Neutral Citation Number: [2025] EWCA Civ 715

Case No: CA-2023-002564

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE ROBIN KNOWLES
[2023] EWHC 2638 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2025

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE PHILLIPS
and
LORD JUSTICE JEREMY BAKER

- -

Between:

THE FEDERAL REPUBLIC OF NIGERIA	**Claimant/ Respondent**
- and -	
PROCESS AND INDUSTRIAL DEVELOPMENTS LTD	**Defendant**
-and-	
SEAMUS RONALD ANDREW	**Additional Appellant**

- -
- -

John Wardell KC, Simon Adamyk and Jia Wei Lee (instructed by **Seamus Andrew**) for the **Additional Appellant**
James Willan KC, Tom Ford and Malcolm Birdling (instructed by **Mishcon de Reya**) for the **Respondent**

Hearing dates: 1 and 2 May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Sir Julian Flaux C:

Introduction and background

1. The Additional Appellant, Mr Seamus Andrew, is a barrister and solicitor who acted for the Defendant, Process & Industrial Developments Limited ("P&ID") in an arbitration against the Respondent ("FRN") arising from FRN's breach of a Gas Supply and Processing Agreement ("GSPA") dated 11 January 2010. By an Award dated 31 January 2017, the arbitral tribunal (Sir Anthony Evans, Chief Bayo Ojo SAN and Lord Hoffmann) found that P&ID's claim against FRN succeeded and awarded it U.S.$6.6 billion damages. In October 2017, after the arbitration had concluded, Mr Andrew became a director of P&ID when his company, Lismore Capital Limited ("Lismore"), acquired a stake in P&ID.

2. By an application made on 5 December 2019, FRN challenged the Award and other Awards made in the arbitration proceedings before the Commercial Court under section 68(2)(g) of the Arbitration Act 1996 on the grounds that the Awards had been procured by fraud and that the GSPA and the arbitral process were tainted by bribery, corruption and perjury. Following an eight week trial between January and March 2023, the judge, Robin Knowles J, handed down a detailed judgment on 23 October 2023, running to 595 paragraphs, in which he found that three separate irregularities brought the case within section 68(2)(g): (i) Mr Michael Quinn, co-founder with a Mr Cahill of P&ID had knowingly given false evidence in the arbitration, concealing bribes paid by P&ID to Mrs Grace Taiga, Director of Legal at the Ministry of Petroleum Resources when the GSPA was entered, in connection with its entry; (ii) P&ID continued to pay bribes to Mrs Taiga during the period of the arbitration in order to conceal from the tribunal the fact that she had been bribed; and (iii) P&ID had improperly retained and utilised internal legal documents of FRN that it had received during the arbitration.

3. So far as that third irregularity is concerned, the judge found that P&ID had received a number of FRN's internal legal documents, various examples of which he set out in the judgment, including many documents which were plainly subject to legal professional privilege, were confidential to FRN and were documents which P&ID was not entitled to see. As he found at [211] of the judgment, the documents were transmitted to P&ID deliberately by the individuals in Nigeria who procured them. Their release to and retention by P&ID was not authorised by FRN. Among those acting for P&ID who received the FRN internal legal documents were Mr Cahill, Mr Andrew and Mr Trevor Burke. Mr Andrew had the conduct of the arbitration, initially assisted by Harcus Sinclair LLP, as solicitors of record for P&ID in the arbitration. The representation moved to his own firm, SC Andrew LLP, in September 2014, when he became a partner there. In December 2012, Mr Burke, a criminal law QC (now KC) who was a nephew of Mr Michael Quinn, was sent a file of documents to read into P&ID's claim.

4. In relation to the receipt and use of FRN's internal legal documents, FRN's Re-Re-Re-Amended Statement of Case set out a detailed pleading at [79A] to [79M] which included specific allegations against Mr Andrew. Amongst the matters pleaded were: (a) that Mr Andrew was involved in the receipt of FRN's internal legal documents ([79C]); (b) that between November 2014 and June 2017, he was provided with copies of FRN's internal legal documents ([79D]); (c) that it was to be inferred that many other of FRN's internal legal documents were shared with him and others acting for P&ID, but have been lost, deliberately destroyed or withheld by those involved to conceal

P&ID's wrongdoing ([79F]); (d) that at no material time did he, Mr Burke or P&ID's other legal advisers reveal contemporaneously to FRN or the tribunal that P&ID was being improperly provided with privileged and confidential documents ([79I]); (e) that it was to be inferred that P&ID was making use of FRN privileged documents to gain knowledge of what FRN was being advised and the steps it was planning to take in the arbitration and to obtain improper strategic knowledge and influence via corrupted officials at FRN, of the steps FRN was or was not taking ([79J]); (f) that P&ID's contemporaneous knowledge of the contents of FRN's internal legal documents meant that P&ID knew that FRN did not know that the GSPA had been procured by bribery and/or that the evidence of Mr Quinn was perjured, as a result of which P&ID continued to pursue its claim in the arbitration and/or continued to rely on Mr Quinn's perjured witness statement, absent which matter no award in its favour would have been obtained ([79K]); (g) that had FRN and the tribunal known that P&ID had been making extensive use of privileged and confidential information unlawfully obtained from Nigerian officials, that would have undermined P&ID's credibility with the tribunal, which would not have awarded P&ID any damages ([79L]).

5. Both Mr Andrew and Mr Burke gave written and oral evidence at the trial on behalf of P&ID. Neither was a party to the proceedings. Although the judge found at [207] of his judgment that: "Mr Andrew tried his best to answer questions carefully and accurately" he went on, particularly at [213] to [217] and [229] to make findings which were critical of Mr Andrew's conduct in relation to FRN's internal legal documents. I will set out those findings in more detail later in this judgment, but for the present simply note that the judge found that: (i) Mr Andrew and Mr Burke appreciated that the documents included ones which were privileged and Mr Andrew's explanation that the documents were shared as part of settlement discussions was rejected as untrue ([214]); (ii) Mr Andrew and Mr Burke knew that they were not entitled to see the documents and their "decision not to put a stop to it" (clearly a reference to the continued retention and use of the documents by and on behalf of P&ID) was "indefensible" [215]; (iii) the reason they behaved this way was because of the money they hoped to make if P&ID succeeded in the arbitration, up to US$3 billion in the case of Mr Andrew ([207] and [215]); (iv) Mr Andrew's suggestion in his evidence that he did not pay particular attention to FRN's internal legal documents and did not read them all or some of the ones he received completely was untruthful ([216]); and (v) the improper retention of FRN's internal legal documents enabled P&ID to track FRN's internal consideration of merits, strategy and settlement during the arbitration and allowed it to monitor whether FRN had become aware of the fact that it and the tribunal were being deceived ([217]).

6. The judgment in draft had been provided to the parties in the usual way to consider any typographical corrections and the like on 16 October 2023, a week before hand down. As a director of P&ID, Mr Andrew received a copy. On 17 October 2023, Mr Andrew emailed the judge via the judge's clerk saying that he had seen the draft judgment in his capacity as a director of P&ID and, having given preliminary consideration to its contents, he said he would very much like to speak to Mr Gregory Treverton-Jones KC, leading counsel who had been advising him in relation to FRN's allegations against him of professional misconduct. He said that he understood Mr Treverton-Jones KC sometimes made submissions to the court between dissemination of a draft judgment and hand-down in relation to draft findings of professional misconduct. He wanted to share the judgment with Mr Treverton-Jones KC so the latter could advise him whether any submissions ought properly to be made to the judge, prior to hand down, in relation

to the findings as to his professional standing and asked for permission to share the judgment with Mr Treverton-Jones KC.

7. That email was copied to Mark Howard KC, leading counsel for FRN at the trial before the judge. He emailed the judge via the judge's clerk on 18 October 2023 saying that Mr Andrew was not a party and, in his personal capacity, had no standing to make representations about the contents of the judgment, citing the judgment of Gloster LJ in the Court of Appeal in *Gray v Boreh* [2017] EWCA Civ 56 (referred to in more detail below).

8. The judge responded via his clerk the same day saying:

> "The judge is content for Mr Andrew to show the confidential draft judgment to Mr Treverton-Jones KC on the same basis of confidentiality. This is not however to be taken as any indication that an application on behalf of Mr Andrew in relation to the confidential draft judgment would be appropriate."

