



Neutral Citation Number: [2025] EWHC 2497 (Comm)

Case No: LM-2024-000175

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/10/2025

Before :

PAUL MITCHELL KC

(sitting as a Deputy High Court Judge)

Between :

MHA ADVISORY LTD

Claimant

- and -

MR SHIRAN WYNTER

Defendant

**Mr Richard Leiper KC and Ms Katherine Eddy (instructed by Marriott Harrison LLP) for
the Claimant**

**Mr Stuart Benzie and Mr Matthew Tonnard (instructed by Michael Cummins
Employment Solicitors) for the Defendant**

Hearing date: 8 April 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 October 2025 by circulation to
the parties or their representatives by e-mail and by release to the National Archives.

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PAUL MITCHELL KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

PAUL MITCHELL KC:

Introductory

1. This is an application to set aside a final arbitration award made on 31 May 2024 (“**the Award**”) on the ground of alleged serious irregularity. In short, the Claimant characterises the arbitrator’s approach to certain issues as amounting to a dereliction of his duty: he has, it is said, declined to adjudicate upon the key conflict in the evidence before him. The Claimant contends that this alleged choice on the part of the arbitrator falls within Section 68(2)(a) of the Arbitration Act 1996 (“**the Act**”), in that it evidences a failure by him to comply with his general duty under Section 33 of the Act; and further or alternatively falls within Section 68(2)(d) of the Act, in that it evidences a failure by the arbitrator to deal with all the issues put to him. The Claimant contends that the only remedy possible in the circumstances is to set aside the award and remit the dispute to a differently constituted tribunal.
2. Given that the Claimant challenges the award pursuant to the provisions of Section 68 of the Act reviewed above, it brought the current claim as of right under Section 68(1). Were this to be an appeal on a question of law arising out of an award, the Claimant could only proceed in accordance with the provisions of Section 69, by seeking permission to appeal. I mention the well-known distinction between claims under Section 68 and appeals under Section 69 because the nature of the argument made by the Claimant here is characterised by the Defendant as a complaint that the arbitrator’s alleged choice amounted to an error of law on his part. I consider this further below.
3. The Claimant was represented by Mr Richard Leiper KC and Ms Katherine Eddy; the Defendant by Mr Stuart Benzie and Mr Matthew Tonnard. As was appropriate on a day-long hearing, I was addressed orally only by Mr Leiper and Mr Benzie, but I have no doubt that a great deal of teamwork went into their submissions, which were very helpful to me. I am very grateful to all counsel.

The facts

4. The Claimant was substituted by a consent order made on 4 August 2025 for the previously named claimant, MacIntyre Hudson LLP. The LLP was an accounting, auditing and business advisory firm of chartered accountants. The Defendant was until 31 July 2023 a member of the LLP. The terms of his membership were regulated by a Members Agreement (“**the Agreement**”) to which he subscribed on or about 1 October 2020 by way of a deed of adherence (“**the Deed of Adherence**”).
5. The Defendant entered the Deed of Adherence upon being promoted to a role within the business operated by the LLP described as “Associate Partner”. Although the Defendant joined an LLP, I understand that there were distinctions between members that mirrored a traditional partnership, in particular between equity partners and other types of partner. I do not have a full copy of the Agreement but I understand that it purported, at least, to apply in the same manner to all members, regardless of whatever titles or rights they might have arising outside the terms of the Agreement.
6. The Agreement contained, at Clause 27, provisions purporting to restrict the Defendant from various activities for two years from the date he ceased to be a member. Each partner

promised to the LLP and a group of companies owned or connected with it (“**the Internal Group**”) as follows:

- i) 27.1.1: the Partner will not within a period of 2 years from the Partner's Succession Date either on the Partner's own account or for or jointly in conjunction with or on behalf of any other person firm or company whether directly or indirectly solicit business, entice clients or interfere with the relationship between MH LLP and or any member of the Internal Group and its clients or any of them for any services supplied by MH LLP or any member of the Internal Group where such clients were receiving such services from MH LLP or any member of the Internal Group where such clients were receiving such services from MH LLP or any member of the Internal Group at any time during the period of 2 years prior to the Partner's Succession Date and with whom the Partner had material dealings during such 2 year period.
 - ii) 27.1.2: the Partner will not within a period of 2 years from the Partner's Succession Date either on the Partner's own account or for or jointly in conjunction with or on behalf of any other person, firm or company whether directly or indirectly act for, or provide services in competition with MH LLP or any member of the Internal Group to, any person, firm or body corporate which was a client of MH LLP or any member of the Internal Group at any time during the period of 2 years prior to the Partner's Succession Date and with whom the Partner had material dealings or which was a potential client of MH LLP or any member of the Internal Group at the Succession Date to whom MH LLP or any member of the Internal Group had presented or issued engagement terms during the 3 month period preceding the Succession Date and with whom the Partner had been materially involved.
 - iii) 27.1.3: the Partner will not within a period of 2 years from the Partner's Succession Date either on the Partner's own account or for or jointly in conjunction with or on behalf of any other person firm or company whether directly or indirectly solicit or endeavour to entice away offer employment or partnership to or enter into partnership with or employ any person who was at any time during the 2 years prior to such Succession Date a member of or employed by MH LLP or any member of the Internal Group.
7. For convenience, I refer hereafter to the restrictive covenants contained in these three clauses of the Agreement as “**the Covenants**”.
 8. It is not a matter of controversy that after 31 July 2023, the Defendant solicited and dealt with clients of the LLP and sought to and did in fact recruit members of the LLP’s staff to join him at a new company, Haines Watts Audit EM Limited (“**HWAEM**”). The Defendant was a director of and shareholder in HWAEM, which was incorporated on 14 November 2023 and which engaged directly in competition with the LLP. It is not disputed that, if the Covenants were enforceable, then the Defendant was in breach of them. On 25 January 2024, the LLP applied to the High Court for an injunction restraining the Defendant from acting in the same manner; in response to the application, the Defendant gave undertakings to the Court to adhere to the Covenants (save in respect of a specific list of clients and staff).

