Case No: 2011-469

Neutral Citation Number: [2012] EWHC 87 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 26/01/2012

Before:

MR JUSTICE HAMBLEN

- -

Between :

ABUJA INTERNATIONAL HOTELS LIMITED — **Claimant**

- and -

MERIDIEN SAS — **Defendant**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Official Shorthand Writers to the Court)

- -

Adedamola Aderemi & Amina Rawlings (instructed by **Samuel & Co**) for the **Claimant**
Vernon Flynn QC & David Pope (instructed by **SNR Denton**) for the **Defendant**

Hearing dates: 20 January 2012

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Judgment
As Approved by the Court

Mr Justice Hamblen:

1. In these proceedings, the Claimant ("Abuja") challenges an ICC arbitration award dated 18 March 2011 ("the Award") made following a three-day hearing in December 2010 before a tribunal comprising Stephen Males QC as chairman, the Honourable Justice Kayode-Eso (a former Justice of the Supreme Court of Nigeria) and Dr Tunde Ogowewo (an English and Nigerian barrister who teaches at King's College London) ("the Tribunal").

2. In the Award, the Tribunal upheld Meridien's claim that Abuja had breached a hotel management agreement dated 24 September 2003 ("the Management Agreement"). The Tribunal ordered Abuja to pay Meridien around US$7.2 million plus interest and costs.

3. Abuja challenges the Award under ss.67 and 68 of the Arbitration Act 1996 ("the Act"). It also issued an application for permission to appeal under s.69 but this was abandoned at the hearing.

Factual background

4. The background facts are set out in the Award. Meridien is a French company. It is part of the "Le Méridien" group, which operates an international chain of hotels. Since November 2005, Meridien's parent company has been Starwood Hotels & Resorts Worldwide, Inc. ("Starwood").

5. Abuja is a Nigerian company. It owns an hotel in Abuja, Nigeria that was formerly known as "Le Meridien Abuja", but is now known as the "Nicon Luxury" ("the Hotel"). Abuja was originally owned by the Nigerian Government. In November 2006, 90% of its shares were sold for US$50 million to a Nigerian private company, Hotels Acquisition Limited ("HAL"), as part of a Government privatisation programme.

6. Under the terms of the Management Agreement, Meridien was to market and manage the Hotel in return for certain fees. The Management Agreement was to run for an initial term of 10 years.

7. The Hotel opened in 2004. Meridien managed it without major incident until late 2006, when HAL took control of Abuja. HAL was dissatisfied with the Management Agreement and wanted the Hotel to be run by Nigerians rather than foreigners like Meridien. From about early 2007, Abuja unilaterally took over the management of the Hotel. It revoked the authority of the Hotel's general manager over the bank account, it starved the Hotel of funds so that staff and suppliers could not be paid, and it sacked several employees. These actions – and others – were found to be in breach of the Management Agreement, as the Tribunal found at paragraphs 122 to 124 of the Award. This aspect of the Award is not subject to challenge.

8. In March 2007, notices of default were served on Abuja under the Management Agreement. When Abuja failed to remedy the defaults identified in those notices, Meridien sent a letter, dated 8 June 2007, in which it purported to terminate the Management Agreement with effect from 30 June 2007.

9. Pursuant to the arbitration agreement contained in clause 9.6.1 of the Management Agreement, Meridien began an ICC arbitration against Abuja in November 2009. Abuja challenged the validity of the arbitration agreement and, without prejudice to that contention, defended Meridien's claim and advanced its own counterclaim.

