Case No: A3/2005/2844

**Neutral Citation Number: [2006] EWCA Civ 1340**
**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM QUEEN'S BENCH DIVISION, COMMERCIAL COURT**
**MR JUSTICE CRESSWELL**

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 16th October 2006

**Before :**

**SIR ANTHONY CLARKE (MR)**
**LORD JUSTICE RIX**
and
**LORD JUSTICE LONGMORE**

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**Between :**

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| **CGU International Insurance Plc & ors** | **Applicant** |
| **- and -** | |
| **AstraZeneca Insurance Co Ltd** | **Respondent** |

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(Transcript of the Handed Down Judgment of
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Mr Colin Edelman QC & Mr David Edwards (instructed by Messrs Mayer Brown Rowe & Maw LLP) for the Applicant
**Mr Christopher Butcher QC & Mr Stephen Kenny** (instructed by **Messrs Lovells**) for the Respondent

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# Judgment

**Lord Justice Rix :**

1. This is an application for permission to appeal, on notice, with appeal to follow if permission is granted. The application for permission to appeal is in itself highly contentious, for the respondents submit that there is a statutory and thus jurisdictional bar on any possibility of this court, the court of appeal, granting permission to appeal or entertaining any form of appellate proceedings in circumstances where the judge did not give permission to appeal himself: see section 69(8) of the Arbitration Act 1996. The applicant, however, submits that there is court of appeal authority, namely *North Range Shipping Ltd v. Seatrans Shipping Corporation* [2002] EWCA Civ 405, [2002] 1 WLR 2397, which allows a residual discretion to permit an appeal, despite the judge's refusal of permission, where that refusal can be challenged on the grounds of unfairness pursuant to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). The appellant submits that there was such unfairness here. The respondents on the other hand submit that *North Range* was decided *per incuriam* and is wrong, and should not be followed; and that in any event, what is dressed up as a challenge to unfairness below is in truth nothing more than a complaint that the judge erred in refusing permission.

*Section 69(8) of the Arbitration Act 1996*

2. Section 69(8) is one of a number of provisions of the Arbitration Act 1996 (the "1996 Act") which limit the right of appeal to cases where the first instance judge himself gives leave to appeal. (The 1996 Act, preceding as it does the CPR, uses the expression "leave" where the CPR now speaks of "permission".)

3. Section 69 is concerned with appeal from arbitration awards. It enacts a concern, in the interests of party autonomy, privacy and finality, that such awards should not be readily transferred to the courts for appellate review. Therefore, an appeal to the (first instance) court can only be brought with leave and only if a number of conditions are met, eg the decision of the tribunal on a point of law is "obviously wrong" or that "the question is one of general public importance and the decision of the tribunal is at least open to serious doubt" (section 69(3)). If leave to appeal to the court is refused, then an appeal to the court of appeal from that refusal can only be granted by the first instance court, unless that court itself gives leave to appeal from its refusal of leave. Thus section 69(6) provides:

> "(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal."

Section 69(2) also provides that

> "(2) An appeal shall not be brought under this section except…with the leave of the court."

4. "The court" in those subsections and elsewhere means the court of first instance: see section 105 of the 1996 Act, *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* [2001] QB 388 and *Athletic Union of Constantinople v. National Basketball Association (No 2)* [2002] EWCA Civ 830, [2002] 1 WLR 2863.

5. In this case we are concerned with section 69(8) which deals with the situation where what is in consideration is a further appeal to the court of appeal from the decision of the court of first instance on the merits of the appeal from the arbitrators' award. Thus –

> "(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.
>
> But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

6. There is a similar provision under section 68, which provides for the possibility of challenging an award for "serious irregularity affecting the tribunal, the proceedings or the award". Thus, under section 68(4):

> "The leave of the court is required for any appeal from a decision of the court under this section."

7. Section 67, which is concerned with challenging an award on the ground of the arbitral tribunal's lack of substantive jurisdiction, also contains, in its subsection (4), a provision in identical terms to section 68(4).

8. It is therefore common ground in this case that, without the commercial court judge's leave to appeal, the merits of his decision on the appeal to him from the award, cannot come before this court. And it is also common ground that, as a corollary of the need for leave to appeal from the judge, this court cannot entertain an appeal, or an application for permission to appeal, on the merits of the judge's decision to refuse leave to appeal: *Lane v. Esdaile* [1891] AC 210, itself applied in *Henry Boot*. As Tuckey LJ said in *North Range* (at para 11): "What is clear is that there is no appeal from the judge's refusal to give leave on the merits."

9. The issue is whether the residual discretion, to consider where necessary the fairness of the judge's refusal of leave to appeal, in the event of a breach of article 6 of the Convention, propounded by this court in *North Range*, survives the *per incuriam* submission made to us; and if it does, assists the applicant on the facts of this case.

*The underlying dispute between the parties*

10. The applicant is AstraZeneca Insurance Company Limited, a wholly owned subsidiary of AstraZeneca plc and a captive insurer of the group's property, business interruption and liability insurance ("AZICL"). The respondents are a group of insurance or reinsurance companies, lead by CGU International Insurance plc ("CGU") and Royal & Sun Alliance Insurance plc ("RSA"). For convenience, I will refer to the respondents as the reinsurers.

11. In 1997 AZICL insured the group companies under a worldwide Excess Liability Policy ("ELP") and reinsured with the reinsurers. The ELP contained no express choice of law; the reinsurance contract expressly referred to English proper law. It has always been common ground, however, that the ELP was also governed by English law as its proper law.

12. For relevant purposes, the cover granted by the ELP and reinsured with the reinsurers was liability to pay "damages on account of (a) Personal Injuries [and] (b) Property Damage".

13. The ELP contained a "USA Service of Suit" clause relating to insureds operating in the USA. Such a clause bound such insureds to submit to a court of competent jurisdiction within the USA. The reinsurance contract contained a London arbitration clause.

14. The ELP contained a "follow the fortunes" clause, but no "follow the settlements" clause. It is said that whereas the former would or might bind the reinsurers to pay in respect of a liability imposed on AZICL under the ELP by the judgment of a foreign court even interpreting the ELP cover by means of its own law and in a way different from English law, a settlement in anticipation of such a liability would not be binding on reinsurers if English law applied to the relevant liabilities.

15. In November 1997, Garst Seed Company ("Garst"), an AstraZeneca company operating in the USA, incorporated in Delaware, and with its headquarters and principal place of business in Iowa, obtained a licence to produce and distribute a genetically modified corn-seed called "Starlink". The US Department of Agriculture permitted the use of Starlink for animal feed purposes but not for human consumption. In September 2000 there were reports that certain human feed products had tested positive for a protein which Starlink produced. These reports generated a large number of claims against Garst brought by farmers, food manufacturers, food processors and the like. Claims totalling about $2 billion were ultimately settled for a sum of approximately $80 million. AZICL covered and paid Garst and sought recovery from the reinsurers, who declined liability for some 90% of the claim.

16. AZICL's claim went to arbitration. The essential dispute between the parties was as to whether the reinsurance contract covered the settlements in circumstances where, as the reinsurers alleged, Garst's liability to pay damages was not (for the most part) on account of Property Damage, but on account of the US claimants' own liabilities. For these purposes AZICL alleged that had AZICL declined Garst's claim, Garst would have commenced proceedings against AZICL in the state courts of Iowa and that those courts, applying Iowa law to the ELP in accordance with their local conflict of laws rules, would have held that all the amounts claimed by Garst were

covered as "damages on account of…Property Damage". The reinsurers put those matters in issue as questions of fact, but also contended that the only relevant law was English law and that under English law Garst's and AZICL's claims were not in respect of damages payable on account of Property Damage. AZICL conceded that English law was the proper law of both insurance and reinsurance contracts (as I have said that was always common ground), but denied that that was determinative of the outcome of its claim.

