prior to the Claim Period. I do not consider that the Arbitrator was obviously wrong on his construction.

288. Further, I do not consider that the impact of this aspect of the claim is sufficiently pleaded for me to be satisfied that it substantially affects CTL's rights.

Delay in production of the Network Rail GWA.

289. I have already dealt with and rejected CTL's challenge based on s. 68 above.

290. At paragraph 16 of the Ground of Appeal, CTL puts forward the ground "*in paragraph [278] of the Award did the Arbitrator wrongly reject any case based upon delay in production of the General Works Agreement upon the basis that CTL did not [rely] in respect of Network Rail approvals on the basis of failure to implement the GWA or even upon failure to conclude the GWA earlier?*"

291. The ground is elaborated by saying that the Arbitrator's reasoning was "simply wrong" and referring to paragraphs 26.7, 26.13, 26.17(ii) and 26.18 of CTL's written Closing Submissions.

292. LUL submits that there is no question of law raised by an issue as to whether the Arbitrator's reasoning was wrong or not. Rather, LUL submits that the Arbitrator correctly analysed the breach of Schedule 5 to which the failure to sign the GWA was relevant.

293. I do not consider that this raises a question of law. At most there is an allegation of a failure by the Arbitrator to deal with a pleaded allegation because he misinterpreted CTL's submissions. In my judgment, that does not raise a question of law to which section 69 of the Act applies, nor does an assertion that the Arbitrator's reasoning was "simply wrong".

294. In any event, the Arbitrator was neither wrong nor obviously wrong. I consider that the Arbitrator properly interpreted CTL's submissions and that there was no independent cause of action based on a failure to enter into the GWA. Rather CTL's case proceeded on the basis that the failure led to a breach of the Schedule 5 obligation.

Yardstick: Jubilee Line up to 20 December 2002

295. In paragraph 17 of the Grounds of Appeal CTL puts forward the question: "*did the Arbitrator err in law in holding in paragraph 286 of the Award that in respect of delays to the Jubilee Line prior to 20 December 2002, CTL had not made out its case because CTL had failed to establish an acceptable yardstick by which to measure the progress which LUL ought to have achieved?*"

296. At paragraph 286 of the Award the Arbitrator stated that: "*On the first issue, I am driven to conclude that CTL has not made out its case because, for reasons already given, I take the view that it has failed to establish an acceptable yardstick by which to measure the progress which LUL ought to have achieved.*"

297. The Arbitrator was there dealing with the first issue which he had identified in paragraph 285 where he said: "*In respect of the period prior to the issue of VN 228 on 20th December 2002, the issue is whether LUL failed to proceed with due diligence in implementing the EBW.*" The Arbitrator was referring to his finding in paragraph 236 that the dates in UD07 could no longer be regarded as a satisfactory yardstick for measuring LUL's performance of its EBW obligations.

298. CTL also refers to paragraph 107 of the Award where the Arbitrator held that "*no EBW was carried out during the claim period on the Jubilee Line*" because "*at least in the period from 18th December 2002 all concerned were anticipating the instruction which ultimately materialised in the form of VN 228*". CTL submits that the Arbitrator should have found that he had a satisfactory yardstick and should have held that up to 20 December 2002, LUL caused the whole of the period of inactivity.

299. LUL says that there is no question of law and submits that this is a challenge to the factual conclusions in paragraph 286 which cannot be maintained under s. 69.

300. The issue is not phrased in terms of a question of law and I do not consider that a question of law, rather than one of fact, can be formulated. The question was what were the dates for LUL to carry out the EBW obligations. CTL relied on the dates in UD07 and had no fallback position: see paragraph 222 of the Award. The Arbitrator held that CTL could not rely on those dates. CTL relied as much on those dates for the Jubilee Line as any other line. Therefore CTL had not established what were the dates on which LUL should have complied with its EBW obligations which generally required LUL to act with due diligence. In any event, there is nothing obviously wrong in the Arbitrator's conclusions.