The arbitration

10. The Management Agreement contained the following clause dealing with the settlement of disputes and applicable law:

> "Section 9.6 – Settlement of disputes and applicable law
>
> 9.6.1 In the event of a dispute resulting from the interpretation, the performance or notice of termination of this Agreement, the Owner and Le Meridien shall use their best efforts to settle it amicably. In the event that one or both of the Parties to this Agreement decide to refer the dispute to arbitration, said arbitration proceedings shall take place in London before the International Chamber of Commerce, by one or more arbitrators appointed in accordance with its rules. Such proceedings shall be conducted in the English language. It is agreed between the Parties that during any controversy, claim, disagreement or dispute "Le Meridien" shall remain in possession of the Hotel and both Parties shall continue to fulfil their obligations under this Agreement until the dispute is finally settled (within the limits of the Initial Term or the Extended Term as provided under Sections 8.1 and 8.2).
>
> 9.6.2 This Agreement shall be construed, interpreted and applied in accordance with the laws of Nigeria."

11. In accordance with Article 18 of the ICC Rules the Tribunal drew up Terms of Reference which were signed by the parties. This included the following:

> "1 The arbitration will be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce in force as from 1 January 1988 ("the Rules").
>
> 2 The curial law applicable to the arbitration is English law and the mandatory provisions of Part I of the United Kingdom Arbitration Act 1996 ("the Act") will apply.
>
> 3 In respect of any matter not provided for by the Rules or by the mandatory provisions of the Act, the arbitration will be conducted in accordance with such directions as may be given by the Tribunal in its discretion.
>
> …..
>
> 6 The governing law of the Management Agreement is the law of Nigeria."

12. The final hearing of the arbitration took place from 14 to 16 December 2010. The Tribunal allowed the parties to make further written submissions thereafter. The Award was published on 18 March 2011. In it, the Tribunal rejected Abuja's jurisdictional challenge, upheld Meridien's claim and dismissed Abuja's counterclaim.

The Issues

Section 67

13. Abuja challenged the substantive jurisdiction of the Tribunal on the grounds that:

(a) The Constitution of the Federal Republic of Nigeria 1999 invalidates the commercial arbitration agreement between the parties because such an arbitration agreement is unconstitutional, null and void as it is contrary to s. 36(1) & (3) of the 1999 Nigerian Constitution.

(b) The failure of Meridien to comply with Section 54(1) of the Companies and Allied Matters Act and incorporate its business in Nigeria invalidated the entire Management Agreement including the arbitration agreement contained in it and thus deprived the Tribunal of substantive jurisdiction.

(c) The arbitration agreement was agreed with constraint and is contrary to public interest.

(d) The arbitration agreement was invalid on the basis of force majeure and privatisation which affected the totality of the Management Agreement.

Section 68

14. Abuja challenged the Award for serious irregularity on the grounds that:

(a) the Tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction) by making an award when Meridien had failed to incorporate in Nigeria as required under Nigerian law. Alternatively the Tribunal failed to deal with all the issues that were put to it with reference to s. 68(2)(d).

(b) the Tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction) because the proper party had not terminated the agreement.

(c) the Tribunal failed to comply with its general duty pursuant to s.33 of the Arbitration Act 1996 alternatively exceeded its jurisdiction (otherwise than by exceeding its substantive jurisdiction) in awarding the sum of US$6,000,000 as damages for future loss.

(d) the Tribunal failed to comply with its general duty pursuant to s.33 of the Arbitration Act 1996 alternatively exceeded its jurisdiction (otherwise than by exceeding its substantive jurisdiction) in awarding damages for future loss on the basis of a 577 room hotel.

(e) the Tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction) by making an award in respect of marketing contribution. Alternatively the Tribunal failed to deal with all the issues that were put to it with reference to s. 68(2)(d).

(f) the Tribunal failed to comply with its general duty pursuant to s.33 of the Arbitration Act 1996 by making an award of the sum of US$1,246752.15 as accrued debt and US$220,000 in respect of technical services.

(1) Section 67

General legal issues

15. There are various general legal considerations which are of relevance to the arguments raised by the Abuja.

16. First, s.67 is concerned with challenges to the "substantive jurisdiction" of the arbitral tribunal. Pursuant to s.82 of the Act "substantive jurisdiction" refers "to the matters specified in section 30(1)(a) to (c)", namely:

> "(a) whether there is a valid arbitration agreement,
> (b) whether the tribunal is properly constituted, and
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

17. In the present case the relevant issue of substantive jurisdiction is whether there is a valid arbitration agreement.