17. The parties agreed that these questions of fact and the question of the applicable law should be determined by the arbitrators as a preliminary issue. The award, dated 6 April 2005 and headed "Partial Award on Preliminary Issue", defines the preliminary issue as

> "concerning the law to be applied to the question whether or not there was a loss under the underlying Excess Liability Policy in respect of which AZICL was entitled to be indemnified" (at para 1.2).

18. The preliminary issue took place at a hearing over three days in November 2004, at which factual and expert evidence was heard. The arbitrators were Mr T Richard Kennedy, a New York lawyer, Mr Richard Outhwaite, a London underwriter, and, as chairman, Mr Kenneth Rokison QC.

19. On the disputed facts, the arbitrators' award was unanimous. They agreed that, absent the settlement with AZICL, Garst would have sued AZICL in Iowa, where the state court would have confirmed jurisdiction and applied Iowa law to the claim. As to the applicable law, the arbitrators split. The majority, being Messrs Kennedy and Outhwaite, held that, even having regard to the English proper law, the parties contemplated that the law to be applied in the case of US claimants would be the locally applicable law, and that the reinsurance contract was intended to match AZICL's liability.

20. The essence of the majority arbitrators' opinion appears to have been that since the parties contemplated that the reinsurance contract would be back to back with the ELP, therefore they must also have contemplated that the reinsurers would be bound by a US court's construction of the ELP in circumstances where the ELP contemplated service of suit on AZICL in the USA. If so, then a settlement in anticipation of such a judgment made no difference. They castigated the reinsurers' position as opportunistic and wholly unrealistic in a commercial sense.

21. Mr Rokison dissented, however, holding, in a separate dissenting opinion, that the English proper law was determinative, so that what mattered was how English law would construe "Property Damage" in either contract. He was firm in his conclusions, but said that he disagreed with those of his colleagues "reluctantly".

*The appeal to the commercial court*

22. The reinsurers sought leave to appeal to the commercial court from that majority decision of the arbitrators. They also sought leave to bring a section 68 application on the ground of serious irregularity (on the basis that the majority of the tribunal had failed to abide by AZICL's acceptance of English proper law and/or had made findings of fact for which there was no evidence). It was common ground that the issue or issues of law raised by the award were of general public importance (see section 69(3)(c)(ii)). It was also common ground that they were plainly arguable. A great deal of money was at stake.

23. In the circumstances, it appears to have been contemplated that leave to appeal would probably be granted: for a single, three day hearing, at which both the application for leave to appeal and the appeal itself, if leave was granted, were to be heard, was fixed (in August 2005) for November 2005.

24. Leave to appeal was given at the outset of the hearing, on two questions of law, which the judge, Cresswell J, recorded as follows in his order dated 1 December 2005:

> 1. By reference to which substantive law is AZICL's liability to Garst to be determined?
> 2. By reference to which substantive law is the Reinsurers' liability to AZICL under the reinsurance contract to be determined?

25. It was meanwhile agreed that the reinsurers' section 68 application would be stood over to await judgment on the appeal.

26. By his judgment [2005] EWHC 2755 (Comm) Cresswell J allowed the appeal, preferring Mr Rokison's analysis. At the critical point of his judgment, the judge put the matter in this way:

> "113. AZICL conceded before the Tribunal that applying English conflict rules the proper/governing law of the ELP "was, is and always will be" English law and that "the whole bundle of policies is governed by English law because English law would not…strip them out".
>
> 114. Given these concessions (which appear to me to have been correctly made) the words "damages on account of…Property Damage" must (see Dicey & Morris Rule 178 above) be construed in accordance with the governing law of the ELP – English law.
>
> 115. The majority's conclusion that "the parties to the [ELP] contemplated at the time the contract was made that the extent of coverage afforded to Garst under the Policy would be determined according to US law" (Award paragraph 12.17), was a departure from the concessions.

> 116. It is for the Tribunal to determine what the words "damages on account of…Property Damage" mean in the context of the ELP applying English rules of construction of commercial contracts. These rules are set out at Chitty on Contracts vol 1 29th edn paragraphs 12-041 and following. Mr Butcher accepted "As a matter of principle obviously the document has to be construed in accordance with the relevant matrix, as a matter of English law". It is for the Tribunal (not me) to construe the words "damages on account of…Property Damage" applying English rules of construction having regard to the whole of the ELP and the relevant commercial background…
>
> 127. In my opinion the answer to question (2) is the same and consistent with the answer to question (1) – English law.
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> 128. I agree with Mr Rokison that to conclude that in the present case (which, I again emphasise, is concerned with a settlement where no proceedings were commenced) Reinsurers' liability to AZICL under the Reinsurance in relation to the scope of cover and in particular what constituted "Property Damage" would vary, depending on (i) the identity of the insured AstraZeneca company making the original claim, (ii) the court in which such claim would have been pursued if not settled, (iii) the law which the court would have applied, and (iv) how the term "Property Damage" would have been construed in accordance with that law, would not be "back to back" so much as "back to front". Such a conclusion would be contrary to English conflicts rules and would involve a commercially uncertain and unworkable answer."

*The application by AZICL to appeal to the court of appeal*

> 27. Following the handing down of judgment, Cresswell J heard submissions as to consequential orders. We are concerned in particular with AZICL's application to him for leave to appeal to this court. The parties prepared for this application by submitting written skeletons. There was also oral argument, although the judge did not feel it necessary to call upon the reinsurers to respond. He rejected AZICL's application. He said that he would give his reasons in writing. In the circumstances, the reinsurers accepted that their section 68 application could be dismissed.
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> 28. The reasons in writing subsequently given by the judge were endorsed in manuscript on a standard form dealing with permission to appeal. He wrote:
>
> > "Permission is refused broadly for the reasons set out in paragraph 7 of the [reinsurers'] skeleton argument. I refer to the analysis in the judgment at paragraphs 90 to 131. I draw particular attention to paragraph 116."

29. In their submissions to the judge on the question of leave to appeal, AZICL had emphasised (1) that the issue was for the judge, since under section 69(8) this court could not give permission if the judge refused; (2) that the questions of law remained of general and fundamental importance to the London insurance and reinsurance markets, especially since worldwide policies remain commonplace and the risk that a foreign court, properly applying local conflict rules, may apply a different proper law to that arrived at by English conflict principles is a real one: therefore the section 69(8) condition of "general public importance" had been met; (3) that the discretionary test for leave to appeal in such circumstances remained that laid down by the majority of this court in *Geogas SA v. Trammo Gas Ltd (The Baleares)* [1991] 1 Lloyd's Rep 349, namely that the question of law is "worthy of consideration by the Court of Appeal", and otherwise the general "real prospect of success" test in CPR Part 52.3(6); and (4) that in the circumstances leave should be granted. In this connection AZICL stressed again the importance of the issues, the division of opinion among the arbitrators, but on balance in their favour, and arguments in support of the arbitrators' conclusion founded in authorities relied on in submissions.

30. In their written submissions in response, to whose para 7 the judge had referred in his reasons, the reinsurers had also made detailed citation of *The Baleares*, and in para 7 had gone on to give reasons why –

> "In the final analysis, the question for this Court is: is its decision one which it considers open to any serious doubt; or (putting it another way), is there any realistic possibility that the Court of Appeal might come to a different result."