VN228: Delay to the Jubilee Line after 20 December 2002

301. This is a similar issue to that raised above but relates to the position on the Jubilee Line after 20 December 2002. At paragraph 18 of the Grounds of Appeal, CTL poses this issue: "*did the Arbitrator err in law in holding in paragraph 288 of the Award that in respect of delays to the Jubilee Line after 20 December 2002, LUL was not in breach of its obligation in Clause 59.1 to perform the EBW with due diligence because it did nothing in anticipation of a change to the Contract which it wanted or needed to order by way of a Variation?*"

302. In paragraph 288 of the Award the Arbitrator held that: "*Given the anticipation of the issue of VN 228, I am unable to accept that LUL can be said to have acted unreasonably.*"

303. The Arbitrator was there dealing with the second issue which he had identified in paragraph 285 where he said: "*In respect of the period [after 20th December 2002], the issue is whether the expectation that VN 228 would be issued in due course rendered LUL's inactivity on the EBW front unreasonable.*"

304. CTL submits that a need or a desire on the part of LUL to change the Contract cannot as a matter of law justify a finding that LUL was not in breach of its obligations to perform the EBW on the Jubilee Line.

305. LUL submits that there is no formulation of a question of law and that paragraphs 287 to 289 of the Award contain findings of fact.

306. The issue is not phrased in terms of a question of law. It is phrased as a question of breach arising under Clause 59.1 of the Connect Contract. The factual position was that LUL issued VN 228 on 18 December 2002 and called upon CTL to put forward proposals which it later did on 27 March 2003 and 4 September 2003. After further discussion and agreement, LUL issued the Authority Notice required by Clause 27.15 on 20 January 2004: see paragraph 106 of the Award.

307. The Arbitrator identified the issue which arose at paragraph 285 of the Award and answered the question of whether LUL acted reasonably at paragraph 288. I do not consider that there is a question of law. In any event, there is nothing obviously wrong in the Arbitrator's findings.

Reduction of 13 weeks from the extension of time.

308. In paragraph 19 of the Grounds of Appeal CTL raises the following question: "*did the Arbitrator err in law in holding in paragraph 330(7) of the Award that he should make a reduction of 13 weeks from the award of 61 weeks which he would otherwise have granted because of a potential saving in the time to be taken for Corporate Line commissioning at handover?*"

309. CTL sets out these further "grounds":

(1) There was no causal or logical connection between the possible 13 week saving in time required for Corporate Line commissioning at Handover and the 61 week delay which he found had been caused by breach of the Corporate Power Obligation.
(2) If credit was to be given in respect of that saving against delays in EBW, it should have been given first in respect of the 32 weeks (out of a total of 93 claimed) in respect of which no extension of time was granted.
(3) In any event, the 13 week saving was theoretical-it might never be achieved.

310. In its submissions CTL also says that the Arbitrator was wrong to give credit for savings in respect of potential later activities when assessing the effect of the breach.

311. LUL submits that there is no question of law but it is a question of fact as to whether there should be an allowance of 13 weeks for a "*saving that CTL and Thales were able to make by adjusting the sequence and timing of Corporate Line Commissioning at Handover*" as set out in paragraphs 104(6) and 330(7) of the Award.

312. I do not consider that any question of law has been properly formulated and I do not see that any such question could be formulated. The mere statement that the Arbitrator was wrong or erred in law does not give rise to a question of law. The Arbitrator found as a fact that there was a period of delay of 61 weeks but that a mitigation measure resulted in a time saving of as much as 13 weeks.

313. In any event, I do not consider that there is anything obviously wrong in the approach of the Arbitrator.

Extension of time in respect of breach of the SDP space obligation at Camden Town.

314. The question which is formulated in paragraph 21 of the Grounds of Appeal is this: "*the Arbitrator having held in paragraphs 259 and 260 of the Award that LUL was in breach of the SDP space obligation so that the EBW at Camden Town was not completed until 13 July 2005, did he err in law in failing to grant any extension of time in respect of that breach?*"

315. CTL sets out these further "grounds":

(1) The effect of the Arbitrator's findings of fact was that EBW was not completed at Camden Town until 13 July 2005.
(2) He had held at paragraph 85(5) of the Award that UD07 contemplated that enabling works would be complete at all locations by 24 February 2003.
(3) In the circumstances he was wrong to grant no extension of time in respect of the breach of the SDP Space Obligation at Camden Town.