9. On 8 November 2023, a consequentials hearing before the judge was fixed for Friday 8 December 2023, with the judge requesting on 24 November 2023 that any grounds of appeal be provided to the Court by 1 December 2023. Mr Andrew did not comply with that timetable, but, previously unheralded, on the afternoon of 6 December 2023, counsel for Mr Andrew, Mr John Wardell KC and Mr Jia Wei Lee, wrote a letter to the judge enclosing draft grounds of appeal and a skeleton argument in support of Mr Andrew's application for permission to appeal against the findings in the judgment that he had breached his professional duties by failing to return FRN's internal legal documents. The judge indicated through his clerk that he had read this material, that it was open to Mr Lee to attend the consequentials hearing as it was in open court, but that it struck the judge that a formal written issued application would be needed as a starting point.

10. At the consequentials hearing on 8 December 2023, Mr Howard KC submitted to the judge that he should not entertain any application by Mr Andrew at that hearing, even for directions, for reasons which he elaborated. Mr Lee accepted that Mr Andrew had not made a formal written application, saying that the intention had been that it be heard that day, but the agenda was such that that seemed impracticable. Preferably, it could be dealt with on paper but if not, a further hearing could be listed for the judge to decide whether to grant or refuse permission to appeal. Therefore, he asked for an adjournment of Mr Andrew's application with provision for responsive submissions and the listing of a further hearing, with probably an extension of time if notice of appeal to the Court of Appeal was required. The judge responded in these terms:

> "I am going to require a formal application supported so far as possible by evidence, if this is even to begin. That is a matter for you and your client as to how quickly that is done, if it is to be done. I will reserve the matter to myself. The first thing I shall do is, if there is such an application, is to give it consideration. And there is a whole range of things that I could do at that point."

11. On 21 December 2023 at 10.21 am, the judge's clerk emailed Mr Lee as follows:

> "Further to your attendance at the hearing on 8 December 2023, the judge would be pleased to know for administrative reasons if an application is to be issued and, if so, when."

There was no response from Mr Lee until the afternoon of the following day, as set out in [13] below.

12. Also on 21 December 2023, the judge handed down his Ruling on Leave to Appeal and made an Order setting aside the Awards in whole and refusing P&ID leave to appeal under section 68(4) of the Arbitration Act 1996. His Order contained at [12] a general liberty to apply to the judge.

13. Mr Lee responded to the email from the judge's clerk set out at [11] above in these terms at 15.36 on 22 December 2023:

> "Mr Andrew will not now be making an application for permission to appeal to the judge. He has instead filed an appellant's notice seeking permission to appeal directly from the Court of Appeal.
>
> No disrespect is intended by seeking permission directly from the Court of Appeal. The reason for this choice is that, given that Mr Andrew's application was not considered and determined at the consequentials hearing, and no extension of time was granted, the lower court is now *functus officio* and no longer has jurisdiction to determine an application for permission to appeal."

14. Mr Andrew's Appellant's Notice in this Court had in fact been issued on 21 December 2023. This was more than five weeks after the date for filing any Appellant's Notice with the Court of Appeal which, under CPR 52.12(b), was 21 days after the hand-down of the judgment i.e. 13 November 2023.

15. Permission to appeal and an extension of time for appealing were initially refused by Males LJ on 19 March 2024. However, on 11 April 2024, Mr Andrew made an application under CPR 52.30 to re-open the refusal to grant permission to appeal. On 11 November 2024, Mr Andrew made an application for Males LJ to recuse himself from dealing with the CPR 52.30 application. By an Order dated 25 November 2024, Males LJ refused the application for him to recuse himself, but granted the application to re-open permission to appeal, ordering that the application for permission to appeal be listed for oral hearing before three judges of the Court of Appeal with the appeal to follow if permission were granted. This judgment is in respect of that hearing which the Court heard on 1 and 2 May 2025.

The judgment below

16. In the circumstances, it is only necessary to refer to those passages in the judgment which are relevant to Mr Andrew's proposed appeal. Under the heading "The Arbitration" the judge dealt in general terms with Mr Andrew's involvement at [206]:

> "P&ID was represented in the arbitration initially by Harcus Sinclair LLP, a London based law firm, Mr Seamus Andrew had conduct. The representation of P&ID would move from Harcus Sinclair LLP to Mr Andrew's firm SC Andrew LLP in September 2014, as Mr Andrew became a partner there. On 11 December 2012 Mr Trevor Burke QC (now KC) was sent a file of documents to read into P&ID's claim. Mr Burke KC was a nephew of Mr Michael Quinn."

17. The judge then addressed, again in general terms, Mr Andrew's and Mr Burke's financial interest in the arbitration and their evidence at [207]:

> "Mr Andrew and Mr Burke KC, among others, have very significant personal interests in this matter. They may have a claim to what were described by Mr Howard KC as "life-changing sums of money", contingent upon success for P&ID in this matter. The figures are up to £850 million in the case of Mr Burke KC and up to £3 billion in the case of Mr Andrew. Each gave written and oral evidence at the trial. Mr Andrew tried his best to answer questions carefully and accurately. Mr Burke KC gave answers in a way that appeared business-like and direct at first, but became increasingly exercised as he was taken through more documents."

18. The judge then dealt with the obtaining, retention and use by P&ID of FRN's internal legal documents and the involvement of Mr Andrew and Mr Burke in that improper conduct at [209] to [217] which I will quote in full:

> "209. Nigeria says the internal legal documents with which P&ID was provided in the course of the arbitration were subject to the confidentiality between lawyer and client known as legal professional privilege. This is a privilege recognised in Nigeria and England & Wales. It is of importance to the rule of law *(Three Rivers (No 6)* [2004] UKHL 48 per Lord Scott at [34]) and "long established in the common law" … : *R (Morgan Grenfell & Co Limited) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] AC 563 at [7] per Lord Hoffmann; see also *R (on the application of Jet2.com Ltd) v. Civil Aviation Authority* at [39].
>
> 210. I have reviewed these internal documents and at least some were plainly subject to legal professional privilege: they were confidential to Nigeria and P&ID was not entitled to see them. The more relevant are identified in the course of this judgment. Another was the subject of a separate application in the course of the hearing before me, and privilege in it was not waived by Nigeria. That particular document is not ultimately material to the determination of any of the issues in the case and I do not refer to it further in this judgment.

211. I shall refer to these internal legal documents in the balance of this judgment as Nigeria's Internal Legal Documents. Some of them are said to have been forwarded by individuals named Mr Saheed Akanji, Mr Tokunbo James and Mr Mulero Racheal. Both Nigeria and P&ID say that individuals with these names or aliases are unknown to them. But the transmission of Nigeria's Internal Legal Documents to P&ID was plainly not the result of incompetence. The scale, nature, continuity and destination does not allow that conclusion on any balance of probabilities, even allowing for the seriousness of the conclusion that the transmission was deliberate.

212. Nigeria alleges:

> "P&ID has offered no sensible explanation for why these documents were leaked by [Nigeria's] lawyers and has presented this Court with a conspiracy of silence. The obvious and correct inference is that they were obtained through corruption of [Nigeria's] legal advisers carried out by P&ID and Mr Adebayo. … Mr Murray all but admitted in his oral evidence that [they] were procured by corruption, and no P&ID witness proffered an otherwise honest explanation".

213. As with many features of this matter the position was more complex. I accept that on limited occasions Nigeria's Internal Legal Documents were individually made available by Nigeria to P&ID as a means of showing P&ID that Nigeria really was doing something or was serious in what it was doing. But on other occasions that was not the reason at all. No-one who saw the document in question for P&ID could have mistaken the latter type of document for the former type.

214. Mr Andrew, Mr Burke KC and Mr Cahill were among those who received Nigeria's Internal Legal Documents. As legal professionals Mr Andrew and Mr Burke KC appreciated that these at least included documents that were privileged. They did not know how the documents had come into P&ID's hands. Mr Burke KC gave oral evidence from the witness box that he had conducted an enquiry into where and how; this evidence did not appear in his written evidence and was false. I reject as untrue Mr Andrew's oral evidence that the documents were shared as part of settlement discussions.