31. The reasons included the decisive concessions as to English proper law, the importance of the role of such proper law, the absence of inconsistent authorities, and the promotion of commercial and legal certainty. Para 7 concluded:

> "In short, the Court's decision is orthodox, applies incontrovertible principles of law and is right. It is submitted that the Court should not entertain any doubt about the correct outcome of this case."

*The complaint to this court*

32. AZICL's complaint to this court is that the judge's decision refusing leave to appeal was so misguided or incomprehensible as to amount to no decision at all; or to be arbitrary and perverse; to the extent of being unfair and thus in breach of article 6 of the Convention. There was, it is submitted, no intellectual engagement with the argument put before him. It is therefore inconceivable that the right test (*The Baleares*) was applied and it is suggested that the reason for that was the reinsurers' inaccurate para 7 gloss of that test as being "open to any serious doubt". It was unfair of the judge to accept the reinsurers' argument that only orthodox, incontrovertible principles of law, and not controversial issues of general importance, were involved, when the reinsurers themselves conceded that the issues were of general public

importance at a time when they had to meet that test for the purposes of getting to the court from the arbitrators' award in the first place. In his reference to his own analysis contained in his judgment, the judge showed himself unable to show sufficient objectivity. And in highlighting para 116 of his own judgment, the judge was there making a point not raised in argument before him, and seemed to be suggesting that one of the factors acting on his mind was the consideration that, because of an issue yet to be determined, the questions of law for which leave to appeal was being requested might not substantially affect the rights of the parties.

33. Since the *North Range* residual discretion is challenged before us by the reinsurers, the first matter to be decided is whether this court is bound by that authority, or whether it can be said to have been decided *per incuriam* and to be wrong. For, if we have no jurisdiction to entertain AZICL's complaint, the matter must stop there.

*The statutory context*

34. On behalf of the reinsurers, Mr Christopher Butcher QC founds his argument on relevant statutory provisions. I have already set out, but for convenience repeat here, the critical provision of the 1996 Act, viz section 69(8):

> "But no such appeal lies without the leave of the court…"

35. In addition, Mr Butcher relies on sections 16 and 18 of the Supreme Court Act 1981, pointing out that the jurisdiction of the court of appeal is entirely a matter of statute and that this court has no original jurisdiction (per Lord Diplock in *In re Racal Communications Ltd* [1981] AC 374 at 381H). Thus:

> "16. Appeals from the High Court
>
> (1) Subject as otherwise provided by this or any other Act…the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court.
>
> 18. Restrictions on appeals to Court of Appeal.
>
> (1) No appeal shall lie to the Court of Appeal –
>
> …
>
> (c) from any order, judgment or decision of the High Court or any other court or tribunal which, by virtue of any provision (however expressed) of this or any other Act, is final;
>
> …

(g) except as provided by Part I of the Arbitration Act 1996, from any decision of the High Court under that Part."

36. In *Lane v. Esdaile* the House of Lords held that where statute had conferred on a particular court the power to decide whether permission to appeal should be given or not, the exercise of that power could not be reviewed by another court, for otherwise the whole purpose of the statute would be defeated. It accordingly also held that, although section 3 of the Appellate Jurisdiction Act 1876 apparently gave jurisdiction to the House of Lords in broad terms "from any order or judgment of the Court of Appeal", the decision of the court of appeal to refuse permission to appeal was not such an "order or judgment" within the meaning of that provision. Similar decisions on a range of similar provisions have followed: see *In re Housing of the Working Classes Act 1890, ex parte Stevenson* [1892] 1 QB 609 (CA), *Kemper Reinsurance v. Minister of Finance* [2000] 1 AC 1 (PC). *Lane v. Esdaile* was applied in *Geogas SA v. Trammo Gas Ltd (The Baleares)* [1991] 1 WLR 776 (HL) to section 1(7) of the Arbitration Act 1979, a forerunner (in different terms) of section 69(3) of the 1996 Act; and in *Henry Boot Construction*, where section 69(8) was itself under consideration.

37. Mr Butcher therefore submits that the refusal under section 69(8) of leave to appeal by the commercial court judge is not such a "judgment or order of the High Court" as is referred to in section 16 of the Supreme Court Act 1981; and that section 18(1)(c) and/or (g) of the same Act merely confirms this court's lack of jurisdiction to entertain an appeal from that refusal; as was again recognised in *Henry Boot Construction* (at 396G/H).

38. Subject to the question of a residual jurisdiction in cases where what is in question is not a review of the commercial judge's discretion (which as I have said there is common ground cannot be the subject matter of an appeal from a refusal of leave under section 69(8)) but a matter of unfairness, I do not consider any of this to be now capable of dispute. Indeed, it seems to me that the drafting of the applicable provisions of the 1996 Act may even go beyond the *Lane v. Esdaile* principle of construction. That appears to suggest that the grant to a particular court of a power to give or refuse permission to appeal should be interpreted, without more, as the grant of an exclusive power to do so. In the case of section 69(8), however, and similar provisions of the 1996 Act, the language expressly provides that the power granted is exclusive: "But no such leave lies without the leave of the court…".

39. I therefore turn to the question of a residual jurisdiction. It is to be observed that all the cases previously considered, with the exception of *North Range* itself, either pre-dated the entry into effect of the Human Rights Act 1998, or did not depend upon any submission invoking principles of unfairness in the decision making process, as distinct from a straightforward challenge to the merits of the decision. There is one exception, to which I now turn.

*Aden Refinery v. Ugland*

40. In *Aden Refinery Co Ltd v. Ugland Management Co Ltd* [1987] 1 QB 650, this court considered a challenge to the commercial judge's refusals both of leave to

appeal an arbitration award to his court and of leave to appeal his decision not to grant leave, under section 1(3)(b) and section 1(6A) respectively of the Arbitration Act 1979. It was submitted that a failure to exercise his discretion judicially could render the judge's decisions subject to review on appeal: reliance was placed on a long-established doctrine then known as the *Scherer* principle (after *Scherer v. Counting Instruments Ltd (Note)* [1986] 1 WLR 615) relating to costs, a special principle which had been developed despite the "no appeal shall lie…without the leave of the court" language in what was then section 18(1)(f) of the Supreme Court Act 1981. However, in *Aden Refinery* this court held that the *Scherer* principle had its own peculiar historical reasons, and, anomalous or not, was not to be extended or transferred across into the arbitration context. This court therefore, held that there was no jurisdiction to entertain the appeals before it.

41. However, in an obiter dictum, Mustill LJ went on to say this (at 666B):

> "Accordingly, I hold that the court has no jurisdiction to entertain the present appeal. I say the present appeal, because I can envisage that if a judge had in truth never reached "a decision" at all on the grant or refusal of leave, but had reached his conclusion, not by any intellectual process, but through bias, chance, whimsy, or personal interest, an appellate or other court might find a way to intervene. Of course, nothing of this kind was suggested here. Leggatt J. did arrive at a decision. I prefer to leave the case of impropriety to be dealt with later, if ever it is alleged."