9. Clause 30.1 of the Agreement provides as follows:

“If at any time any dispute or question shall arise between the Partners (including any Outgoing Partner) about MH LLP or a member of the Internal Group or its Accounts or transactions or its dissolution or arising out of or in connection with this Deed or its validity construction or performance then the same shall be referred to an arbitrator to be nominated at the request of any Partner by the President for the time being of the Chartered Institute of Arbitrators and according to the provisions of the Arbitration Act 1950-1996 and the decision of the arbitrator (including a decision that MH LLP or a member of the Internal Group shall be wound up) shall be final and binding on all the Partners and any Outgoing Partner”

10. On 8 February 2024, the LLP and Defendant made a request to the President of the Chartered Institute of Arbitrators to appoint an arbitrator to adjudicate upon the question whether the Covenants were enforceable restraints of trade and, if so, whether the Defendant had acted, or threatened to act, in breach of them. On 7 March 2024, the parties were notified that Mr Michael Cover FCI Arb had been appointed.
11. Between 8 February 2024 and 12 March 2024, the parties prepared statements of case which raised numerous issues for determination. In summary, the Defendant contended first that in substance his status was that of employee rather than partner such that the Covenants could not be regarded as binding on him for various reasons. Second, and front and centre of the Defendant’s submissions, was the contention that the duration of the restrictions in the Covenants was “plainly and obviously unreasonable” (Points of Defence para 31, with particulars of unreasonableness at sub-paras 31.1 to 31.5). The Defendant’s case was that, if enforceable, the Covenants would prevent him from working in his chosen profession at all for two years (Points of Defence paras 28.3).
12. By its Reply, the LLP addressed various contentions of fact made by the Defendant, in particular disputing his assertion that he would not be able to follow his chosen profession for two years.
13. A preliminary meeting was held by Zoom on 12 March 2024, following which the Arbitrator made a procedural order on 20 March 2024. It seems that at the Zoom meeting it was agreed that, although witness evidence would be filed, the arbitration would not receive oral evidence and there would be no cross-examination. There was no formal direction made on 20 March 2024 that the hearing would comprise submissions only but in any event the parties were content to proceed on that basis. Understandably in view of the nature of the dispute, they wanted a decision as soon as possible and the hearing was scheduled to take place on 9 May 2024, with the final award to be handed down on 15 May 2024.
14. Before I consider the hearing and the Award, it is convenient to set out the complaint made by the LLP before me, as stated in the Claim Form:

“7. The reasonableness of the duration of the restrictions was the key issue in the claim and the basis upon which the claim was decided in the Defendant’s favour. It is dealt with at §§ 209 – 295 of the Award. At § 293, the Tribunal records its conclusion on the issue, viz. that the Tribunal had ‘decided, as a fact, that the 2 year restriction is too long and not reasonable and that therefore, in the result, the claim

fails and is to be dismissed. I am also finding as a fact that a covenant of much less far reaching duration would have provided adequate protection to the Claimant.

8. There are two sentences in the Award provided by way of analysis in support of that conclusion, at § 295: ‘With regard to the stickiness or otherwise of the client relationships and the length of the audit cycle, there is a conflict on the evidence and I am unable to decide that the 2 year Restrictions are reasonable on that basis, with the burden being, as agreed on the Claimant to establish that the Restrictions are reasonable. It is said that the Claimant and HWAEM are different firms, but on the evidence before me I am unable to make that distinction.’