215. Mr Andrew and Mr Burke KC knew that P&ID and they were not entitled to see these documents. Their decision not to put a stop to it, at least by informing Nigeria or immediately returning the documents they knew were received, was indefensible. The reason Mr Andrew and Mr Burke KC behaved in this way was because of the money they hoped to make. Mr Burke KC told me in his evidence that:

> "[t]he money is a complete irrelevance here … [r]eputation and career are far more important to me than this notional money".
>
> But that is now, and was not then. Even Mr Cahill and Mr Murray appreciated that P&ID should not have the documents. But their attitude was that this was the sort of thing you took advantage of if it happened. Mr Murray accepted that the receipt and use of Nigeria's Internal Legal Documents was "less than honest".
>
> 216. Mr Andrew suggested in his evidence that he did not pay particular attention to Nigeria's Internal Legal Documents and did not read them all, or some of those he received, completely. That, I find, was not truthful evidence. Mr Burke KC suggested that he did not give much importance to Nigeria's Internal Legal Documents. That too, I find was not truthful evidence.
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> 217. When I refer in this judgment to P&ID retaining Nigeria's Internal Legal Documents I mean its choice, rather than returning the documents immediately and unread, to read them and to take the benefit of the information they conveyed. P&ID's improper retention of Nigeria's Internal Legal Documents, received at various points during the Arbitration, enabled P&ID to track Nigeria's internal consideration of merits, strategy and settlement during the Arbitration. P&ID's improper retention of Nigeria's Internal Legal Documents also allowed it to monitor whether Nigeria had become aware of the fact that the Tribunal and Nigeria were being deceived."

19. The judge dealt with the witness statement of Mr Quinn, the only factual evidence of P&ID in the arbitration, and Mr Andrew's involvement in its preparation at [228]-[230]:

> "228. Although originally served in relation to the dispute over the Tribunal's jurisdiction, the witness statement of Mr Michael Quinn was in the event to comprise P&ID's factual evidence in the Arbitration as a whole. It was accompanied by a 284-page factual exhibit. By the liability stage of the Arbitration Mr Michael Quinn was dead and Mr Andrew would make the following submission to the Tribunal:
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> "It is my submission that the position now, in this arbitration, is that the facts that are not challenged in Mr Quinn's witness statement are the factual basis of the arbitration".
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> 229. Mr Andrew himself had prepared the witness statement, beginning that work on 6 January 2014. He asked P&ID for a list of which documents had come into P&ID's possession 'officially' and which 'unofficially' so that he could limit any references in the witness statement to the former. This reflected, at least in

> part, his recognition that P&ID had been receiving Nigeria's Internal Legal Documents.
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> 230. In final form, as drafted by Mr Andrew and made by Mr Michael Quinn and provided to the Tribunal on behalf of P&ID, the witness statement stated that it was to "explain how the GSPA came about".”

20. The judge went on to address FRN’s case that the witness statement was impliedly representing that the GSPA had been entered by P&ID in wholly legitimate circumstances, which was false because the contract had been won by paying bribes to Mrs Grace Taiga. He found at [254] that Mr Quinn and P&ID intended the witness statement to be understood in that way and that their conduct was dishonest by the standards of ordinary decent people. He did not make any finding against Mr Andrew in that context.

21. I will deal with the judge’s findings about specific internal legal documents of FRN obtained by P&ID to the extent necessary when I summarise counsel’s submissions below.

22. At [493] to [497] under the heading “Knowingly false evidence, continued bribery and retention of [FRN]’s internal legal documents”, the judge set out the three irregularities which brought the case within section 68(2)(g) of the Arbitration Act:

> “493. There remain three things that bring the case within section 68(2)(g), in my judgment, as an "irregularity" (to use the language of the section). Each amounted to fraud by which the Awards were obtained, and by reason of them the Awards or the way in which the Awards were procured was contrary to public policy.
>
> 494. The first is P&ID's providing to the Tribunal and relying on evidence before the Tribunal that was material but was evidence that P&ID knew to be false. Specifically, this was the evidence of Mr Michael Quinn in his witness statement of 14 February 2014 that he was "explain[ing] how the GSPA came about" when he did not do that because he did not mention that Mrs Grace Taiga had been paid a US$5,000 bribe at the end of December 2009 and a £5,000 bribe on 29 March 2010: see [168]-177], [247]-[254] and [417] above).
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> 495. The second is P&ID's continued bribery or corrupt payment of Mrs Grace Taiga directed to the arbitration period in order to suppress from the Tribunal and Nigeria the fact that she had been bribed when the GSPA came about. This continued bribery or corrupt payment is fairly described by Nigeria as bribery "to keep her 'on-side', and to buy her silence about the earlier bribery". Specifically, these were bribes or corrupt payments on 14 July, 14 August and 30 September 2015 totalling NGN 220,000 (then equivalent to US$900), a bribe or corrupt payment on 14 September 2015 of US$1,000 and a bribe or corrupt

> payment on 14 June 2016 of US$3,000 (sent to Vera Taiga): see [401]-[405] above.
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> 496. The third is P&ID's improper retention of Nigeria's Internal Legal Documents that it had received during the Arbitration. It retained these (rather than returned them unread) so as to monitor Nigeria's position and awareness as the Arbitration continued. This included monitoring whether Nigeria had become aware of the deception being practised by P&ID on the Tribunal and on Nigeria as a party before the Tribunal. Specifically, there was a flow of over 40 of Nigeria's Internal Legal Documents to P&ID during the period of the Arbitration from commencement on 22 August 2012 to Final Award on 31 January 2017. The detail of the contents of a number of them is discussed above. All are material, including for the fact that they showed to P&ID that Nigeria had no awareness that Mrs Grace Taiga had been bribed when the GSPA came about and that bribery or corrupt payments continued to buy her silence.
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> 497. These three things do not represent the full extent of the fraud and conduct contrary to public policy on the part of P&ID that was shown at the trial. But it is these three things that are central to Nigeria's challenge under section 68. They do not, it will be noted, include separately Mr Quinn's evidence about finance and engineering, but that is because those areas face the difficulty (brought out by Lord Wolfson KC particularly in his argument under section 73, made at the trial) that Mr Quinn's evidence on them was, to some extent, already challenged or the subject of attempts at challenge in the Arbitration, including by Mr Shasore SAN at the hearing on liability. It was Nigeria's own case in the Arbitration, including at the hearing on quantum, that P&ID had done nothing under the GSPA."

23. There are two paragraphs from the judge's "Endnote" at the end of his judgment on which Mr Wardell KC in particular placed reliance:

> "592. This case has also, sadly, brought together a combination of examples of what some individuals will do for money. Driven by greed and prepared to use corruption; giving no thought to what their enrichment would mean in terms of harm for others. Others that in the present case include the people of Nigeria, already let down in so many ways over the history of this matter by a number of individuals in politics and administration whose duty it was to serve them and protect them.
>
> 593. I will be referring a copy of this judgment to the Bar Standards Board in the case of Mr Trevor Burke KC and to both the Solicitors Regulation Authority and the Bar Standards Board in the case of Mr Seamus Andrew. I trust that these two regulators of the legal profession in England & Wales will consider the professional consequences of the conduct of Mr

> Burke KC and Mr Andrew in relation to Nigeria's Internal Legal Documents. As a separate matter, although there was argument before me about the acceptability of the remuneration arrangements for Mr Burke KC, that would be a satellite point for the issues I have the responsibility to decide and is best left for the regulator for whom it will be a central point."

Grounds of appeal

24. Mr Andrew pursues five grounds of appeal which are in summary as follows:

(1) The conjunction of [592] and [593] of the judgment is that the judge was finding that Mr Andrew was not only breaching his professional obligations in using privileged material but was somehow implicated in the wider allegations of bribery and corruption against P&ID. This was procedurally unfair and breached his rights under Articles 6 and/or 8 of the European Convention on Human Rights ("ECHR") in the following ways: (i) this was not pleaded or put to him in cross-examination, (ii) the allegation that Mr Andrew was "prepared to use corruption" was so serious that the judge should have warned Mr Andrew that he intended to make that finding and given Mr Andrew the opportunity to seek independent legal representation; and (iii) no adequate reasons or particulars are given for such a finding.