18. Secondly, that issue falls to be considered in accordance with English law, being the law governing the arbitration agreement, as the Tribunal held and as is not challenged. The proper law of the main agreement is irrelevant. As stated by Cooke J in *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2008] 1 Lloyd's Rep. 93 at paragraph 35: "The parties have agreed to arbitration in accordance with English law and it is by that law alone that [the validity of the arbitration agreement] can be determined….To delve into the proper law of the [main agreement] to seek for any provision mandatorily applicable by that law to the issue of jurisdiction is impermissible".

(a) Whether the arbitration agreement is unconstitutional, null and void as it is contrary to s. 36(1) & (3) of the 1999 Nigerian Constitution.

19. Section 36 of the Nigerian Constitution provides that, in the determination of a person's civil rights and obligations, he shall be entitled to "a fair hearing … by a court or other tribunal established by law" (s.36(1)) and that the proceedings of any such tribunal "shall be held in public" (s.36(3)). Abuja's case is that the arbitration agreement falls foul of these provisions because an arbitral tribunal is not "established by law" and arbitral proceedings are not generally held in public. Since, so it is said, the requirements of s.36 cannot be waived, the arbitration agreement is invalid.

20. The short answer to this contention is that, as the Tribunal rightly held, Nigerian law is irrelevant to the validity of the arbitration agreement as it is governed by English law.

21. As the Tribunal held, the arbitration agreement provides for arbitration in London and is implicitly governed by English law. It has its closest and most real connection with England because the seat of the arbitration is here: *C v D* [2008] 1 Lloyd's Rep. 239 at paragraph 26. This was recognised and acknowledged by the parties in the signed Terms of Reference which provided that "the curial law applicable to the arbitration is English law".

22. The fact that the Management Agreement is governed by Nigerian law does not mean that the separable and distinct arbitration agreement is so governed. By virtue of s.7 of the Act and the principle of separability it enshrines, the arbitration

agreement "must be treated as a 'distinct agreement'": *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep. 254 at paragraph 17.

23. There are no grounds under English law for suggesting that the arbitration clause is invalid or unenforceable and Abuja does not contend otherwise.

24. Abuja argues that the fundamental and mandatory nature of the Nigerian Constitution "trumps" any application of English law. However, as a matter of English conflicts of laws principles, Nigerian law has no relevance to the validity of the arbitration agreement, whatever the nature of the Nigerian law may be.

25. In any event, there is no evidence of Nigerian law before the Court to make good any argument that the arbitration agreement falls foul of s.36 of the Nigerian Constitution. Indeed, the Tribunal, which included two eminent Nigerian lawyers, reached the clear conclusion at paragraphs 39 to 42 of the Award that even if the arbitration agreement were governed by Nigerian law s.36 of the Constitution would still not invalidate it. In particular they held that:

    (a) the decisions of the Nigerian Supreme Court on which Abuja relies are all concerned with court proceedings in Nigeria and not with arbitrations;

    (b) the Nigerian Arbitration and Conciliation Act 1990 specifically recognises arbitration (including under international arbitration rules) as a valid means of settling commercial disputes; and

    (c) the Nigerian Supreme Court has repeatedly upheld stays of proceedings in the Nigerian courts commenced in breach of an agreement to arbitrate: see, *e.g., M.V. Lupex v N.O.C.&S. Ltd.* [2003] 15 N.W.L.R. 469.

    (d) the consequence of Abuja's argument would be that parties cannot arbitrate under Nigerian federal law, a remarkable result that is most unlikely to have been intended by the Legislature.