316. At paragraph 337 of the Award the Arbitrator stated that he had held that LUL was in breach of a number of obligations; that such breaches were likely to give rise to delay but that the material before him did not establish further delay arising out of the breaches in question.

317. CTL seek to challenge that finding in respect of this and a number of other breaches, as set out below. In relation to the SDP space obligation at Camden Town CTL states that the Arbitrator found that:

(1) LUL were in breach of the SDP obligation at Camden Town;
(2) UD07 contemplated that EBW would be complete at all locations by 24 February 2003;
(3) Completion of EBW at Camden Town was evidenced by QCCs issued on 13 July 2005
(4) There was therefore a delay of 123 weeks from 24 February 2003 to 13 July 2005 caused by LUL.
(5) The matter should be remitted to the Arbitrator for him to consider the appropriate extension.

318. In oral submissions, I was taken to evidence and submissions to demonstrate that there was delay and so the Arbitrator should have granted extensions of time. Mr ter

Haar submitted that the conclusion reached at paragraph 337 of the Award was wrong and was a conclusion which no reasonable arbitrator could reach as the evidence showed that there was delay at stations, for example, on the Northern Line.

319. LUL submits that this whole approach of looking at the evidence and seeing what conclusions the Arbitrator might have reached is impermissible under s. 69 of the Act and that CTL's approach is not based on any questions of law. Rather LUL submits that the finding at paragraph 337 is a finding of fact and there is no question of law which can be formulated. LUL submits that, in the light of the dismissal by the Arbitrator of all of CTL's cases on causation of delay, CTL can hardly complain about the Arbitrator's findings of fact.

320. In relation to CTL's approach, I consider that LUL is correct is its submission that this is an impermissible approach under s. 69. What CTL is attempting to do is to treat the application as an appeal process where it can review all the evidence and submissions in an attempt to reverse the clear findings of fact which the Arbitrator has made in paragraph 337 of the Award.

321. The Arbitrator found that CTL had not established further delay arising from the breach which he had found. There is no question of law which CTL can pursue and, in any event, nothing obviously wrong in the Arbitrator's approach.

Extension of time in respect of breach of the Asbestos obligation at Warren Street.

322. This is a similar ground to the SDP Space obligation at Camden Town. The question which is formulated at paragraph 22 of the Grounds of Appeal is this: "*the Arbitrator having held in paragraph 272 that LUL were in breach of the asbestos obligation is not removing or treating the asbestos problem at Warren Street before the end of the Claim Period, did he err in failing to grant any extension of time in respect of that breach?*"

323. CTL submits that the Arbitrator's finding at paragraph 272 of the Award was that asbestos related delays at Warren Street were not resolved until 2 November 2004 and that the Arbitrator held at paragraph 85(5) of the Award that UD07 contemplated that enabling works would be complete at all locations by 24 February 2003. In those circumstances, CTL submits that the Arbitrator was wrong to grant no extension of time in respect of the breach of the Asbestos Obligation at Warren Street.

324. LUL submits that the Arbitrator made a finding of fact in paragraph 337 of the Award where he had held that LUL was in breach of a number of obligations; that such breaches were likely to give rise to delay but that the material before him did not establish further delay arising out of the breaches in question. LUL again submits that CTL's approach is impermissible under section 69 of the Act and that there are no questions of law.

325. As with the breach of the SDP Space Obligation at Camden Town, I consider that CTL's approach is impermissible under s. 69 of the Act. CTL cannot treat the application as an appeal process where it can review all the evidence and submissions in an attempt to reverse the clear findings of fact which the Arbitrator has made in paragraph 337 of the Award.