(2) The finding at [215] of the judgment that Mr Andrew's conduct was "indefensible" was procedurally unfair and breached his rights under Articles 6 and/or 8 of the ECHR in the following ways: (i) given the severity of the findings the judge intended to make against him, the judge should have warned Mr Andrew that he intended to make such a finding and given him an opportunity to seek independent legal representation; and (ii) the judge failed to give any or any adequate reasons for his findings, particularly he provided no explanation as to the basis on which he concluded that Mr Andrew was obliged to inform FRN that its internal legal documents had been received by P&ID from an unknown source and/or immediately return them.

(3) The finding at [215] and [592] that Mr Andrew's failure to return the internal legal documents was motivated by greed was procedurally unfair and breached his rights under Articles 6 and/or 8 of the ECHR in that the judge failed to give any or any adequate reasons for his finding that Mr Andrew's personal financial interest motivated his conduct.

(4) The finding at [214] that Mr Andrew gave untrue evidence that the internal legal documents were shared as part of settlement discussions was procedurally unfair and breached his rights under Articles 6 and/or 8 of the ECHR because the judge failed to give any or any adequate reasons for his finding.

(5) The finding at [216] that Mr Andrew gave untrue evidence that he did not pay particular attention to FRN's internal legal documents was procedurally unfair and breached his rights under Articles 6 and/or 8 of the ECHR because the judge failed to give any or any adequate reasons for his finding.

The submissions of the parties

25. In setting out the submissions addressed to the Court, I will cite the passages from the authorities on which the parties relied, to avoid repetition in the Discussion section of the judgment.

26. Although at the outset of the submissions of Mr John Wardell KC on behalf of Mr Andrew, the Court indicated that he had first to deal with the issue of whether this Court had jurisdiction over the proposed appeal because of the application of section 68(4) of the Arbitration Act and whether the application for permission to appeal was out of time, Mr Wardell KC indicated that he preferred to stick to his proposed order of his submissions, which dealt first and foremost with the substance of the proposed grounds of appeal.

27. Mr Wardell KC emphasised that, in the critical part of his judgment at [493] to [497] (set out at [21] above) where the judge identified the three irregularities which brought the case within section 68(2)(g), the judge strikingly did not mention Mr Andrew's name at all. Although Mr Andrew accepted that he received some of the internal legal documents from P&ID, he played no part in obtaining them and Mr Wardell KC submitted that Mr Andrew's conduct was not ultimately material to these irregularities and there was no basis for the judge's conclusion that Mr Andrew was corrupt.

28. In support of his case that a non-party can bring an appeal against the adverse findings of a judge at first instance if it can be shown that the findings breached their rights under the ECHR, Mr Wardell KC relied in particular on the decision of this Court in *In re W (A Child) (Care Proceedings: Non Party Appeal)* [2016] EWCA Civ 1140; [2017] 1 WLR 2415. In that case, there were care proceedings in which it was alleged children had been sexually abused by their siblings. A police officer (referred to as "PO") and a social worker ("SW") gave evidence in the proceedings. The allegations of sexual abuse by the siblings were dismissed but, in his judgment, the judge made a number of findings that PO and SW had lied to the court and had subjected the child to emotional abuse. That allegation of emotional abuse was not pleaded and was extraneous to the court's findings as they were irrelevant to the relief sought. Both PO and SW sought to appeal. They were met with two procedural objections: (i) that they were not parties and (ii) that they were seeking to appeal findings in a judgment not an order.

29. In relation to the first objection, McFarlane LJ, giving the lead judgment, at [33] cited the judgment of Dyson LJ in *George Wimpey UK Ltd v Tewkesbury Borough Council* [2008] EWCA Civ 12; [2008] 1 WLR 1649 at [9]:

> "It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success."

He also noted that Dyson LJ had concluded that the definition of "appellant" in the CPR was not confined to someone who was a party to the proceedings in the lower court. McFarlane LJ concluded at [41] that the appeal of PO and SW could be entertained

irrespective of whether they were formally made a party (or an intervener) in the lower court.

30. In relation to the second objection, at [52] McFarlane LJ referred to the decision of this Court in *Cie Noga SA v Australia and New Zealand Banking Group* [2002] EWCA Civ 1142; [2003] 1 WLR 307 (*"Cie Noga")* where Waller LJ said at [27] that: "if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal." However, Mr Wardell KC pointed out that, where a finding might amount to a breach of a person's rights under the ECHR, *In re W* determined that the Human Rights Act conferred a right to assert those rights on appeal. The Court of Appeal found that the trial judge's findings against PO and SW breached their Article 8 rights to a private life.

31. Having cited various provisions of the Human Rights Act 1998, McFarlane LJ said at [115]:

> "Pausing there, a court is a public authority for the purposes of HRA 1998, s 6 (see s 6(3)(a)) and, by s 6(1), it is 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. In the present case I have, unfortunately, concluded that the High Court has acted in a way which is incompatible, that is in breach of, the Convention rights of PO, SW and the local authority to a fair trial in relation to the adverse findings that were made against them. It is therefore open to the appellants to 'rely' on their assertion that the High Court has acted unlawfully in 'any legal proceedings' which expressly include 'an appeal against the decision of a court or tribunal' (s 7(1) and (6)). Indeed, s 9(1) is explicit in providing that proceedings in respect of an assertion that a judicial act is unlawful under s 7(1)(a) may only be brought by exercising a right of appeal."

32. Mr Wardell KC's primary submission as to the application of *In re W* to the present case was that [592] of the judgment was a finding by the judge of corruption on the part of Mr Andrew in the same sense as corruption was found elsewhere in the judgment, in other words the bribery of Mrs Taiga and other Nigerian officials. This was a serious finding against him which was not pleaded and was not put to him in cross-examination.

33. Mr Wardell KC then made submissions about Article 8 of the ECHR which requires a two-stage analysis. The first stage is to ask whether there has been any interference with a person's right to private life. He submitted that the adverse findings had impacted on the private life of Mr Andrew in precisely the manner envisaged by the European Court of Human Rights ("ECtHR") in *SW v United Kingdom* (2021) 73 E.H.R.R 18 (which is the same case as *In re W* but in the ECtHR) where the Court said at [46]:

> "An attack on an individual's reputation which obstructs his or her ability to pursue a chosen professional activity may therefore have consequential effects on the enjoyment of the right to respect for his or her "private life" within the meaning of Article 8 (see, for example, Sidabras and Džiautas v. Lithuania,

> nos. 55480/00 and 5930/00, § 50, ECHR 2004-VIII). Consequently, the Court has accepted that the adverse portrayal of an applicant's conduct in an authoritative judicial ruling could, by the way it stigmatised him, have a major impact on his personal and professional situation, as well as his honour and reputation (Vicent Del Campo v. Spain, no. 25527/13, § 48, 6 November 2018)."

Mr Wardell KC submitted that the adverse findings here were clearly an interference with Mr Andrew's right to a private life and that it could not be said that by the mere fact of giving evidence he had surrendered his right to freedom from interference with his private life.

34. However, Mr Wardell KC accepted in answer to questions from the Court that if corruption on the part of Mr Andrew had been pleaded and put to him in cross-examination and the judge had given reasons for finding he was corrupt, then Mr Andrew could have no complaint. For reasons I will return to, this was a significant concession.

35. The second stage of the analysis under Article 8 is to consider the procedural protections to which Mr Andrew was entitled. Mr Wardell KC referred to the judgment of Cranston J in *R (Tabbakh) v Staffordshire and West Midlands Probation Trust and anoth*er [2013] EWHC 2492 (Admin); [2014] 1 WLR 1022 at [58]:

> "What the Strasbourg court requires is that the decision-making process involved in measures of interference, when considered as a whole, must be fair and such as to afford due respect to the interests safeguarded by article 8."

36. The judge indicated at [60] that what is required by way of procedure varies on a case by case basis, but identified two basic elements of procedural fairness: (i) that the person must have notice of the matters which might be held against him, which meant here that they were pleaded and properly put to him and (ii) that he has the opportunity to deal with those matters which may well entail giving the person an opportunity to seek independent legal advice, the point made in *In re W* at [95] quoted at [93] below.

37. Mr Wardell KC submitted that there is a third element of procedural fairness not mentioned in *Tabbakh*, which is of great importance in this case, which is that the judge must give adequate reasons for his conclusions. He cited the judgment of Males LJ in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413; [2019] 4 WLR 112 ("*Simetra*") at [46]:

> "Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the

> evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it."