26. Abuja had a further argument that the arbitration agreement is invalidated by s.36 of the Constitution by reason of the principle in *Ralli Brothers v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 under which a court will not enforce a contract (even if it is lawful by its governing law) if its performance is unlawful by the law of the country where it has to be performed.

27. The arbitration agreement does not, however, fall to be performed in Nigeria, still less does it have to be performed there. The seat of the arbitration is London. There is no element of the performance of the arbitration agreement which the contract requires to be performed in Nigeria. No question of compulsory performance of the arbitration agreement arises in Nigeria and therefore the principle in *Ralli Brothers* has no application, as the Tribunal rightly decided (at paragraph 49 of the Award) – see *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* at paragraphs 46 to 49.

(b) Whether the failure of Meridien to comply with Section 54(1) of the Companies and Allied Matters Act and incorporate its business in Nigeria invalidated the entire management agreement including the arbitration agreement.

28. Sections 54(1) and 54(2) of the Nigerian Companies and Allied Matters Act 1990 ("CAMA") state that any non-Nigerian company "having the intention of carrying on business in Nigeria" must incorporate as a separate entity in Nigeria and may not in the meantime "carry on business in Nigeria or exercise any of the powers of a registered company" (s.54(1)). Any act of a company in contravention of that requirement "shall be void" (s.54(2)).

29. Abuja contends that, by entering into the Management Agreement and agreeing to perform its obligations thereunder, Meridien intended to carry on business in Nigeria and was therefore obliged by CAMA to incorporate as a separate entity in Nigeria. It never did. The Management Agreement, including the arbitration agreement within in it, is therefore (it is said) void.

30. Even if this argument was correct as a matter of Nigerian law it would not assist Abuja because, for reasons already stated, Nigerian law is irrelevant to the validity of the English law arbitration agreement.

31. Even if that were not so, there is again no evidence of Nigerian law before the Court to support the argument advanced.

32. Further, as the Tribunal held, even if s.54 of CAMA provided grounds for challenging the validity of the Management Agreement that would not necessarily affect the validity of the separable arbitration agreement. The arbitration agreement will only be set aside if it is *directly* impeached by the foreign law; the challenge to it must be "based on facts which are specific to the arbitration agreement": *Fiona Trust* at paragraph 35. However, the Tribunal found that there were no such facts in this case and that either the entry into or the performance of the separable arbitration agreement was capable of amounting to carrying on business in Nigeria.

33. The Tribunal further found that in any event the Management Agreement did not involve the carrying on of business in Nigeria.

34. Abuja also relies on the *Ralli Brothers* principle under this head. For the reasons already given, it is of no application.

(c) Whether the arbitration agreement was agreed with constraint and is contrary to public interest.

35. Abuja's argues that the arbitration agreement was invalidated by the circumstances in which the Nigerian Government sold its shares in Abuja to HAL in November 2006. It contends that HAL was "forced to accept" the arbitration agreement as part of the sale. Since the arbitration agreement was not voluntary, so Abuja says, it fell foul of the principle that arbitration agreements must be agreed "without constraint" and must not run counter to any important public interest.

36. This argument again assumes that Nigerian law and public policy is relevant and applicable to the issue of validity. It is not, for reasons already stated.

37. The argument is any event misconceived. Abuja was and is the party to the arbitration agreement. There is no suggestion that Abuja was subject to any "constraint" or public-interest concern at the time that it entered into the arbitration agreement in September 2003.

38. The fact that HAL has become Abuja's principal shareholder does not change the contractual position. It is not a party to the arbitration agreement and therefore cannot have been constrained to enter into it.

39. Further, as Meridien points out, the notion that HAL was "forced to accept" the arbitration agreement as part of its purchase of Abuja's shares is in any event far fetched. HAL is a sophisticated commercial organisation. Its Managing Director is Jimoh Ibrahim, a billionaire businessman and high-ranking politician. It is clear that HAL would have been well aware of the terms of the Management Agreement when it agreed to purchase Abuja's shares. Indeed, the share sale and purchase agreement expressly stated (at clause 6.1.11) that the Management Agreement "is still subsisting". Moreover, even if HAL were in some way constrained to purchase Abuja on unfavourable terms, its recourse would be against the Nigerian Government under the share sale and purchase agreement.