42. Nourse LJ agreed with Mustill LJ's judgment (at 669G).

43. Mustill LJ's dictum has never had to be made the basis of a decision, but it has been repeatedly cited with approval. Thus in *Daisystar Ltd v. Town and Country Building Society* [1992] 1 WLR 390 at 393/4, in the context of section 54(6) of the Supreme Court Act 1981 ("no appeal shall lie from a decision of a single judge acting under this subsection") Lord Donaldson of Lymington MR said this:

> "For my part, I would affirm that comment by Mustill L.J. While I cannot and do not contemplate bias, whimsy or personal interest in the judges of this court, mischance is always a remote possibility: if, for example, a Lord Justice had pre-read two cases and, owing to mischance and perhaps the absence of counsel or gross incompetence by counsel, in the course of argument it was never borne in on him that the case upon which counsel was addressing him was not in fact the case to which he was applying his mind, I can see that, in those circumstances, it could be argued that there had not been a decision and, if there was no decision, quite plainly section 54(6) does not apply."

See also *Riniker v. University College London (Practice Note)* [2001] 1 WLR 13 at 16, *Clark v. Perks* [2001] 1 WLR 17 at 23, *North Range* at para 12, and *Sealand Housing Corporation v. Siemens AG* [2002] EWCA Civ 1145 (unreported, 2 July 2002) at paras 20/21 and 25/26.

44. Mr Butcher submits that (a) Mustill LJ's dictum requires there to be no "decision" at all (and was so framed because of the statutory language which precludes an appeal from "a decision" to grant or refuse leave); and (b) that Mustill LJ was cautious to allow the possibility that the basis of the residual jurisdiction which he was contemplating was not necessarily by way of appeal but alternatively in some "other court", ie by returning to the commercial court for a rehearing (see now *Seray-Wurie v. Hackney London Borough Council* [2002] EWCA Civ 909, [2003] 1 WLR 257, applying the logic of *Taylor v. Lawrence* [2002] EWCA Civ 90, [2003] QB 528 to the high court where that is the effective final court; see below).

45. However, in my judgment, although it was natural for Mustill LJ to speak in terms which negatived "a decision", and Lord Donaldson's example of mischance seems a good example of an order which was in a real sense no decision at all, there is nevertheless no proper defining point between a decision undermined by bias, whimsy or personal interest and something which is no decision at all. Rather, I regard Mustill LJ as seeking to express a distinction between a decision however flawed by error, and an apparent decision which, because of something which has gone fundamentally wrong in the process, cannot properly be called a decision. Lord Hoffmann was perhaps making a similar distinction in *Kemper Reinsurance* when he sought to express the limits of the *Lane v. Esdaile* principle as follows (at 14/15):

> "In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final. There is obviously a strong case for saying that in the absence of express contrary language, such a decision should itself be final. But judicial review seldom involves deciding a question which someone else has already decided. In many cases, the decision-maker will not have addressed his mind to the question at all…"

46. I am not here concerned with the width of judicial review, but with the distinction between a decision on the merits, right or wrong, and the process by which the decision is supposedly taken, adequate or flawed by unfairness.

47. In my judgment, the dictum of Mustill LJ demonstrates, even before the Human Rights Act, the limits of the *Lane v. Esdaile* principle, and the need for a residual jurisdiction to deal with misconduct or unfairness (or even mischance) in the decision-

making process, if it can be found consistently with the dictates of the relevant statutes. At the end of the day, Mr Butcher did not really deny the need for some such remedy in a proper case: although he did submit, as I will develop below, reasons why it should be confined to a rehearing in the high court rather than by way of appeal.

*The residual jurisdiction in the era of the Human Rights Act*

48. The leading case on the residual jurisdiction in the era of the Human Rights Act is, of course, *North Range*. This court there consisted of Peter Gibson, Aldous and Tuckey LJJ. The judgment of the court was handed down by Tuckey LJ. The context was section 69(2)/(6) and the refusal by the commercial judge, David Steel J, to grant leave to appeal to the commercial court from an arbitration award. The applicant wished to challenge that refusal on the ground that the reasons given for it were inadequate, to the extent that its right to a fair hearing had been violated. It will be recalled that section 69(6) provides that the leave of the (first instance) court is required for an appeal against the grant or refusal of leave to appeal from the award. The case therefore provides a direct parallel for the still more restrictive provisions of section 69(8), which again allows only the first instance court to grant leave for a further appeal to the court of appeal. Sections 69(2) and 69(6) were not cited in terms by Tuckey LJ, but it was conceded by Mr Plender QC, counsel for the applicant in that case, that this court had no jurisdiction itself to grant leave to appeal from the arbitrators' award and could at best allow the appeal from the refusal and remit the matter for rehearing to the commercial court (at para 10).

49. The essence of the judgment's reasoning on the question of residual jurisdiction is contained in its paras 11/14. Since the decision in *North Range* is said to have been arrived at *per incuriam*, it is necessary to set out that passage in full:

> "11. The first question therefore is whether we have jurisdiction to deal with the case on this basis [*ie* on the basis of quashing and remitting]. What is clear is that there is no appeal from the judge's refusal to give leave on the merits. This follows from the language of the statute and was confirmed by this court in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388.
>
> 12. Mr Plender however relied on the provisions of the Human Rights Act 1998. Section 6 of the Act makes it unlawful for a court to act incompatibly with a Convention right. A party's right to complain of an unlawful judicial act is restricted by section 9(1) to the exercise of a right of appeal. The court, he said, was therefore required to give the applicant a right of appeal to enable it to complain that the process by which the judge reached his decision was unfair and contrary to article 6. Unfairness was, he said, to be equated with misconduct. In *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] QB 650 this court recognised that it had a residual discretion under the 1979 Act where the judge had "in truth never reached 'a decision' at all on the grant or refusal of leave, but had

reached his conclusion, not by any intellectual process, but through bias, chance, whimsy, or personal interest": Mustill LJ, at p 666. There is of course no suggestion of misconduct in this case but unfairness and misconduct both relate to process. The House of Lords recognised that it had jurisdiction to reopen an appeal where a party had been subjected to unfairness in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132. So, Mr Plender submitted, this court, which has a duty to act compatibly with the Convention, has jurisdiction to consider whether the judge's reasons were adequate and if not to set aside his decision for that reason. This does not involve a direct challenge to the correctness of the judge's decision on the merits of the application for leave to appeal.

13. Mr Godwin for the respondents relied on section 8(1) of the Human Rights Act 1998, which in relation to an unlawful judicial act confines our jurisdiction to "grant such relief or remedy, or make such order, within [our] powers". As we have no power to allow an appeal from the judge's refusal to grant leave, he said that we could only remit the case to the judge to enable him to give further reasons, which was the relief claimed in *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 WLR 395.

14. We accept Mr Plender's submissions on the question of jurisdiction. If, as is accepted, there is a residual jurisdiction in this court to set aside a judge's decision for misconduct then there can be no reason in principle why the same relief should not be available in the case of unfairness. Each is directed at the integrity of the decision-making process or the decision maker, which the courts must be vigilant to protect, and does not directly involve an attack on the decision itself. This court has of course the general power to set aside decisions under CPR r 52.10(2)(a) and we do not think in the exceptional circumstances envisaged by such a case that the court's powers are circumscribed by section 69 of the 1996 Act. We shall have more to say about the circumstances in which it would be appropriate to invoke this jurisdiction in cases of this kind later in this judgment."

50. Tuckey LJ returned to that last matter at the end of his judgment, at paras 29 and 32, where having held in the interim that article 6, and domestic legal developments, did demand reasons, but having also found that the judge had given reasons which were adequate for the purposes of fairness, emphasised that what was in question was not the correctness of the reasons, but their adequacy; and that the courts would be astute to resist treating an attack on the correctness of reasons as a legitimate complaint of unfairness.

51. In the event, the court granted permission to appeal, but dismissed the appeal. This court therefore exercised the residual jurisdiction which had been disputed before it, even if the result was that the appeal was lost.