38. He submitted that there were compelling reasons why Article 8 does require a judge to give reasons as to why they make findings which are damaging to a witness's reputation. First, a witness must be left in no doubt as to why adverse findings are being made against them. He referred to the judgment of Henry LJ in *Flannery v Halifax Estate Agencies Ltd (trading as Colleys Professional Services)* [2000] 1 WLR 377, cited by Males LJ in *Simetra* at [39]:

> "We make the following general comments on the duty to give reasons. "(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know…whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not."

39. Mr Wardell KC also cited the judgment of Joanna Smith J in *Popely v Ayton Ltd* [2022] EWHC 3217 (Ch) a case on appeal, in which the judge in the lower court had made adverse findings of fact against a person who was not a party, did not give evidence and against whom there was no pleaded case. Mr Wardell KC referred to [34] and [53] of the judgment, submitting that the latter paragraph demonstrated that the rights under Articles 6 and 8 of the ECHR and at common law are coterminous with each other:

> "34. Importantly, Article 8 private life rights include procedural rights to fair process in addition to the protection of substantive rights. Thus in *Turek v Slovakia* (Application No 57986/00) (2007) 44 EHRR 43, at [111], the European Court said that "whilst Art.8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Art.8"…
>
> 53. While I accept that in different circumstances a finding that a non-party has funded a purchase, or has funded litigation (where such finding may properly be said to arise in the context of dealing with an evidential issue that is before the court) may very well not be objectionable or capable of engaging Article 8 or Article 6 rights, I do not consider that it is possible on the exceptional facts of this case to "salami slice" the Adverse Findings in the manner suggested by Mr Evans. I consider that

> the Adverse Findings must be viewed as a whole; taken together they add up to a complete narrative which is both extremely serious and clearly capable of engaging Article 8 and Article 6 rights, together with the entitlement to common law protections."

40. He also referred to the decision of the Divisional Court in *MRH Solicitors Ltd v Manchester County Court* [2015] EWHC 1795 (Admin) where a non-party succeeded on a judicial review of the decision of the County Court which made findings against it which were never pleaded or put. Likewise in the decision of the Privy Council in *Mahon v Air New Zealand Ltd* [1984] 1 AC 808 where a non-party successfully sought judicial review of a public inquiry which had made findings against him. The Privy Council found that the rules of natural justice required the judge presiding over the inquiry to ensure that any person at risk of an adverse finding against them was given an opportunity to respond to such proposed findings and that the findings were adequate and not self-contradictory: see 821A-C in the judgment given by Lord Diplock.

41. Next Mr Wardell KC made submissions about the Article 6 rights which he contended that Mr Andrew has. That Article provides:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

He referred to the judgment of the ECtHR in *Fayed v United Kingdom* (1994) 18 E.H.R.R. 393, where the Court found that an investigation by DTI inspectors without decision-making authority did not engage Article 6, submitting that the position would be different if the investigating body had decision-making capacity, as demonstrated by *Perez v France* (2005) 40 E.H.R.R. 39 at [64]-[65]. Mr Wardell KC submitted that Mr Andrew's civil right to a good reputation had clearly been "determined" by the judge who was sitting in a decision-making capacity. His adverse findings had destroyed Mr Andrew's good name.

42. He submitted that, contrary to FRN's argument, Mr Andrew had Article 6 rights even though he was not a party, referring to [78] in the judgment in *SW v United Kingdom*:

> "The Court has stressed that the question of the applicability of Article 6 cannot depend on the recognition of the formal status of "party" by national law (see *Arnoldi v. Italy*, no. 35637/04, § 28, 7 December 2017)."

In *Arnoldi* the applicant had never become a party to the relevant criminal proceedings. The Italian authorities responded that Article 6 only protects parties but the Court nevertheless found that her civil rights had been determined. Mr Wardell KC submitted that in some respects non-parties are more vulnerable than parties because they do not control the course of litigation, whether to bring a claim or what questions are asked of them or how the litigation is managed.

43. Mr Wardell KC also cited the decisions of the House of Lords in *Jain v Trent Strategic Health Authority* [2009] UKHL 4; [2009] 1 AC 853 and *R (Wright) v Secretary of State for Health* [2009] UKHL 3; [2009] 1 AC 739, where the House of Lords was clear that

the claimants had Article 6 rights which had been breached even though neither claimant was a party to the application in any real sense because they had not been heard.

44. He then turned to his Grounds of Appeal. Ground 1 relates to [592] of the judgment which he submitted contained a damning indictment of Mr Andrew that he was prepared to use corruption. There was no doubt that the judge was referring to Mr Andrew in that paragraph since he went on to refer in the very next paragraph to referring him to the Solicitors Regulation Authority. It was also clear from the first sentence of [594]: "Against the deeply unhappy matters to which I have referred in the last two paragraphs, I am pleased to record that the trial was fought and presented on both sides to the highest professional standards" that the judge clearly intended [592] and [593] to be read together, which is how the matter had been interpreted in the press. Mr Wardell KC referred the Court to various reports by Reuters, Bloomberg and The Times.

45. Mr Wardell KC submitted that FRN was trying to "square the circle" now by contending that the phrase "prepared to use corruption" meant that the arbitral process had undoubtedly been corrupted by Mr Andrew's receipt, retention and use of FRN's internal legal documents, but that is not what the judge was saying. He was saying that Mr Andrew knowingly participated in a corrupt scheme, which was not pleaded, put to him or supported by any reasons at all. However, in answer to a question from Jeremy Baker LJ as to whether the findings at [214] to [216] could in themselves amount to "corruption" Mr Wardell KC accepted that a finding that Mr Andrew deliberately kept the documents or failed to return them, knowing they ought to be returned and did so because he wanted to achieve a certain financial outcome could be described as "corruption". He also accepted in answer to me that if, in [592], the judge had said Mr Andrew was "driven by greed and prepared to act dishonestly" in relation to ground 1 of the appeal, he could not complain.

46. Mr Wardell KC submitted that there were three possible interpretations of [592]: (i) that Mr Andrew was party to the overarching corrupt scheme described at [494] to [496], which was never pleaded or put; (ii) that "prepared to use corruption" does include Mr Andrew but is limited to his treatment of the FRN internal legal documents. This would be odd because it would mean the judge was using "corruption" in two different ways since on the sixty two other occasions on which he referred to corruption in the judgment the judge was referring to bribery and it would also be odd because it would require reading between the lines as to what the judge must have meant. That second interpretation was also not pleaded or put; (iii) that the reference in [592] to "prepared to use corruption" is not a reference directed at Mr Andrew at all but limited to the corrupt scheme at [494] to [496].

47. In relation to Ground 2, concerning the judge's finding at [215] that Mr Andrew's failure to return the FRN internal legal documents was indefensible, Mr Wardell KC commenced by referring the Court to FRN's pleaded case at [37E(7)] of the Re-Re-Amended Reply:

> "…it is averred that Messrs Burke QC and Andrew were under a professional and/or a legal duty under English law, as soon as they became aware that the FRN Privileged Documents contained privileged and/or confidential information belonging

> to FRN, and in any event as soon as it became apparent (or ought reasonably to have become apparent) that the FRN Privileged Documents had been obtained improperly and/or through collusion (i) not to read any further FRN Privileged Documents; (ii) to return the FRN Privileged Documents to FRN and/or to instruct P&ID to do so (and to stop acting for P&ID (to the extent that Mr Burke QC was acting for P&ID at all) if it refused); and (iii) to notify FRN and the Tribunal that they had received the FRN Privileged Documents, and that those Documents appeared to have been obtained improperly and/or through collusion."

48. Mr Wardell KC submitted that the judge's finding at [215] breached Mr Andrew's rights under Articles 6 and 8 of the ECHR in two ways, first that the judge failed to give adequate reasons for such a finding and second that the judge did not give Mr Andrew fair notice that he planned to make such a finding which was, in any event, unnecessary to the actual disposition of the case. On the first, he submitted that the judge did not explain why Mr Andrew was under a duty to return the FRN internal legal documents. It is far from obvious that a solicitor whose client sends him improperly obtained privileged material is under a duty to tell the other side about it and return the documents. The judge should have explained the basis of such a duty, since Mr Andrew owed a duty to his client P&ID to keep confidential information he received from it. If he had a duty to FRN to inform it and return the documents, he was faced with conflicting obligations.