    (d) Whether the arbitration agreement was invalid on the basis of force majeure and privatisation which affected the totality of the Management Agreement.

40. Abuja's force majeure argument is that it says that the Government's sale of its shares pursuant to its policy of privatisation was an act carried out in its sovereign capacity as the Government of Nigeria because the sale was carried out in accordance with statutory powers conferred upon the Government by the Public Enterprises (Privatisation & Commercialisation) Act 2004. Therefore, says Abuja, the privatisation constituted an act of force majeure which had the effect of excusing each party from performing all or any of its obligations under the Management Agreement.

41. Even if that be right it would not go to the Tribunal's "substantive jurisdiction" as defined in s.30(1) of the Act. It would at most relieve Abuja of its obligations under the Management Agreement. It would not affect its obligations under the separable arbitration agreement, still less would it impair the validity of that agreement.

42. In any event, no grounds have been made out for going behind the Tribunal's conclusion that (paragraph 119):

> "First, there was no "act if Government in its sovereign capacity". Secondly, however, even if the shares in the Respondent were sold by the government acting in its sovereign capacity, the breaches of the Management Agreement by the Respondent with which we deal in the next section of this award were not "due to" (or caused by such governmental action but were the result of the free commercial choice of the Respondent's new shareholder."

43. Abuja's privatisation argument is that it was no longer bound by the terms of the Management Agreement (including the arbitration agreement) when the Nigerian Government sold its shares in Abuja to HAL. The basis for this argument is clause

9.1.2(c) of the Management Agreement under which Abuja agreed not to enter into any commitment that might negatively affect the operation of the Hotel, "without prejudice to [Abuja's] right to privatisation of the Hotel". Abuja contends that these words, by implicitly acknowledging that privatisation might negatively affect the Hotel's operation, mean that Abuja could elect no longer to be bound by the Management Agreement *at all* if it were privatised.

44. Again, even if that be right it would not go to the Tribunal's "substantive jurisdiction" as defined in s.30(1) of the Act. It would at most enable Abuja to be relieved of its obligations under the Management Agreement. It would not affect its obligations under the separable arbitration agreement nor does it in any way impair the validity of that agreement.

45. In any event the argument is obviously wrong for the reasons given by the Tribunal. As they stated, clause 9.1.2 (c) it does not mean that Abuja or its new private sector owner was entitled to disregard the Management Agreement once Abuja was privatised. If that far-reaching consequence had been intended much clearer language would have been required than is contained in Article 9.1.2(c).

Conclusion on section 67

46. For the reasons outlined above I am not satisfied that Abuja have established any grounds for challenging the substantive jurisdiction of the Tribunal within s.67.

(2) Section 68

General legal issues

47. There are various general legal considerations of relevance to the arguments raised.

48. First, section 68 requires the applicant to establish: (1) a "serious" irregularity; (2) an irregularity which falls within the closed list of categories in s.68(2)(a) to (i); and (3) that one or more of the irregularities it identifies caused or will cause it "substantial injustice" – see, for example, *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 at paragraph 27 (Lord Steyn).

49. Secondly, the threshold for a challenge under s.68 is high. As stated in paragraph 280 of the Departmental Advisory Committee Report of 1996, s.68, "is really designed as a long stop, available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected". Further, the focus of the inquiry under s.68 is due process, not the correctness of the tribunal's decision – see, for example, *The Petro Ranger* [2001] 2 Lloyd's Rep. 348 at 351.