9. The Award was vitiated by serious irregularity in that... the Tribunal... declined to adjudicate upon the key conflict in the evidence led by the parties as to the reasonableness of the duration of the Restrictions relating to client solicitation, interference and dealing [and] there was no engagement with or conclusion reached as to the evidence justifying the duration of the restrictions relating to staff”

15. I return now to the evidence before and submissions made to the Arbitrator.
16. The LLP filed three witness statements: one each from Mr Neil Berry, Ms Shelley Harvey and Mr Martin Herron. The Defendant filed just the one statement, from himself. In outline, the contentions made by these three witnesses regarding the duration of the Covenants were that:
 - i) Clients form strong relationships with partners (and do not know who is an Associate and who an Equity Partner); when partners leave, therefore, the LLP needed time to re-build relationships between existing clients and the partner replacing the departing partner (Mr Berry at paras 62, 89, 131, 133; Ms Harvey at paras 80 to 82; Mr Herron at paras 78 to 83 and 96).
 - ii) In support of the factual contention that it took two years to re-build relationships, Ms Harvey pointed to certain internal documents of the LLP’s that obliged retiring partners to start succession planning within two years of retirement and relinquish their status as relationship manager with a client no later than one year before retiring (Ms Harvey, para 80). She also said (para 82) that audits are “booked a year in advance”, and that planning for an audit started about a year out from the date auditors commenced work on an audit.
 - iii) The LLP’s confidential information regarding the packages offered to clients and employees was of such a nature that it needed the protection of a two-year moratorium on the Defendant’s making use of it, to prevent the Defendant gaining an unfair advantage in the market by exploiting that information (Mr Berry at para 153; Mr Herron at paras 90 to 92).
17. The evidence of the LLP’s witnesses on these questions comprised their personal observations on these topics, doubtless based on years of experience. In their statements they did not give any examples of specific factual situations that illustrated how both the LLP and Defendant would have appreciated at the time of the Deed of Adherence those facts that rendered the two-year period of the restrictions reasonable. The most they could do was point to what was said to be a consistency of approach across the LLP’s internal documentation (i.e., the succession planning and audit planning procedures).

These internal procedures did not in themselves cast much light on whether the restrictions in the Covenants were reasonably necessary.

18. The Defendant's evidence in support of his contention that the two-year period was simply too long to be reasonable was as follows:
 - i) The two-year period would prevent him from making a living in his chosen profession because he would not be able to obtain employment with another audit firm if subject to the Covenants. He asserted that no firm would be willing to employ someone subject to the restrictions due to the risk of litigation (statement, paras 51 to 52).
 - ii) As to the proposition that clients form strong relationships with partners, the Defendant's position was that the LLP's employees generally built the relationship with clients, and he contended that his own relationship with clients was just as strong before his promotion in October 2020 as it was after that (statement, paras 57 to 58).
 - iii) As to the proposition that two years was required to transition a client to a new partner, the Defendant simply disagreed that this was necessary and contended that even the LLP recognised that one year was sufficient (statement, paras 59 to 65).
19. As with the LLP's evidence, the Defendant's did not contain any specific examples of facts from practice that illustrated his assertions.
20. In short, the evidence for each party regarding the reasonableness of the time period in the Covenants was almost exclusively argument based on (prima facie plausible) assertions of fact. The arguments made by each were cogent, but none of the witnesses gave detailed particulars that might have supported their general assertions regarding why the two-year period was or was not necessary.
21. In the bundle before me was a transcript of the hearing on 9 May 2024. The transcript had been generated by Zoom and the parties accepted it was accurate enough for present purposes. Given that the only complaint made by the LLP before me concerned the Arbitrator's approach to determining whether the period of time in the Covenants was reasonable, I refer in this judgment only to a selection of passages of the transcript dealing with the reasonableness of the period.
22. The transcript records Mr Leiper's submissions on the weight to be given to Ms Harvey's evidence that the LLP usually booked audits one year in advance. The evidence before the Arbitrator was that the Defendant was able to organise with almost no notice an audit of a client that had moved from the LLP to his new employer, and at one point the Arbitrator said to Mr Leiper:

“You can probably gather I am baffled as to why it takes a year when Mr Wynter appears to be able to do it in minus one month”
23. Mr Leiper's argument was that the Defendant's new firm, HWAEM, was in a completely different position to the LLP: the LLP could legitimately claim to need a year to organise an audit, where (he contended) HWAEM could, indeed was obliged to, if it wished to survive economically, organise an audit with much less notice.

24. When Mr Benzie opened his case before the Arbitrator, he made clear that “enforceability is the only issue”, and that “we restrict our objection solely to the two-year point... we do not say that the terms of the clauses of themselves are unreasonable. We just say the period is unreasonable”. During his submissions, he referred to the absence of decided cases concerning restrictive covenants in LLP agreements, saying this:

“Again, for that reason... the reality is that nothing you’ve heard really helps you very much with whether or not two years is reasonable or not. Everything Mr Leiper said about confidential information, about the cycle of so on – the cycle of audit and so on, they get you to the point of saying, ‘Yes, there’s a legitimate interest to protect, and yes, it’s reasonable to protect it’. We don’t challenge that; we agree with that. The only evidence you’ve heard, and I’ll have to come to it in great detail towards the end of my submissions, is this issue about the audit cycle and preparing a year in advance and everything, and I’ll address you on that in due course. But we say at best that goes nowhere.”