49. Mr Wardell KC submitted that FRN's pleaded case is not supported by the authorities. He referred to two family law cases, *White v Withers* [2008] EWHC 2821 (QB); [2009] 1 FLR 383; [2009] EWCA Civ 1122; [2010] 1 FLR 859 and *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] Fam 116. In those cases, a spouse had illicitly obtained confidential documents of the other spouse and handed them to their solicitors. The so-called *Hildebrand* rules in family law cases provide that documents illicitly obtained by a spouse should be handed over at the disclosure stage to the solicitors for the other side to excise privileged material and ensure that anything disclosable is disclosed in the proceedings. The issue in these cases was whether a spouse that complied with the *Hildebrand* rules was immune from an action in damages.

50. In *White*, the husband discovered via the *Hildebrand* protocol that his wife had illicitly obtained a number of his confidential documents including some that were privileged. He brought proceedings against the wife's solicitors for misuse of confidential information. Eady J struck out the claim, holding at [8]-[9] that the mere receipt of the documents by the solicitors and their retention did not give rise to a cause of action. The Court of Appeal agreed, Ward LJ saying at [23]:

> "Mrs White's communication of that confidential/private information to her solicitors for their use in the litigation could never be characterised as misuse of it."

However, the appeal was allowed on the basis that there were two points which were sufficiently arguable to go to trial, that the wife's solicitors had positively encouraged her to take the husband's confidential documents and that some of the documents were originals not copies.

51. In *Tchenguiz*, the wife's brother, the first defendant, had accessed and copied documents from the husband's computer without his permission. He handed eleven files to his solicitors who instructed a barrister to go through and remove privileged material. The remaining seven files were sent by the solicitors to the wife's solicitors who sent copies to the husband's solicitors. In Queen's Bench Division proceedings Eady J granted an injunction restraining the defendants from disclosing to anyone including the wife and her solicitors the information in the files and requiring them to return the files to the husband. In Family Division proceedings, Moylan J held that the seven files should be returned to the husband for him to remove any privileged material but the remaining material should be returned to the wife for use in the matrimonial proceedings.

52. Mr Wardell KC referred to two passages in the judgment of the Court of Appeal (Lord Neuberger MR, Moses and Munby LJJ). At [41] the Court addressed the so-called *Hildebrand* rules:

> "*Hildebrand v Hildebrand* itself is accordingly no authority for the proposition that a spouse may, in circumstances that would otherwise be unlawful, take, copy and retain copies of confidential documents. In other words, it is no authority for the so-called *Hildebrand* rules. Wilson LJ, who as counsel had successfully argued in *Hildebrand v Hildebrand* that the court should not act in a way which might appear to condone such conduct, at p 253D, later acknowledged judicially in *White v Withers LLP* that the *Hildebrand* rules "can hardly be accounted robust" and that they needed to be tested for compatibility with principles in other areas of law [2010] 1 FLR 859, para 83. As he said, at para 79:
>
> > "The ratio decidendi of *Hildebrand*, important though it has proved to be, relates only to the time at which copy documents thus obtained should be disclosed to the other spouse, namely no later than at the normal disclosure stage and thus in effect (albeit now subject to the prohibition against disclosure prior to the first appointment contained in rule 2.61B(6) of the Family Proceedings Rules 1991) at the time of service upon that spouse of the first questionnaire (or as soon after service of the questionnaire as that rule permits and in any event before service of answers to it).""

53. Mr Wardell KC also referred to [70] where the Court said:

> "…we were taken to the observation of Eady J in *White v Withers LLP* [2009] 1 FLR 383, para 8, that the mere receipt of documents by the solicitors from their client, and their continued retention in connection with the matrimonial proceedings, simply cannot give rise to a cause of action. In our view, that observation (which may in any event have been limited to a cause of action in damages) should be taken as applying only to the receipt of documents by solicitors from their client; further, it should not be taken as suggesting that the claimant could not recover the documents from the solicitors."

54. He submitted that there was no suggestion in *Tchenguiz* that there was a positive duty owed by a solicitor to return to the other side confidential or privileged documents or volunteer that the solicitor had been provided with or seen such documents. He submitted that Mr Andrew's decision to retain the FRN internal legal documents but not to use them was within the ambit of what was proper on the basis of these two authorities. He also submitted that the decision of Mostyn J in *L v K* [2013] EWHC (Fam) 1735; [2014] Fam 35 on which FRN relies is in conflict with the ratio of *Hildebrand* which was approved in *Tchenguiz*. Mostyn J stated at [56(3)] of his judgment the third principle which he derived from *Tchenguiz*:

> "If a wife supplies such documents to her solicitor then the solicitor must not read them but must immediately seek to obtain all of them from the wife and must return them, and all copies (both hard and soft), to the husband's solicitor (if he has one). The husband's solicitor, who owes a high duty to the court, will read them and disclose those of them that are both admissible and relevant to the wife's claim, pursuant to the husband's duty of full and frank disclosure. If before that exercise has taken place the husband's solicitor is dis-instructed the solicitor must retain those documents pending a further order of the court."

Mr Wardell KC submitted that this was a misinterpretation of what this Court was saying in *Tchenguiz*.

55. The other case relied on by FRN is the decision of this Court in *Arbili v Arbili* [2015] EWCA Civ 542, which Mr Wardell KC submitted was dealing with an entirely different point, the decision of the court below to exclude illegally obtained evidence on which the husband sought to rely on the eve of the hearing. Macur LJ referred to *Tchenguiz* and the principle she sought to derive from it at [35]:

> "I recognise the professional difficulties for any legal representative informed of the existence of illicitly obtained materials, as did His Honour Judge Horowitz QC, but this particular topic has been traversed at some length in *Imerman v Tchenguiz and other*s [2010] EWCA Civ 908 sufficiently to give an adequate indication of the steps to be taken. The unlawfully obtained materials must be returned. The recipient's duty to make any relevant disclosure arising from them within the proceedings is triggered. The ability of the wrongdoer, or their principal, to challenge the sufficiency of the disclosure, is confined to evidence of their memory of the contents of the materials but is admissible."

56. Mr Wardell KC submitted that, in that case, the Court of Appeal did not consider the questions of when such documents have to be returned or whether they have to be returned in response to an application or whether the solicitors are under a duty to return them voluntarily.

57. He submitted that the question whether Mr Andrew was in fact under such a duty was not before this Court since the appeal was on procedure. However, due process required the judge to grapple with the relevant law before condemning Mr Andrew to a finding

of indefensibility and it was sufficient for Mr Wardell KC to demonstrate that there is a significant amount of conflicting authority on the subject which the judge ignored.

58. He pointed out that, in relation to Mr Andrew's professional duties, the only authority which FRN had relied upon in closing before the judge was [7.2] of the Bar Standards Board Written Standards For The Conduct of Professional Work which was in force until January 2014, whereas almost all the FRN internal legal documents forwarded to Mr Andrew were received by him after that date.

59. Mr Wardell KC submitted that, in finding that the breach was indefensible, the judge had failed to deal with what Mr Andrew thought his obligations were. If it was going to be said that he had deliberately breached his professional obligations, that should have been put to him in cross-examination. He took the Court to a passage in Mr Howard KC's cross-examination of Mr Andrew where Mr Andrew said that he did not think that he had a positive duty to return the documents. He repeated that evidence later, saying that he had a duty of confidentiality to P&ID.

60. In relation to Grounds 3 to 5 Mr Wardell KC relied upon the written submissions in Mr Andrew's skeleton argument. In relation to the finding that Mr Andrew was motivated by greed (Ground 3), it was submitted that the finding was not supported by reasons or pleaded and put to him. It was submitted that the judge had not pointed to any evidence that Mr Andrew had in fact been swayed by financial interest. In any event, the significant personal interests referred to at [207] only came about in October 2017, when Lismore acquired the shareholding in P&ID, which was several months after the arbitration concluded. There was no pleaded case that he had a financial interest before the arbitration concluded. Nor was it put to him in cross-examination that he was motivated by greed to withhold FRN's internal legal documents during the arbitration. Furthermore, it was submitted that Mr Andrew was not given any or any sufficient warning that the judge was considering a finding of greed.