50. Thirdly, for there to be a "serious irregularity" under s,68(1)(b) because the tribunal has exceeded its powers it is necessary to establish that the arbitral tribunal purported to exercise a power it does not have. The erroneous exercise of a power which the tribunal does have involves no excess of power. In particular, s.68 is not engaged if the tribunal merely arrives at a wrong conclusion of law or fact: see, for example, *Lesotho* at paragraphs 24 and 31.

51. Fourthly, for there to be a "serious irregularity" under s.68(1)(d) because the tribunal has failed to deal with an issue put to it, it is necessary to establish that the tribunal has failed to deal at all with a "fundamental" issue, which generally means an issue

the determination of which is essential to a decision on the clams or specific defences raised in the course of the reference: see *Fidelity Management SA v Myriad International Holdings BV* [2005] 2 Lloyd's Rep. 508 at paragraphs 7-10.

(a) Whether the Tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction) by making an award when Meridien had failed to incorporate in Nigeria as required under Nigerian law. Alternatively the Tribunal failed to deal with all the issues that were put to it with reference to s. 68(2)(d).

52. Abuja criticises the Tribunal's decision as being contrary to the evidence and one which no reasonable tribunal could have reached. However, that is a criticism of how the Tribunal exercised a power it clearly had, namely to decide the issue in question. An error, however gross, in the exercise of a power does not involve an excess of that power – see *Lesotho* at paragraph 25.

53. Abuja further contends that the Tribunal failed to deal with its case that Meridien had been carrying on business in Nigeria before it entered into the Management Agreement. It is correct that this issue is not expressly addressed in the Award but the "fundamental" or "essential" issue before the Tribunal was whether section 54 provided Abuja with a defence. That issue was addressed and decided by the Tribunal. The Tribunal was not required expressly to address all the arguments advanced as to why it did or did not provide Abuja with a defence. As stated by Thomas J. in Hussman *Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83 at 97:

> "I do not consider that section 68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that."

(b) Whether the Tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction) because the proper party had not terminated the agreement.

54. This was a substantive issue raised by Abuja at the arbitration. It contended that no valid notice of termination was given as it was given by Meridien's parent company, Starwood, and not by Meridien.

55. This argument was rejected by the Tribunal who found that (paragraph 128):

> "The notices referred to the Management Agreement and made clear that they were intended to constitute notices of default and of termination respectively under that agreement. We accept the Claimant's submission that it was sufficient to constitute a valid notice under the agreement that the notice should make clear to the reasonable recipient of the notice that it was a notice under the agreement sent on behalf of the Claimant. This the notices undoubtedly did, and we have no doubt the Respondent understood them in this way."

56. Abuja now seeks to challenge those findings. This is impermissible and raises no issue of excess of powers. Even if the Tribunal's conclusion was wrong it would not

involve an excess of powers or any "serious irregularity". In any event the Tribunal's conclusion as to how the notice would reasonably be and was understood was essentially one of fact and therefore not open to challenge, and there is no longer any s.69 challenge.

(c) Whether the Tribunal failed to comply with its general duty pursuant to s.33 of the Arbitration Act 1996 alternatively exceeded its jurisdiction (otherwise than by exceeding its substantive jurisdiction) in awarding the sum of US$6,000,000 as damages for future loss.

57. Abuja challenges the Tribunal's decision on the grounds that there was no or insufficient evidence to support the conclusion reached. Even if (which is not the case) there had been no evidence that would not involve an excess of power, for reasons already stated.

58. In relation to the alleged breach of the Tribunal's general duty under s.33 of the Act to act fairly the general context needs to be set out. At the arbitration Abuja was represented by a large team of experienced Nigerian lawyers. They produced written submissions running to nearly 80 pages that covered this issue. At the hearing itself, Abuja's counsel cross-examined Meridien's witnesses for more than a day and made closing submissions that lasted over four hours.