52. *North Range* was applied by this court (Arden and Longmore LJJ) in an application for permission to appeal, heard on notice and decided after hearing submissions from counsel for both parties, in *BLCT (13096) Limited v. J Sainsbury plc* [2003] EWCA Civ 884 (unreported, 30 June 2003). The application complained of the first instance court's decision to proceed to a decision on whether or not to grant leave to appeal against an arbitration award without an oral hearing. The applicant further argued that the restriction contained in section 69(6) was itself incompatible with article 6. Arden LJ asked herself (at para 45) whether the section 69(6) restriction –

> "would apply to the refusal of a judge to recuse himself on the grounds of bias. It would certainly be very odd if the refusal of the judge to give leave against that decision meant that the appellant had no avenue of appeal to the Court of Appeal. In my judgment, the answer lies not in any incompatibility with the Convention but in the residual jurisdiction articulated in the *North Range* case."

*Per incuriam*

53. Mr Butcher submits that *North Range* was decided *per incuriam* in as much as it held that a residual jurisdiction did exist to remedy a breach of the article 6 requirement of fair process. In developing this submission, he has not cited any authorities on the doctrine of *per incuriam* itself other than *Rickards v. Rickards* [1990] Fam 194, but has submitted in effect that in overlooking the numerous statutory prohibitions cited above, as well as the *Lane v. Esdaile* line of authority, this court there erred so fundamentally as to remove the validity of that decision as a matter of binding precedent. It is true that Tuckey LJ did not in terms cite any statutory prohibitions, not even section 69(6), and that *Lane v. Esdaile* does not appear to have been cited to the court.

54. In developing this theme, Mr Butcher has also submitted that Strasbourg authorities, such as those relied on by Mr Edelman QC, counsel for AZICL, do not require a right of appeal, only that any right of appeal granted should be fairly operated, and should not be operated, for instance, in such a way as to deny practical access to the court: see, for instance, *Delcourt v. Belgium* (1970) 1 EHRR 355, *Golder v. United Kingdom* (1979-80) 1 EHRR 524, *Albert and Le Compte v. Belgium* (1983) 5 EHRR 533, *Monnell & Morris v. United Kingdom* (1987) 10 EHRR 205, *De Ponte Nascimento v. United Kingdom* (application 55331/00, decision 31.1.02). It was common ground that the section 69(8) restriction was compatible with article 6. The Convention therefore could not create an appellate jurisdiction which did not exist. It is simply that, where there is no, or restricted, appellate jurisdiction, a lower court

becomes the final court, whose decision exhausts the domestic remedies and renders a complaint to Strasbourg procedurally viable.

55. Consistently with this approach, Mr Butcher submitted further, the Human Rights Act provided no remedy for the absence of appellate jurisdiction, even in the case posited of unfairness. Thus article 13 was not enacted in terms as a "Convention right" by being included in Schedule 1, and its place was substituted by sections 7, 8 and 9 of the Act, which provide:

> "7. Proceedings
>
> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –
>
> > (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> >
> > (b) rely on the Convention right or rights concerned in any legal proceedings…
>
> 8. Judicial remedies
>
> In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate…
>
> 9. Judicial acts
>
> (1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only –
>
> > (a) by exercising a right of appeal;
> >
> > (b) on an application (in Scotland a petition) for judicial review;
> >
> > (c) in such other forum as may be prescribed by rules.
>
> (2) That does not affect any rule of law which prevents a court from being the subject of judicial review."

56. Mr Butcher submits: (1) that for a complainant to exercise a right of appeal under section 9(1)(a), such a right of appeal must exist, but in the present case no right of appeal exists to be exercised; (2) that the high court is not susceptible to judicial review under section 9(1)(b); and that any remedy, if it exists, can therefore only be pursued under section 9(1)(c) in "such other forum as may be prescribed by the

rules". Such a remedy might exist before the commercial court itself, under the inherent jurisdiction recognised in *Ex parte Pinochet (No 2)* (for the House of Lords), *Taylor v. Lawrence (No 2)* (for the court of appeal) and *Seray-Wurie v. Hackney* (for the high court itself). The principle was expressed in the last of those cases by Brooke LJ in these terms:

> "17. The question which Lloyd J referred to this court for its consideration is whether the High Court when sitting as a court of appeal possesses a similar jurisdiction to reopen its decisions in exceptional circumstances in order to avoid real injustice. It appears to me that the same logic which drove the Court of Appeal in *Taylor v. Lawrence* [2002] 3 WLR 640 to hold that the Court of Appeal possessed such a power must also drive us to hold that the High Court, which also possesses an inherent jurisdiction to do what it needs must have power to do in order to maintain its character as a court of justice (see *Taylor v. Lawrence*, pp 655-656, paras 51-53), possesses a similar power. The restrictions on the exercise of the power will be precisely the same. As Lord Woolf CJ said, at p 657, para 55: "What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy"."

57. Thus this solution could provide a remedy in the exceptional case which demanded it, in accordance with section 9(1) of the Human Rights Act, and in accordance with principles recently recognised in respect of each tier of court where that court was in effect the court of last resort, without creating an appellate jurisdiction in this court, in contravention of the prohibition of statute and the long line of cases headed by *Lane v. Esdaile*. This solution is consistent with Mustill LJ's "or other court". The residual jurisdiction of *North Range* could not be supported.

58. On the other side, Mr Edelman submits that *North Range* is not *per incuriam*, is binding on us, and is right. He relies on *Aden Refinery* as indicating a residual appellate jurisdiction even before the Human Rights Act. Now, under section 3 of that Act, this court is obliged to construe legislation, including the Human Rights Act itself, "so far as it is possible to do so…in a way which is compatible with the Convention rights": *R v. A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, *Sheldrake v. DPP* [2004] UKHL 43, [2005] 1 AC 264. The impact of the Act is two-fold: first, via article 6, it entrenches the guarantee of a fair judicial process; secondly, section 3 ensures that all relevant statutes should, and can, be read so as to except from any prohibition on appeal without the leave of the judge a complaint of unfairness in breach of article 6. If and in so far as this might still leave this court without an express grant of relevant jurisdiction, section 9(1)(a) can be construed as creating a right of appeal: as *North Range* decided (see this court's acceptance there of Mr Plender's submission that "The court…was therefore required to give the applicant a right of appeal" (at paras 12 and 14)). That was a possible construction of section 9(1)(a). Alternatively, the

*Lane v. Esdaile* construction of the relevant statutes, upheld by *Henry Boot* prior to the HRA, must now give way to a more generous construction, pursuant to section 3.

*Is North Range binding?*

59. In my judgment, however, *North Range* was not decided *per incuriam*, is binding on this court, and is correct in holding that a residual jurisdiction exists for reviewing on appeal the misconduct or unfairness of a first instance judge's determination concerning the grant or refusal of leave to appeal.

60. It is true that in *North Range* Tuckey LJ makes no express mention of the provisions of the Supreme Court Act 1981, or of *Lane v. Esdaile*, which appears not to have been cited to the court. Nevertheless, *Henry Boot* was cited, and was expressly referred to for the proposition that it is "clear…that there is no appeal from the judge's refusal to give leave on the merits" (at para 11). This is said to follow "from the language of the statute and was confirmed by this court in *Henry Boot*" (*ibid*).