25. Later, Mr Benzie turned to the principle that no-one is entitled to protection against fair competition, saying this:

“... the point is no one is entitled to protection against competition, and so any protection against competition, and I accept these aren’t – there is no non-compete clause here – but they are in essence, protection against competition because they’re protecting clients. Nobody’s entitled to that, and, in those circumstances, it’s for the claimant to show to you that the protection is reasonable and only what is reasonable. I say where they fall down is showing two years is reasonable. I say when you look at the evidence, and you look at the reasons, Mr Berry’s witness statement... I’m looking at paragraph 133, and he lists the reasons why things might take two years. So, emotional factors, retiring partners, emotions, client nervousness. Then he goes on to lack of preparedness, succession planning, the personality assessment, and then last, and you’d have thought what maybe should have come first, client relationships:

‘Transitioning clients involves more than just transitioning files; it requires building trust and understanding. In understanding the unique needs of each client, the process cannot be rushed’

Well again, what that’s setting out in my submission is rather a wish list of what a partner in any services firm would like to have. That’s not necessarily what they’re entitled to when what they’re benefitting from protection is against competition. Whilst they are entitled to protect their client relationships, it certainly isn’t the case that they’re entitled to a period that allows them to build trust and understand the unique relationship to each client. So what I say is, when you look at Mr Berry’s evidence, what you’re faced with is a situation where the claimant is asking for something which goes way outside the basic purpose of allowing the enforceability of clauses which would otherwise be [un]enforceable for breach of public policy”

26. Mr Benzie made much the same submission later in relation to the evidence of Mr Herron. As is self-evident, Mr Benzie’s submissions focussed on the arguments made by the witnesses for the LLP, with his principal counter-argument on behalf of the

Defendant being that what the LLP sought was an ideal environment in which to manage the effect of the departure of a member of the LLP; but what it was entitled to was only reasonable protection for its legitimate interests.

27. In relation to the reasonableness of the period provided for in the Covenants, Mr Benzie submitted this:

“I also say this, that a two-year restriction is exceptional and without very good justification it would be unreasonable. As I said, there is little guidance. The way things have been looked at is – I mean *Carmichael* [*Pricewaterhousecoopers LLP v Carmichael* [2019] EWHC 824 (Comm)] is – I say in terms of its legal content is of very little use to you, but it does give you an indication of a clause that was used by a major international professional services [firm]”.

28. Mr Benzie’s argument, again self-evidently, was that there was no justification to be found anywhere in the authorities for a period of protection as long as two years; and that if such a period were to be justifiable, there would need to be cogent and good reasons. In answer to that submission, the Arbitrator noted that the duration of the restrictive covenant in the *Carmichael* case was less than two years and concerned a much more senior person than the Defendant.

29. The final exchanges between Mr Benzie and the Arbitrator were as follows:

“Mr Benzie: We do not challenge anything other than the two years. I have given you the reasons, the purpose of the restrictions we accept is to protect legitimate interests. We do not challenge the interest in any way including confidential information, we just say two years is too long. Mr Berry talks about the client relationships, we have talked about that. We say what they are asking for, and the justifications they give for two years, are just – the evidence of Ms Berry and Mr Heron, and Ms Harvey all go too far. What they are asking for is the ideal commercial situation in which you have enough time to embed an absolutely rock-solid relationship with a client. not a situation where you just protect an initial relationship.

The Arbitrator: Actually, I suppose what you are saying, if I hear you right Mr Benzie, is two years is too long. You have made an open offer to accept a year but you have taken a view on that and you are not really saying a year’s ok, you just say you are prepared to accept as part of a negotiation conducted on an open basis, that you would settle there, right?

Mr Benzie: Yes... Duration is of great importance so unless the claimant can satisfy that two years is reasonable you should find –

The Arbitrator: Yes, that is my point there, isn’t it. The burden is on the claimant, yes, I think we are all agreed on that.”

30. At the end of Mr Leiper’s submissions in reply, the Arbitrator expressly checked with both counsel that each considered he had had a reasonable opportunity to present his case and deal with that made by his opponent; both counsel confirmed that they had. Had either of them wished to make further submissions, the whole of the following day had been set aside just in case, but in the circumstances that day was not needed.