59. The Tribunal went to considerable lengths to accommodate Abuja. It allowed Abuja to serve its witness evidence two months out of time. It admitted Abuja's expert evidence, even though Abuja only produced its expert's report on the second day of the hearing. During Abuja's oral closing submissions, the Tribunal asked Abuja's counsel if he wanted to have Meridien's witnesses recalled. He declined the invitation: see p.132 of the transcript of day 3 of the hearing. Even after the hearing, the Tribunal allowed Abuja to make three further rounds of written submissions: see paragraph 20 of the Award.

60. Abuja had an experienced counsel team. If there was an issue upon which they wished to put in further evidence, or to recall witnesses or to make further argument, it was incumbent upon them to make an appropriate application to the Tribunal. They did not do so in relation to any of the issues about which complaint is now made.

61. In these circumstances, the contention that the Tribunal acted unfairly towards Abuja and that it had no reasonable opportunity to put its case is ambitious.

62. The particular point made in relation to the loss of earnings claim is that Meridien had provided little or no evidence as to the expenses to be taken into account in relation to that claim and that Abuja therefore had no proper opportunity to deal with the claim. However, Abuja relied on the paucity of evidence as to expenses in support of their contention that the claim had not been proved and should be dismissed. The Tribunal did not accept that contention but did make a substantial reduction from Meridien's claim for expenses, a reduction which they recognised may well be excessive. That was a matter for the Tribunal and involves no unfairness. The Tribunal did take into account the unsatisfactory nature of the evidence on expenses, but not to the extent that Abuja would have wished.

(d) Whether the Tribunal failed to comply with its general duty pursuant to s.33 of the Arbitration Act 1996 alternatively exceeded its jurisdiction (otherwise than by exceeding its substantive jurisdiction) in awarding damages for future loss on the basis of a 577 room hotel.

63. The Tribunal awarded damages on the basis that the Hotel would have had 577 rooms by 1 January 2009. This reflected Abuja's obligation under the Management Agreement to complete the hotel with 577 rooms. Abuja contended that damages should be assessed on the basis that the Hotel had 253 rooms, which was the position at the date of alleged termination and indeed at the date of the hearing.

64. Abuja contends that this conclusion was reached without any evidence. For reasons already stated, even if this was the case it would not involve an excess of power. In any event, the Tribunal's conclusion was based on Abuja's obligations under the Management Agreement rather than what would in fact have happened.

65. The claim based on 577 rooms was clearly set out in Meridien's expert evidence with which Abuja joined issue. As such there was every opportunity to deal with it in evidence and submissions, particularly bearing in mind the matters set out in paragraphs 57-59 above.

(e) Whether the Tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction) by making an award in respect of marketing contribution. Alternatively the Tribunal failed to deal with all the issues that were put to it with reference to s. 68(2) (d).

66. Abuja contends that the Tribunal's award in respect of marketing contribution was contrary to the evidence, which was that to the effect that this was an expense. Even if that be correct, for reasons already stated it would not involve an excess of power.

(f) Whether the Tribunal failed to comply with its general duty pursuant to s.33 of the Arbitration Act 1996 by making an award of the sum of US$1, 246752.15 as accrued debt and US$220,000 in respect of technical services.

67. The claim for accrued debt involved invoices which would appear to have been produced by Meridien at a late stage. Abuja was given the opportunity to make written submissions in relation to the invoices, which it did. No further application was made.

68. The claim for technical services was addressed by both parties. Abuja complains about the conclusion reached by the Tribunal in relation to the period over which damages were awarded, but that goes to the correctness of the decision made and is not a s.68 matter.

69. In the light of these considerations, and having regard to the matters set out in paragraphs 57-59 above, I am satisfied that no unfairness or breach of natural justice has been made out.

Conclusion on section 68

70. For the reasons outlined above I am not satisfied that Abuja has established any irregularity within s.68, still less a "serious" irregularity which has caused or will cause it substantial injustice.

Conclusion

71. Abuja has not made out its case under either s.67 or s.68 of the Act and it follows that its applications must be dismissed.