61. In *Henry Boot* Waller LJ cited extensively from *Lane v. Esdaile* and other later authorities in the House of Lords in that line dealing with relevantly similar provisions of the Arbitration Act 1979 and other statutes, such as *Gelberg v. Miller* [1961] 1 WLR 459, *Aden Refinery*, and *Geogas v. Trammo Gas*. In that connection, Waller LJ also referred to section 16 of the Supreme Court Act (at 395D and 396G) and to section 18(1)(g) of the same Act (at 396H). The most that Mr Butcher can say (and has said) is that there is no express reference to section 18(1)(c). However, that provision, which, it will be recalled, says that no appeal shall lie from any decision which "by virtue of any provision (however expressed) of this or any other Act, is final", seems to me to take the matter no further. It is merely a statutory confirmation of the *Lane v. Esdaile* principle of construction, which concluded, in the words of Lord Halsbury LC (at 212/213), that –

> "it seems to me obvious that it was intended that the decision should be final (whether that is said in terms or not seems to me to be immaterial)".

62. Therefore, Tuckey LJ in *North Range* was not only aware of, but applied, all that learning encapsulated in *Henry Boot*. His opening premise, as I have said, was that "there is no appeal from the judge's refusal to give leave on the merits". He considered that to be so as a matter of the language of section 69 itself, but also as confirmed by (a line of authority concluding in) *Henry Boot*.

63. That left open, however, the distinction drawn in the argument made to this court in *North Range* between a challenge on the merits and a challenge to the process by which a decision on the merits had been arrived at. We have not been pressed with any line of authority which has made clear that a distinction of this kind cannot be made for the purposes of this court's jurisdiction. Mr Butcher referred us to *In re*

*Racal Communications Ltd* [1981] AC 374, where Lord Diplock said this (at 379/380):

> "Subsection (3) provides that his decision shall *not* be appealable. One asks rhetorically: "What could be plainer than that?" What principle of statutory interpretation can lead one to suppose that Parliament when it said "not appealable" really meant "appealable on some grounds but not on others"? To give to the phrase "shall not be appealable" its ordinary and, linguistically, its only possible meaning, does not lead to results so manifestly absurd or unjust as to drive one to the conclusion that Parliament must have intended that, despite the unqualified language used, the judge's decision should be unappealable on some grounds only but appealable to the Court of Appeal on others."

In that case, however, the argument was not about process, but about an error of law as to jurisdiction.

64. Now, in theory, this court may have been right or wrong to find in this distinction between merits and process and in the Human Rights Act to which Tuckey LJ next immediately turned (at para 12: "Mr Plender however relied on the provisions of the Human Rights Act 1998…") support for its conclusion as to a residual jurisdiction. However, I am unable to see in Mr Butcher's submissions a basis for saying that this court's conclusion was arrived at *per incuriam*.

65. In my judgment, therefore, *North Range* is binding on this court. Mr Butcher has not sought to distinguish it, eg by reference to any distinction between section 69(6) and section 69(8).

66. In these circumstances, it does not matter, and it certainly does not fall to this court to say, whether the decision in *North Range* is right or wrong. But since we have heard detailed submissions on that topic, I would record my respectful judgment that it is right.

67. What has, I think, emerged is that the decision, which was succinctly expressed, could be further analysed, and possibly in more than one way.

68. One possibility is that Tuckey LJ (ie this court) was saying that section 69 could be construed all by itself as dealing only with decisions on the merits, and not with a process undermined by misconduct or unfairness. In support of that approach is his initial statement that the language of the statute and the line of authority ending in *Henry Boot* prevented any appeal from a refusal to give leave on the merits; also his reliance on Mustill LJ's dictum from *Aden Refinery*; and his statement that a residual jurisdiction for misconduct could not be separated in principle from a similar jurisdiction in a case of unfairness (at para 14). On this basis, the *Lane v. Esdaile* principle, which is a principle of construction, is distinguished.

69. Another possibility is that, whatever might otherwise be the construction of the statute, a right of appeal, a residual jurisdiction, should nevertheless be granted, by virtue of the Human Rights Act itself, to deal with those cases which raised questions

of misconduct or unfairness, ie in Tuckey LJ's words were "directed at the integrity of the decision-making process or the decision maker, which the courts must be vigilant to protect, and [do] not directly involve an attack on the decision itself" (at para 14). In support of that alternative approach is the fact that the submissions of Mr Plender which the court accepted took flight from the Human Rights Act ("Mr Plender however relied on the provisions of the Human Rights Act…"); and the acceptance of the submission (recorded at para 12) that, because a remedy was restricted by section 9(1) of the Act to the "exercise of a right of appeal", the court was "required to give the applicant a right of appeal to enable it to complain…". On this basis the source of the jurisdiction could be found in the Human Rights Act itself.

70. A third possibility is that the Human Rights Act, by virtue of its section 3, itself altered, if necessary, the construction of section 69 so as to exclude from its possible ambit any challenge which went to misconduct or unfairness in the process, as distinct from the merits of the decision. For this reason as well, the *Lane v. Esdaile* principle of construction could be distinguished and evaded. Admittedly, there is no express reference to section 3 in *North Range*.

71. There are arguments which play upon what the court in *North Range* might have intended between these possible alternatives. However, its judgment should not be read as though it were a statute. In my judgment, it is at least a possible construction that section 69(8) is not purporting to deal with appeals from the first instance judge on the basis of his own misconduct or the unfairness of the process. The whole context of section 69 is an appeal on the merits. A challenge to the award on the basis of serious irregularity is dealt with separately under section 68. (A challenge to the award based on substantive jurisdiction is again dealt with separately under section 67.) Here is material which at least arguably answers the questions posed by Lord Diplock in *In re Racal*. While it is understandable that a challenge to the award based on serious irregularity (affecting the tribunal, the proceedings or the award) should be dealt with expressly by the statute, it is equally understandable that the statute does not expressly deal with, indeed it may be said does not contemplate, misconduct or unfairness (and all misconduct is a form of unfairness) by the court. The statute may not contemplate such failure in the judicial process, and indeed it is likely to be quite exceptional and rare, but in theory it may occur. If it should occur, what reason is there for thinking that Parliament intended that it should be swept under the carpet by the judge's own power to refuse leave to appeal to the court of appeal? The same question arises if the unfairness occurs not in the conduct of the judicial appeal at first instance, but in the process of considering an application for leave to appeal to the court of appeal.

72. The truth of the matter is: there are all sorts of contexts in which, for good reason, Parliament has provided that there should be restrictions on the appeal process, and a limit to appellate jurisdiction. In such situations, for the reasons given in *Lane v. Esdaile*, it is natural to conclude that, even in the absence of express language, the statute intended the lower court's discretion as to whether or not to give permission to appeal to a higher court to be exclusive and final. However, there is no similar rationality, it may be said no good reason at all, for thinking that a court's unfairness is to be left incapable of appellate review. While bearing fully in mind the need for finality in litigation, and the injustice which may itself be created by losing sight of that need, this court in *Taylor v. Lawrence (No 2)* recognised the imperative need for

an effective remedy, in a possible case of bias, to maintain confidence in the administration of justice (at para 55). It adopted the words of Lord Diplock in another case of the need for courts to have power "to maintain its character as a court of justice" (at para 53). Although the context there might have been one where it was assumed that the court in question had an underlying or inherent jurisdiction, I cite the doctrine to highlight the unlikelihood that Parliament, a fortiori in a situation where an appeal jurisdiction was possible, intended the unfair process of a lower court to be immune from appellate review.