31. On 31 May 2024, the Arbitrator issued the Award, which covered 42 pages of single-spaced type. As the LLP's solicitor explains in her statement in support of the current application, the reason for the change in date from 15 May 2024 was the time taken to produce the transcript of the hearing from which I have quoted extracts above.
32. In the Award, the Arbitrator recited the background facts and identified the issues in the arbitration. At paragraph 128, he recorded:

“By the time that it came to the Hearing, the Issue for the tribunal at this point had been narrowed down to: Are each of the Restrictions in Clauses 27.1.1, 27.1.2 and 27.1.3 enforceable, as the Respondent had agreed to provide suitable Undertakings, should the Restrictions be found to be enforceable”
33. He then recorded the submissions of the parties. There is no complaint that this record was in any way inaccurate having regard to the written and oral submissions made to him.
34. Section J of the Award was titled “Discussion and Findings on the Issues”. At paragraphs 272 – 276, the Arbitrator set out areas of common ground: that he had to consider the enforceability of the Covenants as at the date of the Deed of Adherence; that there was no dispute the LLP had a legitimate interest in protecting the interests particularised in the Covenants; and that he had to decide whether the restrictions contained in the Covenants were reasonable. As to resolving that latter dispute, he said there were two stages:
 - i) First, he had to decide if the Defendant was of “sufficient position and status so that it was reasonable for the Restrictions to apply to him”; and
 - ii) Second, “the tribunal then has to look at the reasonableness or otherwise of the period of the Restrictions, at 2 years, although these two aspects are closely linked”.
35. The Arbitrator considered the first of those stages between paragraphs 277 and 288. After a careful analysis of the evidence, the Arbitrator expressly found as a fact that the Defendant was indeed of such position and status within the LLP's organisation that the Covenants could prima facie apply to him.
36. Between paragraphs 289 and 296, the Arbitrator addressed the reasonableness of the duration of the restrictions contained in the Covenants. It is convenient to set out those paragraphs in full:

“The reasonableness or otherwise of the Duration of the Restrictions

290. The tribunal now turns to the reasonableness or otherwise of the duration of the Restrictions. I note in passing that the Restrictions are not what might be called non-competes: they are restrictions on dealing with certain clients of the Claimant and also not soliciting staff of the Claimant and also relating to the confidential information. The last point has been dealt with by the [Defendant] giving undertakings.

291. The [Defendant] submits that the Restrictions prevent him from earning a living in his chosen profession. There is no evidence to that effect. For example,

there is no evidence from the [Defendant's] new firm that the Restrictions are damaging the part of its business with which the [Defendant] is involved. I therefore find as a fact that the Restrictions have not prevented the [Defendant] from earning a living in his chosen profession.

292. It is common ground that the tribunal's task is now to decide whether the 2-year period in the Restrictions is reasonable. I am unable to decide whether, for example, a shorter period might be reasonable and hence enforceable. It is also common ground that I make the above decision in my discretion.

293. Taking that into account, I have decided, as a fact, that the 2 year restriction is too long and not reasonable and that therefore, in the result the claim fails and is to be dismissed. I am also finding as a fact that a covenant of much less far reaching duration would have provided adequate protection to the Claimant.

294. In reaching that conclusion, I have not found the Department of Business and Trade Report on Non-Compete Clauses of much assistance, as this Report, which recommended a maximum restriction of 3 months, related only to contracts of employment, which is not what we have here, and to non-competes, which is also what we do not have here.

295. I have also not found much assistance in the authorities, which have been very [ably?] presented to me. It is common ground that there are really no authorities on restrictions in LLPs. The only exception is the *PWC v Carmichael* case... which was of course an interim decision of the Court. Even there, the restriction was at most 15 months, being 9 months garden leave and 6 months restriction, in aggregate less than the 2 years that are sought to be enforced in this arbitration. With regard to the stickiness or otherwise of the client relationships and the length of the audit cycle, there is a conflict on the evidence and I am unable to decide that the 2 year Restrictions are reasonable on that basis, with the burden being, as agreed, on the Claimant to establish that the Restrictions are reasonable. It is said that the Claimant and HWAEM are different firms but, on the evidence before me, I am unable to make that distinction.

296. At the Hearing, Mr Benzie for the [Defendant] indicated that the [Defendant] was requesting a Declaration that the Restrictions were unenforceable. As this was not in the [Defendant's] Points of Defence, I am not giving such a Declaration, but in what are described as the Holdings of this Award, I am setting out what amounts to a recital to that effect.”

37. The claim form in these proceedings was issued on 28 June 2024.

The Court's jurisdiction under Section 68

The jurisdiction to intervene where there has been serious irregularity

38. Section 68 of the Act provides, in relevant part, as follows:

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

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(a) failure by the tribunal to comply with section 33 (general duty of tribunal)...

(d) failure by the tribunal to deal with all the issues that were put to it...”

The restrictions on a party invoking the Court’s jurisdiction

39. The restrictions referred to in Sections 70(2) are as follows:

“(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).”

40. Section 57 provides, in relevant part:

“Correction of award or additional award.

(1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may on its own initiative or on the application of a party—

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.”

41. The LLP did not apply to the Arbitrator to clarify or remove any ambiguity in the Award. As noted above, it issued the claim form in these proceedings within 28 days of the Award being issued, stating in the claim form that it had “no available recourse pursuant to Section 57” of the Act. The LLP’s solicitor said in her witness statement in support of the current application that “the irregularity in issue in this application is fundamental to the decision reached in the Award and is accordingly not capable of correction under s 57 AA 1996”.