61. Mr Andrew's counsel dealt with Grounds 4 and 5 together in their skeleton argument. They noted that the adverse findings at [214] and [216] of the judgment were to the effect that he had given false evidence about FRN's internal legal documents, submitting that the judge had given no explanation for why he considered the evidence to be untrue. The findings are also inconsistent with the judge's finding at [207] that "Mr Andrew tried his best to answer questions carefully and accurately". They submitted that the failure to give reasons was particularly striking given the sheer volume of evidence adduced in Mr Andrew's fifth witness statement as to the circumstances in which he came to receive FRN's internal legal documents.

62. They noted that the judge identified 14 of FRN's internal legal documents in the judgment of which only 6 were sent to Mr Andrew. They identified the judge's findings on these at [256], [275], [282], [293], [325] and [336] of the judgment and then submitted that the judge made no finding that Mr Andrew, as opposed to P&ID generally, read or made use of any of these documents. There was no reference to his detailed written and oral evidence as to the circumstances in which he received the documents or how he avoided using them. The judge's failure to address any of that evidence is a breach of Mr Andrew's rights under Articles 6 and 8 of the ECHR given that he is a legal professional and the findings have potential career-ending consequences.

63. Towards the end of his oral submissions, Mr Wardell KC addressed section 68(4) of the Arbitration Act which provides: "The leave of the court is required for any appeal from a decision of the court under this section." He submitted that there were three main reasons why section 68(4) is not a bar to this appeal. The first is that the sub-section (4) is intended to reflect the public interest that arbitration should produce a high degree of finality for the parties. He referred to the earlier appeal in *Federal Republic of Nigeria v Process & Industrial Developments Ltd* concerned with the currency of the costs order: [2024] EWCA Civ 790; [2025] 1 WLR 129 in the judgment of Snowden LJ at [34] to [36]. At the end of that analysis, Snowden LJ noted that the outcome of the appeal would have financial consequences for the parties, but it was difficult to see how the decision on such a limited matter could cause any uncertainty in the arbitral process. Mr Wardell KC submitted that the same analysis applied here: Mr Andrew was not a party to the arbitration, the arbitration agreement or the application under section 68 to set aside the Awards. This is the only opportunity he has to challenge the findings made against him. If the findings were excluded from the judgment, nothing would affect the safety of the judge's set aside order.

64. Second, the appeal is not against a decision of the court as the sub-section requires, but against the specific findings against him as a non-party on the basis that they were made in a procedurally unfair way and breached his rights under the ECHR. He referred to [39]-[40] of my judgment in *Manchester City Football Club Ltd v Football Association Premier League Ltd* [2021] EWCA Civ 1110; [2021] 1 WLR 5513 ("*Manchester City*"), cited by Snowden LJ in the earlier appeal in this case at [23], submitting that, in the same way, this appeal was not seeking to attack the decision to set aside the Awards under section 68:

> "39. Citation of [certain] cases provoked a debate between counsel and the court as to where the line was to be drawn between decisions which would be caught by the limitation on the right of appeal in the relevant section of the 1996 Act and decisions which would not. Males LJ posited the example of a case management decision about how a section 68 application should be dealt with. As I said at the time, that would seem to be an example of something which is part of the process of reaching a decision under section 68, so would be caught by the limitation on the right of appeal. Sir Geoffrey Vos MR suggested to Lord Pannick [counsel for the club] that a consequential decision on a section 68 application, for example as to costs, would also be caught by the limitation.
>
> 40. Lord Pannick made it clear that he was not inviting this court to lay down any general principles applicable in every case, but only to determine that this court had jurisdiction to hear the appeal from the publication judgment. I agree that it is not necessary for present purposes to determine the more difficult question whether case management decisions either side of the substantive decision under, say, section 67 or 68, for example as to how a hearing is to be conducted or as to costs, would be caught by the limitation in subsection (4) of each section. Whilst such case management decisions may be said to be part of the

> process of reaching the substantive decision, the question whether the substantive decision should be published is a distinct question separate from the decision itself. In the present case, the judge's decision that the merits judgment and the publication judgment should be published was an application of common law principles as set out in the decision of this court in *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2005] QB 207. It was not a decision of the court under sections 24, 67 or 68 and was, therefore, not caught by the limitation on the right of appeal. In those circumstances, I am satisfied that this court has jurisdiction to hear this appeal . . ."

65. Third, Mr Wardell KC submitted that, if necessary, section 68(4) had to be read down under the Human Rights Act, so as to preserve Mr Andrew's rights under the ECHR.

66. In relation to the application for an extension of time to seek permission to appeal, with which Mr Wardell KC dealt at the end of his oral submissions, he accepted that the deadline for Mr Andrew filing his notice of appeal was 13 November 2023, 21 days after the judgment was handed down. He submitted that there were nonetheless three reasons why an extension should be granted. First, the Appellant's Notice was issued late because of a mistaken assumption that time would run from the date of the consequentials hearing on 8 December 2023. As Mr Andrew had explained in his ninth witness statement, he only realised after the consequentials hearing that this might have been a mistake and the Appellant's Notice was then issued promptly and, in any event, within 14 days of the consequentials hearing.

67. Second, the fact that the Appellant's Notice was filed late had much to do with the judge's refusal to hear Mr Andrew's oral application for permission to appeal at the consequentials hearing. He could only have issued his notice in time if he had issued it before the consequentials hearing, thereby electing not to seek permission from the judge, which is out of step with judicial guidance that it is best practice to seek permission initially from the first instance judge. He acted on the reasonable assumption that he would seek permission from the judge at an oral hearing and, if permission was refused at that hearing, he would be granted an extension of time in which to lodge his application with the Court of Appeal.

68. Third, Mr Wardell KC submitted that the judge did not have jurisdiction to consider an application for permission to appeal after the conclusion of the consequentials hearing, which he submitted was made clear by the judgment of this Court given by Underhill LJ in *McDonald v Rose* [2019] EWCA Civ 4; [2019] 1 WLR 2828 at [21(4)]:

> "If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal: see *Lisle-Mainwaring* [2018] 1 WLR 4766".

69. He referred the Court to that earlier case, *Lisle-Mainwaring v Associated Newspapers*, where the judge gave an oral judgment dismissing an application by the claimant for specific disclosure. No application for permission to appeal was made by the claimant

at the hearing, but an application for permission was made later the same day and the judge purported to grant permission. What happened thereafter is explained by Coulson LJ at [11]:

> "Once the dust had settled, and following short written submissions on the issue from both parties, on 10 April 2018 Sir David emailed the parties to make plain that he understood his authority to do anything further in the case expired at midnight on 23 March, which was why he had acted as he had done. He said that the fact that the defendant's advisers had been wholly unaware of the application was unfortunate. He went on to say that, although he could not give a ruling on the matter, it seemed to him that CPR 52.3(2) and paragraph 4.1 of Practice Direction 52A meant that a judge could only grant permission at a hearing, and had no jurisdiction to do so after the hearing had concluded. He said that if this was right, his grant of permission was invalid, and that it would then be for the claimant to apply to the Court of Appeal for such permission."

70. This Court then analysed the relevant provisions of CPR 52.3 and the Practice Direction, concluding that the proper practice was to apply for permission to appeal to the first instance judge at the hand down of the judgment. The Court concluded at [21]-[22]:

> "21. In the present case, no element of the usual or proper practice was followed by the claimant's solicitors. An application for permission to appeal was not made at the handing down of the judgment. An application to adjourn that part of the hearing, so that the making of an application for permission could be considered, was also not made. When the application was made to the court it was made unilaterally, and the defendant had no idea at all that it had even been made. The defendant was never given the opportunity of making any submissions at all on the application for permission to appeal.
>
> 22. For all these reasons, as Sir David Eady himself suggested in his email of 10 April, his grant of permission to appeal was invalid. Accordingly, it is for this court to consider afresh whether or not permission to appeal should be granted."

71. Mr Wardell KC referred to the exchange between the judge and Mr Lee at the consequentials hearing set out at [10] above. He submitted that the judge had refused to consider Mr Andrew's application and had failed to adjourn the hearing, so he was no longer seised of the application for permission to appeal and was *functus officio*.