73. If, therefore, that construction of section 69(6) or section 69(8), which confines its restriction on access to the court of appeal without the leave of the first instance court to matters of the merits of the first instance decision and does not extend it to unfairness in the process, is a possible construction, then, in the light of section 3 of the Human Rights Act it is a necessary and correct construction. Once that shift, if shift it is, is adopted, then, as it seems to me, there is no further problem. The doctrine of *Lane v. Esdaile* is only a principle of construction. If, at any rate with the assistance of section 3, section 69 is construed not to exclude appellate review of the unfairness of the first instance court's decision, then, as it seems to me, there is plainly jurisdiction for that review. Section 16 of the Supreme Court Act 1981 states that, subject as otherwise provided by that or any other Act, the court of appeal "shall have jurisdiction to hear and determine appeals from any order or judgment of the High Court". If section 69(8) does not exclude such an appeal, if limited to a review of unfairness in the process, then there is no longer any difficulty in construing "any order or judgment" as including an order or judgment refusing leave to appeal where that order or judgment has been invalidated by unfairness in the process. If necessary, section 16 has itself to be construed pursuant to the requirements of section 3 of the HRA, but, in truth, there is no need of section 3 when once the underlying statute, here section 69(8), has been construed as not requiring finality of an order or judgment invalidated by unfairness in the process. Sections 18(1)(c) and 18(1)(g), on the same reasoning, take the matter no further. Their effect excluding appeal are both parasitic on the construction of section 69. Indeed, the terms of section 18 seem to me to underline the fact that, once section 69, by reason of section 3 of the HRA, is construed so as not to cover an appeal against unfairness in the process, then section 16 itself presents no difficulty, but on the contrary expressly grants jurisdiction.

74. On this basis, there is clearly a remedy under section 9(1)(a) of the Human Rights Act, for the complainant is entitled to exercise its section 16 right of appeal.

75. In these circumstances, it is unnecessary to determine whether section 9(1)(a) can itself, with the aid of section 3, be construed to grant a right of appeal where otherwise there would be none. If it is so construed, it becomes an alternative source of court of appeal jurisdiction; and it matters not that the Supreme Court Act does not itself grant jurisdiction. The section 18 exclusions would be exclusions from the 1981 Act jurisdiction, not from the residual jurisdiction provided by section 9(1)(a). Section 9(2), by going out of its way to emphasise that section 9(1)(b) does not grant a right of judicial review where none exists, as from the high court, may be said to render it possible to construe section 9(1)(a) as a source of jurisdiction: for there is no similar limitation in respect of that subsection. And even if article 13 is not itself a Convention right enshrined in Schedule 1, the purpose of section 9 may be said to

provide the means for a remedy where one is needed to protect the Convention right to be found in article 6.

76. My preferred analysis is that section 3 renders it possible to limit the restriction of section 69(8), thus in any event enabling statutory jurisdiction to be found in section 16. That renders any other possible analysis unnecessary.

77. Similarly, it is unnecessary to consider what other expedients might be necessary, faute de mieux, if no appellate residual jurisdiction were possible. Plainly, if appellate review were impossible, it would be necessary to consider whether, on the *Taylor v. Lawrence (No 2)* and *Seray-Wurie* principle, a remedy for unfairness could be found in a reopening of a decision by a collateral challenge in the same, high court, jurisdiction. However, that only has to be stated to be seen to be so much the less satisfactory solution.

78. In any event, *North Range* remains a binding precedent, vindicating residual jurisdiction for an appeal to review and if necessary set aside a decision unfairly obtained by unfair process. As in *North Range* itself, it is accepted that the court of appeal cannot itself make the decision whether to grant or refuse leave to itself. That can only be done, where the original decision is set aside, on a remission to the first instance court.

79. It is unnecessary and, it seems to me, unproductive to debate whether by reason of bias, whimsy, chance or personal interest, or anything of that nature, for Mustill LJ was not purporting to write a statute, a decision may be said to be no decision at all. That is a metaphor at best, for even a biased decision is, in a very real sense, a decision, and, until the judgment or order which states it is set aside, will be effective. Just as a decision reached without jurisdiction, even if in one sense formally void, may be effective and unappealable, if the relevant statute so decrees (*In re Racal*; but *cf* para 82 below). Nevertheless, the metaphor is useful. What one is looking for is not merely an error of law, but such a substantial defect in the fairness of the process as to invalidate the decision.

80. For these purposes, it is clear that perversity in itself, a decision that no reasonable decision-maker could make, is not enough. It might be enough in judicial review: but in this context, perversity is an error of law like any other.

81. This is clear from *Cetelem SA v. Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1 WLR 3555. An issue there arose between parties in arbitration about the power of a judge to make a freezing order under section 44 of the Arbitration Act 1996. Section 44(7) provides that "The leave of the court is required for any appeal from a decision of the court under this section". The judge had made a freezing order and had refused leave to go to the court of appeal. An initial question in this court was whether there was any jurisdiction to entertain the application for leave to appeal. It was held that if the judge had had no jurisdiction to make the freezing order he had made below, his decision would not have been a "decision…under this section" and this court would have jurisdiction to take the appeal. As it is, this court held that the judge had acted within his jurisdiction, and, although leave to appeal would be granted, the appeal would be dismissed.

82. On the subject of leave to appeal, Clarke LJ there said this (at para 24):

> "24. As I see it, the purpose of section 44(7) and the many sections like it is to limit the role of the court where the court is exercising its supervisory powers under the 1996 Act. In those circumstances it seems to me to make sense to preclude further recourse to the court by way of appeal. It makes much less sense so to hold where the judge makes an order which he has no jurisdiction to make. I would draw a distinction between orders which are within the court's jurisdiction and those which are not. Thus section 44(7) and its equivalents in other parts of the Act limit appeals on fact or law to cases in which the judge at first instance grants permission to appeal. As I see it, however strong the proposed appellant's argument that the judge was wrong in law or on the facts, this court will have no jurisdiction. It will not be enough to show that the judge was plainly wrong in fact or law or that he made a decision which no reasonable judge could make. Parliament has limited the supervisory jurisdiction of the courts to one tier."

83. Clarke LJ went on to draw support for that conclusion from the rejection of the exceptionable "*Scherer* principle" in *Aden Refinery* (see para 40 above).

84. Mr Edelman nevertheless submitted that a perverse decision could be classified as unfair process for the purposes of article 6, relying on the expression "arbitrary, unfair or a denial of the right of access to court" in *De Ponte Nascimento*. Mr Edelman said that a perverse decision was arbitrary and therefore unfair and, where it leads to the loss of any opportunity of appeal, a denial of the right of access to the court. In my judgment, however, that is not so. As was said later in *De Ponte Nascimento* –

> "Article 6 § 1 does not guarantee a particular outcome in any case or that the "right result" will be reached by the domestic courts. In the present case, the Court of Appeal's decision to refuse permission to appeal because the majority of the court thought that the application either did not have a realistic prospect of success or that the balance of justice lay in upholding the earlier judgment was not arbitrary or unfair."

85. In my judgment, an "arbitrary" decision in this context goes beyond perversity as that expression is generally used in our courts and is looking to something which amounts to unfairness in the process, such as deciding on the basis of a litigant's skin colour. Otherwise, the contrast with the "right result" could not be made.

86. For all these reasons, the residual jurisdiction referred to in *North Range* exists, is binding on us, and is fully explicable, if not without, at least with the aid of the Human Rights Act.

87. It is against this background therefore that I must now revert to the complaints made about Cresswell J's reasons for refusing leave to appeal to this court.