42. The Defendant’s immediate response to the LLP’s application was to apply for an order that the claim be dismissed without a hearing. Technical defects in that application led His Honour Judge Pelling KC to dismiss it on 14 October 2024, with the costs of the application being reserved to the conclusion of the claim; but even though the application was dismissed, it can be seen from it that the Defendant not only vigorously resisted the

suggestion that there is any irregularity, let alone a serious one, but also insisted that the LLP has simply misread or misunderstood the Award. The Defendant maintained that position at the hearing before me.

43. Although the Defendant has never formally invited the Court to consider whether the LLP had any available recourse under Section 57 of the Act; and although the LLP declared in its Claim Form and supporting evidence that it had no available recourse under Section 57, it nevertheless seems to me that, in view of the contentions made by the Defendant to the effect that the LLP has simply misread or misunderstood the Award, I am obliged to consider that question as part of ascertaining whether I have jurisdiction to consider the LLP's application under Section 68.
44. It is well established that if an award contains an inadequate rationale or incomplete reasons, then it is likely to be ambiguous or to require clarification; a state of affairs which falls precisely within the ambit of Section 57(3)(a) of the Act: see *Al-Hadha Trading v Tradigrain* [2002] 2 Lloyd's Rep 512 per HHJ Havelock-Allen QC at [70] and [71] and *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm) per Cooke J at [26] and in particular at [28]:
- “... It seems to me that section 57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist. The policy which underlies the Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the Court. Torch contended that it was clear the arbitrator had not decided the issue and that therefore there was no ambiguity in the award which required clarification, but the very existence of a genuine dispute on this question militates against that argument. If there was unarguably a clear failure to deal with an issue, it could be said that there was no ambiguity in the award, but as set out in *Al-Hadha* at paragraph 70, an award which contains inadequate rationale or incomplete reasons for a decision is likely to be ambiguous or need clarification.”
45. I have set out already above at paragraph 14 the LLP's basis for making this application under Section 68, but the key phrases bear repeating:
- “7. The reasonableness of the duration of the restrictions was the key issue in the claim and the basis upon which the claim was decided in the Defendant's favour. It is dealt with at §§ 209 – 295 of the Award...
8. There are two sentences in the Award provided by way of analysis in support of that conclusion, at § 295...
9. The Award was vitiated by serious irregularity in that... (i) The Tribunal... declined to adjudicate upon the key conflict in the evidence led by the parties as to the reasonableness of the duration of the Restrictions relating to client solicitation, interference and dealing [and] (ii) There was no engagement with or conclusion reached as to the evidence justifying the duration of the restrictions relating to staff”
46. It seems to me that the wording of the Claim Form itself suggests that the complaint is actually that the Award lacked sufficient reasons for the key decision: the complaint appears to be that there were only two sentences provided by way of analysis. The case made on the Section 68 application, however, is that the said two sentences themselves evidence a fundamental dereliction of duty on the part of their author, and I accordingly

postpone reaching a final conclusion on the question whether the LLP could have had recourse under Section 57 until I have considered the application under Section 68, to which I now turn.

The test for serious irregularity under Section 68

47. The Departmental Advisory Committee report on Clause 68 of the draft bill is often cited in the authorities in this area of the law as giving a helpful guide to the intended effect of the section (see, for example, *Torch Offshore* (above), per Cooke J at [21] and *Fidelity Management SA v Myriad International Holdings* [2005] EWHC 1193 (Comm), [2005] 2 All ER (Comm) 312, per Morison J at [5]):

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

48. As is clear from the wording of Section 68(2), an irregularity can take a number of forms; and it is only serious if it has caused or will cause substantial injustice to the applicant. It was common ground before me that the threshold to be surmounted to establish serious irregularity within the meaning of Section 68 generally was a very high one.
49. The first irregularity identified by the LLP is an alleged failure by the Arbitrator to comply with the general duty imposed on him by Section 33 of the Act. That section provides:

General duty of the tribunal.

(1) The tribunal shall—

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

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

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

50. In *Terna Bahrain Holding Company v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 All ER (Comm) 580, Popplewell J, as he then was, distilled from the authorities the following principles regarding irregularities of the type referred to in Section 68(2)(a):

“(1) In order to make out a case for the Court's intervention under s. 68(2)(a), the applicant must show:

(a) a breach of s. 33 of the Act; i.e. that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined;

(b) amounting to a serious irregularity;

(c) giving rise to substantial injustice

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

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

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

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

(6) The requirement of substantial injustice is additional to that of a serious irregularity, and the applicant must establish both.