326. The Arbitrator found that CTL had not established further delay arising from the breach which he had found. There is no question of law which CTL can pursue and, in any event, nothing obviously wrong in the Arbitrator's approach.

Extension of time in respect of breach of the Information obligation at Willesden Green.

327. Again in paragraph 23 of the Grounds of Appeal there is a similar ground. The question formulated is this: "*the Arbitrator having held in paragraphs 274 - 275 that LUL was in breach of the information obligation in that information in respect of Willesden Green which should have been released by 1 November 2001 was not provided during the course of the Claim Period, did he err in law in failing to grant any extension of time in respect of that breach?*"

328. CTL submits that the Arbitrator found at paragraphs 274 to 275 of the Award that information in respect of Willesden Green which should have been released by 1 November 2001 was not provided during the course of the Claim Period and that the B3 pack was not issued until the 17th September 2004. CTL submits that this meant that the EBW could not be commenced and/or completed during the Claim Period. As a result CTL submits that, as the Arbitrator held that UD07 contemplated that enabling works would be complete at all locations by 24 February 2003, he was wrong to grant no extension of time in respect of the breach of the Information Obligation at Willesden Green.

329. Again, as with the breach of the SDP Space Obligation at Camden Town, I consider that CTL's approach is impermissible under s. 69 of the Act. CTL cannot treat the application as an appeal process where it can review all the evidence and submissions in an attempt to reverse the clear findings of fact which the Arbitrator has made in paragraph 337 of the Award.

330. The Arbitrator found that CTL had not established further delay arising from the breach which he had found. There is no question of law which CTL can pursue and, in any event, nothing obviously wrong in the Arbitrator's approach.

Extension of time in respect of breach of the Approval obligation at Wembley Park.

331. Again this is a similar ground. The question formulated at paragraph 24 of the Grounds of Appeal is this: "*the Arbitrator having held in paragraphs 293 and 294 that LUL was in breach of the approval obligation in respect of the B3(1) Pack for Wembley Park throughout the Claim Period, did he err in law in failing to grant any extension of time in respect of that breach?*"

332. CTL submits that the Arbitrator held at paragraphs 293 to 294 of the Award that LUL was in breach of the Approval Obligation throughout the Claim Period at Wembley Park and that although the B3 Pack was issued for approval on the 13th September 2001, LUL neither approved or rejected it during the Claim Period. CTL submits that this meant that the EBW could not be commenced and/or completed during the Claim Period. As the Arbitrator held at paragraph 85(5) of the Award that UD07 contemplated that enabling works would be complete at all locations by 24 February 2003. CTL submits that the Arbitrator was wrong to grant no extension of time in respect of the breach of the Approval Obligation at Wembley Park.

333. Again, as with the breach of the SDP Space Obligation at Camden Town, I consider that CTL's approach is impermissible under s. 69 of the Act. CTL cannot treat the application as an appeal process where it can review all the evidence and submissions in an attempt to reverse the clear findings of fact which the Arbitrator has made in paragraph 337 of the Award.

334. The Arbitrator found that CTL had not established further delay arising from the breach which he had found. There is no question of law which CTL can pursue and, in

any event, nothing obviously wrong in the Arbitrator's approach.

Summary

335. For the reasons set out in respect of each of the grounds of appeal I refuse leave to appeal under s. 69 of the Act.

336. Even if I had come to a different conclusion on any of the particular grounds, I do not consider that this is a case where I would have given leave to appeal taking account of the general reasons set out above. First, the questions of law are generally not properly identified. Secondly, given the general difficulties with causation, I am not satisfied, apart from the ground based on the 13 week allowance, that any question of law would substantially affect the rights of the parties. Thirdly, such questions of law as are raised do not satisfy the test under s. 69(3)(d) because I do not consider that it would be just and proper in all the circumstances for the Court to determine those questions of law.

Conclusion

337. For the reasons given above, I reject LUL's application under s. 68 of the Arbitration Act 1996 and CTL's application under s.68 of the Arbitration Act 1996. I also refuse CTL's applications for leave to appeal under s. 69 of the Arbitration Act 1996.