*Was there unfairness in the judge's refusal of leave to appeal?*

88. I refer to paras 20/33 and especially 32/33 above.

89. I assume (I stress the word assume) that there is much to argue about the arbitrators' split decision and the judge's reversal of the majority award on appeal. I do so, conscious that it is no part of this court's business, on this application, to get involved in the merits of the parties' dispute; but also conscious that if there was nothing to say against the judge's solution, then this whole application would have been totally moot. Thus there might in theory be arguments, irrespective of the English proper law of the ELP and of the reinsurance contract, as to how English law would regard the significance of the local court applying a different substantive law to the claim; or, as to how English law would construe "damages on account of…Property Damage".

90. On that assumption, the question remains whether there is anything arguably unfair, or anything arbitrary or unfair, about the judge's refusal of leave to appeal to this court, which should entitle this court to give leave to appeal so that the question whether the judge's refusal should be set aside can be debated here.

91. It is submitted that the judge's refusal was so misguided or incomprehensible as to amount to no decision at all; or to an arbitrary and perverse decision; or to evidence of a lack of any intellectual engagement with the arguments put before him; in sum, to the extent of the process being flawed and invalidated by unfairness.

92. Thus, first, it is suggested that the judge must have regarded the issue on appeal as not being of general importance, even though at the time of the application to appeal from the arbitrators it was common ground that the award did raise an issue of general public importance. It is said that the judge could not in such circumstances fairly have changed his mind about the importance of the issue. I do not accept that submission. The judge does not state whether or not he regarded the issue as of general importance, but he did say that he broadly agreed with the reinsurers' submissions, which were to the effect that his decision was orthodox, applied incontrovertible principles of law and was right. So he might have regarded the issue as being of general importance, but in no way novel, and covered by well established principle and authority; or he might have thought that for these reasons such an issue could not be described as of general importance at all. On either hypothesis, it could not be said that his view was unfair in itself or evidence of unfair process. It appears that, rightly or wrongly, he regarded the proper law of the contracts as being decisive. On that basis, he would be entitled to agree in the first place that an award which displaced the proper law in favour of the local law raised an issue of general public importance, but, secondly, that his correction of that error, by restoring the position to orthodoxy, left no room for further controversy.

93. Secondly, the applicant complains that the reference in the judge's reasons to para 116 of his judgment in particular shows a fundamental failure to engage intellectually with the issues: by considering a point not raised in argument, or suggesting that the real issue between the parties was yet to be determined. Again, I disagree. There may or may not be room for disagreement about what the judge meant in his para 116 in

referring to an issue left for determination by the arbitrators about the meaning of "damages on account of…Property Damage": and whether such a meaning, as a matter of English law, could still be informed by a referral over from English law to the local law. However, that would be for argument before the arbitrators. I note that in his dissenting opinion Mr Rokison had said that what mattered was how English law would construe "Property Damage". It seems to me to be impossible therefore for Mr Edelman to submit that the judge was trespassing into an area which the parties had never dealt with; or that he was being unfair in suggesting that there remained questions for the arbitrators to resolve, by the English proper law of the contracts. On any view, the arbitrators' award was only on a preliminary issue and they would have to apply the contracts to the facts.

94. Thirdly, the applicant complains that the judge failed to apply *The Baleares* as the applicable test by which to judge an application for leave to appeal to the court of appeal. Again, I would disagree. There is no sign that that is so. Both parties cited *The Baleares* (in this court) to the judge as the leading case on the question of the test for deciding whether to grant leave to appeal to the court of appeal. Leggatt LJ's expression "worthy of consideration by the Court of Appeal" is in any event not a term of art, but a broad test which leaves it open to the court in its discretion to take account of a number of factors, including the need for finality and the fact that an appeal to this court would be, in substance if not for the purposes of the post 1996 Act CPR 52.13, a second appeal. In *The Baleares* the bone of contention was whether the *Nema* guidelines should operate at the stage of leave to appeal to the court of appeal: the majority held that they should not. But no one was suggesting to Cresswell J that the section 69(3) test applied to the later stage of a further appeal to the court of appeal. Leggatt LJ went on, immediately after speaking of the test as being whether the question of law is worthy of consideration by the court of appeal, to say (at 363) –

> "That will include an assessment of whether there is sufficient doubt about the correctness of the Judge's decision to warrant such consideration; whether the decision of the Court of Appeal "would add significantly to clarity and certainty of English commercial law"; and whether for some other reason the Court of Appeal agrees to consider the question of law. If when application is made to him the Judge is in doubt, he can, while giving a certificate, himself refuse leave, so allowing the Court of Appeal to decide whether or not to entertain an appeal. Provided that due regard is paid to the pursuit of "speedy finality", there is no apparent justification for making appeals to the Court of Appeal on points of law arising out of decisions of Judges on appeal from arbitrators more difficult to maintain than other appeals in respect of which leave is necessary."

95. Under the 1996 Act, however, the position is again somewhat different, for the Arbitration Act 1979's technique of allowing the issue of leave to appeal to go to the court of appeal (provided the first instance judge certified a point of general public importance of some other compelling reason for an appeal) has now altered in favour of limiting the decision on leave to appeal to the first instance court.

96. The applicant's complaint is that the reinsurers' gloss of the relevant test as being whether the issue is "open to any serious doubt; or (putting it another way), is there any realistic possibility" of a different result on appeal, was a misdirection: and that the judge applied that error in adopting para 7 of the reinsurers' skeleton. Again, I disagree. The test of realistic possibility of success on appeal is the most general test there is, now to be found in CPR 52.3(6) and wholly familiar to the judge. In that context, the associated reference to "any serious doubt" can hardly be supposed to make any difference in practice. This is a fortiori the position since para 7 of the reinsurers' skeleton also submitted that the judge's decision reflected orthodoxy and that he "should not entertain any doubt about the correct outcome of this case". If, as the judge said, he refused leave "broadly for the reasons set out" in that para 7, there is no ground for saying that he adopted the wrong test for his decision. But even if he was in danger of misapplying the right test by confusing it with a misleading gloss of it, that, in my judgment, is an error of law like any other, and does not amount to unfairness in the process.

97. Finally, Mr Edelman submits that the judge showed himself insufficiently objective to free himself from his own decision in favour of the reinsurers. I disagree. Every first instance judge is wholly familiar nowadays with the need to consider whether he should give leave to appeal against the decision which he has just arrived at. Cresswell J is an experienced commercial judge. There is no sign that he failed to consider the issue of leave to appeal objectively. He heard oral submissions for some half an hour on the subject.

98. In sum: I can find in none of these submissions any cause for thinking that the judge's refusal of leave to appeal was arbitrary or unfair; or was the product of a failure of intellectual engagement with the arguments put before him; or amounted actually or metaphorically to the absence of a decision on the issue; or even (for all that I have rejected this as a possible test of unfairness) was perverse; or, for this is ultimately the test, amounted to such unfairness in the process as to amount to a breach of article 6 of the Convention.

*Conclusion*

99. In conclusion, I would affirm the *North Range* residual jurisdiction to enquire into unfairness in the process of a refusal of leave under section 69(8), but reject the challenge in this case.

100. It is important to underline what was also said in *North Range* about the dangers of this residual jurisdiction being misused. There may be a temptation, even an unconscious one, to present an unfavourable decision as one which is not only wrong but arrived at unfairly. But in the nature of things it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced. The courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration.

101. Although, in deference to the arguments which have been placed before us, I have treated the submissions about the residual jurisdiction in detail, this application

ultimately turns on the strength of AZICL's case for bringing itself within that jurisdiction. Since in my judgment that case would not meet the standard test for the granting of an appeal to this court, I would refuse its application.

**Lord Justice Longmore:**

102. I agree.

**Master of the Rolls**

103. I also agree.