(7) In determining whether there has been substantial injustice, the Court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome”

51. The second irregularity identified by the LLP was that identified in Section 68(2)(d) of the Act, covering a situation where a tribunal has failed to “deal with all the issues that were put to it”. In *Fidelity Management SA* (above), at [9], Morison J provided the following summary of propositions extracted from an earlier decision of Colman J, *World Trade Corp Limited v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2004] 2 All ER (Comm) 813. Morison J’s summary of Colman J’s judgment has since been adopted by Ramsey J in *London Underground Limited v Citylink Telecommunications Limited* [2007] EWHC 1749 (TCC), [2007] 2 All ER (Comm) 694 at [42], and I too respectfully adopt the summary as setting out the relevant considerations:

“(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 –

‘s 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 [see s 70(4) of the Act]. It is accordingly self-evident that: (i) failure to deal with an “issue” under s 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; (ii) Parliament cannot have intended to create co-extensive remedies for deficiencies of reasons one of which (s 68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (s 70(4)) was designed to provide a specific remedy for a specific problem; (iii) 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.’ (See [2004] 2 All ER (Comm) 813 at [19]).

(5) Accordingly, s 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.’ (See [2004] 2 All ER (Comm) 813 at [20].)”

The LLP’s argument

52. The LLP’s argument stands or falls on the factual contention that at paragraph 295 of the Award, the Arbitrator acknowledged that there was a conflict in the evidence regarding the reasonableness of the duration of the restrictions contained in the Covenants, but he professed himself “unable to resolve” that conflict and thus concluded that the LLP had not made out its case that the duration of the restrictions was unreasonable. Based on this predicate, the LLP argued that:
- i) The Arbitrator’s approach was “manifestly unfair to the Claimant and a serious abdication of [his] responsibilities”. In support of that proposition, Mr Leiper referred me to various authorities concerning the circumstances in which a court would be entitled to dispatch a disputed issue of fact by resort to the burden of proof.
 - ii) The Arbitrator’s finding of fact at paragraph 293 of the Award that the two-year period was unreasonable was manifestly unfair, because the basis upon which the Arbitrator approach the business of weighing the evidence was manifestly unfair.
 - iii) The irregularity has caused substantial injustice, in that but for the alleged irregularity, the outcome of the arbitration might well have been different.
53. The Defendant’s submissions were that:
- i) To the extent the Arbitrator found that the evidence led by the LLP did not satisfy him that the duration of the restrictions in the Covenants was reasonable, there was nothing objectionable in such an approach. The Arbitrator clearly had formed a view on whether the time period was reasonable and in forming that view he was not persuaded by the LLP’s evidence.
 - ii) The Arbitrator clearly did engage with all the submissions made by the parties and the evidence led by them, as demonstrated by the structure of the Award, which extensively recited the evidence and submissions.
 - iii) The Arbitrator clearly had dealt with the issues which were put before him and there was no issue left unaddressed.

Analysis

54. It is self-evident from the Award that the Arbitrator had turned his mind to every fact presented to him and every submission made: he recorded all of them, including the arguments made by each party regarding whether the two-year period was reasonable or not. When he came to expressing his conclusion on reasonableness, it is certainly the case that he did so very shortly: he stated at paragraph 292 of the Award that his conclusion on the question was a matter for his discretion and then simply said at paragraph 293 what his conclusion was.

55. If the Arbitrator had articulated the factors he had taken into account when reaching his conclusion as to reasonableness and supported it with a list of those factors, then I do not see how the current application could have been made. The indisputable fact is, however, that he certainly did make a determination on the issue put before him and he clearly had considered the arguments made to him.
56. What the Arbitrator said in paragraph 295, in my judgment, was an explanation as to why he was not accepting the case made by the LLP that the duration of any of the restrictions was reasonable:
- i) He seems to me to have considered that the duration of the period of restriction in the *Carmichael* case supported his conclusions regarding the two-year period in the instant case: he expressly mentioned that case and expressly noted that the period there was 15 months.
 - ii) He stated that each party had expressed different views on whether client relationships were, to use his phrase, “sticky”. In this, he was correct: see paragraphs 16 to 18 above.
 - iii) His statement “I am unable to decide that the 2 year Restrictions are reasonable on that basis, with the burden being, as agreed on the Claimant to establish that the Restrictions are reasonable” seems to me to mean that he was unpersuaded by the LLP’s evidence that the period was reasonable because there was evidence from the Defendant that went in the opposite direction and he was not prepared to conclude that the LLP’s evidence – which was, after all, mainly argument and opinion in any event – gave a safe enough basis for concluding that the two-year period was reasonable to protect the LLP’s interests.
 - iv) I do not accept that the Arbitrator’s phrase “I am unable to decide” can reasonably be read as amounting to an acknowledgment that he was declining to adjudicate upon a conflict of evidence. If the Arbitrator had wanted to say that he was unable to reach a decision at all, then he would have said so; but he was actually saying that he was not prepared to accept the LLP’s evidence as decisive of the reasonableness of the two-year period.
 - v) His statement that “it is said that the Claimant and HWAEM are different firms, but, on the evidence before me, I am unable to make that distinction” seems to me to mean that he remained “baffled” by the contention that the Claimant needed one year to organise an audit whereas the Defendant’s new firm, HWAEM, could organise an audit in a far shorter period. As I understand it from the context I have reviewed above, what the Arbitrator was saying here was that he could not accept arranging an audit could take so long.
57. Although the Arbitrator’s observations about the lack of difference between the LLP and HWAEM are couched in terms of rejecting the LLP’s contentions to the effect that there was such a difference, it is clear that he was not persuaded there was any relevant difference that would explain why HWAEM could prepare for an audit in a few weeks and yet the LLP required an entire year. If there was no relevant difference between the LLP and HWAEM in this respect, it would also follow that there was no need for a two-year restriction to prevent the Defendant from soliciting or dealing with the LLP’s clients after he had ceased to be a member of the LLP: the Arbitrator was effectively rejecting

the LLP's case that it needed a year to prepare for audits and thus rejecting one of the building blocks of its case that it needed the protection of a two-year restriction on the Defendant's post-membership dealings with clients of the LLP.

58. In my judgment, the LLP's contentions regarding what the Arbitrator said in the Award were simply wrong. The Arbitrator was asked by the parties to proceed at speed to reach a conclusion on the questions put to him and he gave a clear answer: the duration of the restrictions was not reasonable in all the circumstances.
59. It could be said that it is not clear from the Arbitrator's approach of looking at the two-year period contained in each Covenant compendiously, rather than on a Covenant-by-Covenant basis, whether he had in fact determined that the two-year period in each Covenant was not reasonable. It seems to me clear from the Award that he intended to say the two-year period in each and all of the Covenants was unreasonable; and to the extent that there might be questions regarding any particular Covenant, these could have been made as part of a request for clarification.
60. In my judgment, the LLP could legitimately have asked the Arbitrator to unpack further his conclusion that the two-year period in the Covenants was not reasonably necessary to protect the LLP's legitimate interests. I consider that the LLP's assertion in the unamended Claim Form that it had no available recourse under Section 57 of the Act was wrong. That assertion is predicated on the contention made in the witness statement in support of this application to the effect that "the irregularity is fundamental to the decision reached"; but that is not a relevant consideration in assessing whether the Award could be clarified, with the possible result that any perceived irregularity would be cleared up by further explanation. The assertion that there was an irregularity at all flows from the LLP's interpretation of what the Arbitrator said; but if clarification had been sought and provided, then the assertion of irregularity could not have been made.
61. Furthermore, even if the Arbitrator had made his decision as to reasonableness entirely on the basis that the LLP had failed to prove its case, such a decision would be open to challenge not under Section 68 of the Act but under Section 69. A decision to proceed in a certain way regarding the weight to be placed on evidence is a judicial decision, as the cases cited by the Claimant show (*Re A (Children) (Care Proceedings: Burden of Proof)* [2018] EWCA Civ 1718, [2018] 4 WLR 117; *Stephens v Cannon* [2005] EWCA Civ 222). In the event the Arbitrator had made the decision he is accused of making he would not have been failing to comply with his duty under Section 33 of the Act; he would have been loyally complying with it but, arguably, getting the law wrong.

Conclusion

62. I have held that it was open to the LLP to ask the Arbitrator to clarify what he meant. The LLP clearly could have done this, as it managed to assemble its claim to this Court in the time period within which it could have applied to the Arbitrator under Section 57(3)(a). Accordingly, in my judgment, the LLP had available recourse under Section 57 which had not been exhausted; and thus, pursuant to Section 70(2), the LLP could not bring the current application at all.
63. In case I am wrong about the threshold issue, I also address the Section 68 application.

64. I have rejected the LLP's interpretation of what the Arbitrator was saying in the Award, from which it follows that I also dismiss the LLP's application under Section 68(2)(a). I have also rejected the contention that the Arbitrator failed to address all the issues put before him, and accordingly I dismiss the application under Section 68(2)(d).
65. As the authorities consistently have made clear, Section 68 of the Act exists to provide a protection of last resort for a party in the extreme event an arbitral tribunal has gone so wrong that justice cries out for the Court to intervene. In my judgment, the LLP's application here was abusive of the right to bring an application of last resort:
 - i) The LLP could have sought clarification of the Award from the Arbitrator before launching into the expense of this challenge;
 - ii) The application involved making serious allegations against the Arbitrator of effectively being so incompetent that he had perpetrated a serious injustice. As I trust is clear from this judgment, although it might be said that the Arbitrator could have expressed himself more clearly (and I make even that mild critique with all due respect for him), the contention that he was in dereliction of his duty is patently wrong and in my view was unjustified having regard to the well-known very high threshold for invoking Section 68.
66. I invite the parties to agree a form of order and if possible to agree an appropriate costs order. If a further hearing is necessary, one can be organised for the convenience of the parties after handing down of this judgment.