72. On behalf of FRN, Mr James Willan KC submitted that the short answer to this appeal is that, whatever the ambit of the *In re W* jurisdiction, this case does not fall within it. It is an exceptional jurisdiction to cover a situation where something has gone so fundamentally wrong in the lower court that an individual who was not a party finds themselves to be the subject of severe criticism which went beyond the four corners of the case which the court had to decide and had no meaningful opportunity to make

representations before the criticism was made. This case could not be further from that situation. One of the central allegations of FRN here was that the Award had been obtained by fraud because its opponent, P&ID, had access to FRN's privileged documents. One of the central protagonists in that fraud, repeatedly named in the pleadings and cross-examined for days, was Mr Andrew. He was P&ID's agent and representative for the purposes of the arbitration. The whole reason why days were spent before the judge examining what Mr Andrew had done, was that his acts were attributable to P&ID and, if he had wrongly retained privileged documents, in breach of his professional duty, that was a basis upon which the Award could have been fraudulently and improperly obtained.

73. The suggestion in Mr Andrew's skeleton argument, though not repeated orally, that the judge was on some frolic of his own, is completely divorced from reality. The judge was deciding precisely the case presented to him and put to the witness and it was all done fairly. The allegations were pleaded, the case was put in cross-examination. Mr Andrew had the opportunity, both in an extensive trial witness statement and over several days of cross-examination, to answer the allegations and the judge gave the essential reasons why he criticised Mr Andrew: he had received documents he knew he was not entitled to receive and he lied to the court about his reason for thinking they had been legitimately provided, i.e. for the purposes of settlement. Mr Willan KC submitted that this was frankly the answer to Grounds 2 to 5.

74. He submitted that the short answer to Ground 1 is that for the challenge to get off the ground, Mr Wardell KC has to say that [592] was implicitly bringing Mr Andrew within the scope of the bribery findings in [495] and [496]. However, that is self-evidently not what [592] was doing when read in context. It was part of an endnote making generic reference to the misconduct of a number of individuals and the suggestion that it was specifically making a finding that Mr Andrew had been involved in the scheme of bribery is simply wrong. Mr Willan KC submitted that the best reading of [592] is that "corruption" was being used in a broader sense of dishonest conduct in the pursuit of gain which is what the judge found Mr Andrew did. The paragraph was simply referring compendiously to more detailed findings elsewhere which are unimpeachable.

75. Mr Willan KC turned to make submissions on the law. He began by submitting that Mr Andrew generally had no right of appeal against the findings in the judgment because he is not challenging the Order: *Cie Noga*. The only way the Court has jurisdiction is if Mr Andrew's rights under the ECHR are engaged and have been breached. There is no jurisdiction for this Court to consider breaches of common law protections on an appeal by a non-party who is not seeking to overturn an Order.

76. Mr Willan KC referred to the judgment of this Court in *Gray v Boreh* [2017] EWCA Civ 56, which he submitted was very close to being on point. In that case, in which I was the trial judge, I found that Mr Gray, who was a non-party but the solicitor for the Republic of Djibouti in the main trial, had dishonestly misled me into making a freezing order against the defendant, which I had set aside in an earlier judgment. Mr Gray sought permission to appeal against my judgment. There was a long delay in dealing with permission to appeal in this Court because the decision of the Court of Appeal in *In re W* was awaited. By the time the judgment on the application for permission to appeal was handed down I had handed down the main trial judgment and permission to appeal to this Court had also been refused.

77. The Court of Appeal (Gloster and Briggs LJJ) found at [34] that, in the absence of permission to appeal being granted to Mr Gray on his procedural grounds (which concerned *inter alia* his rights under the ECHR), there could be no free-standing appeal on his so-called substantive appeal because the Court of Appeal had no jurisdiction to entertain such an appeal. At [35] Gloster LJ set out the reasons for reaching that conclusion:

> "In summary, my reasons for such a conclusion are:
>
> i) Contrary to the position of the appellant in *MA Holdings* [i.e. the *George Wimpey* case]…, Mr Gray was not a person who was substantively affected by Flaux J's decision to set aside the freezing order or who had any substantive interest in it being set aside, such as to confer on him a right of appeal. Mr Gray had no personal, in the sense of financial or proprietary, interest in the freezing order remaining in place, or being set aside. He had no legal or equitable rights which were affected in any way by the decision. His only interest in the outcome of the set aside application was reputational. The fact that, pursuant to Flaux J's order dated 31 March 2015, he was joined as a respondent to the proceedings "solely for the purposes of applying for permission to appeal" cannot per se confer on him "party" or "appellant" status. If McFarlane LJ was deciding at paragraph 41 of his judgment in *Re W (a child)* that, even in the absence of (a) a substantive interest in the outcome of an appeal and (b) an allegation that a court, in coming to a decision, had acted in breach of a witness' article 8 private life rights or article 6 rights, a witness had sufficient status to appeal, I would, with respect, disagree with him.
>
> ii) The decisions in *Cie-Noga SA* and *Re M (Children) (Judge's findings of fact: jurisdiction to appeal)* supra clearly demonstrate that, normally, this court does not have jurisdiction to entertain an appeal against findings of fact which do not amount to a determination, order or judgment, unless they concern the issue upon which the determination of the whole case ultimately turns or are otherwise subject of a declaration within the order. Although this court (or indeed the first instance court) may have power to amend an order to include a declaration, since "clearly, such a declaration carries significant import in relation to finality of proceedings which should render them the rare exception rather than the rule. They should not be incorporated without the most careful judicial consideration as to consequences and effect." see per Macur LJ in *Re M (Children) (Judge's findings of fact: jurisdiction to appeal)* at para 21. In the present case there is no justification for this court to permit the amendment of the order to include such a declaration at the suit of a non-party, in circumstances where neither of the actual parties to the litigation have sought to appeal. Nor is Mr Gray seeking to challenge the judge's decision in its result, viz. whether the

> freezing order should be set aside and costs orders made against the claimants and Gibson Dunn. His only interest is in challenging findings of fact and reasons which led to those orders.
>
> iii) Nothing in *Re W (a child)* provides a route of appeal in respect of such matters. As Mr Kendrick submitted, article 8 provides procedural safeguards in terms of the right to a fair process: it does not provide a guarantee that a judge, having operated a fair process, will reach the correct conclusion on the substance of the case. The right to a fair process does not require that a litigant, let alone a witness, be afforded a right of appeal against a decision with which he disagrees on the substance. A court does not act unlawfully by getting the wrong answer on the merits. Such a conclusion is sensible: it is one thing to say that a witness whose professional reputation is at stake should not be criticised without warning and a fair opportunity to respond, but it would be quite another to allow a professional witness to appeal simply because he or she disagreed with a judge's criticism of his or her evidence, professionalism or conduct.
>
> iv) I reject Mr Gray's argument that he stands in some sort of special position because he was not a mere witness or third party, but was called by Flaux J in his supervisory capacity over officers of the court and that the judge made "final determinations" against Mr Gray as part of an inquisitorial process that the judge set in train and conducted. That mischaracterises the nature of the proceedings and Mr Gray's involvement as a witness. As Mr Kendrick submitted, the proceedings were, and were only, the hearing of an application by Mr Boreh for particular relief against the claimants and Gibson Dunn. There was no inquiry or exercise of disciplinary jurisdiction against Mr Gray and no judgment or order was made in the exercise of the Court's supervisory jurisdiction, as is apparent from the face of the Order appealed against."

78. Mr Willan KC emphasised, in particular, the last sentence of (iii) about not allowing a professional witness to appeal simply because they disagree with the judge's criticism of their conduct, which is the position here. He submitted that if, as that case demonstrates, the only basis on which this Court would have jurisdiction is if there is a breach of the ECHR, then Mr Andrew cannot rely on what might be called common law unfairness. Much of Mr Wardell KC's submissions were taken up with such matters as the duty to give reasons at common law, but that does not avail Mr Andrew unless there is a breach of his rights under the ECHR.

79. Mr Willan KC also relied on the section of the *Gray* judgment in which this Court refused permission to appeal as a matter of discretion on the procedural grounds that Mr Gray's Article 8 rights had been breached, in which there were parallels with the present case. At [38] Gloster LJ said there was a complete air of unreality in Mr Gray's contention that he did not know what claim he had to meet. He was closely involved at

every stage of the freezing order application, just as Mr Andrew was closely involved at every stage of the litigation.

80. At [40] Gloster LJ pointed out that there was no indication in Mr Gray's affidavits that he was under any misapprehension as to the case he had to meet. He set out a lengthy explanation of his conduct by reference to a large quantity of material. At the end of that paragraph, Gloster LJ said:

> "But I accept Mr Kendrick's submission that, in the circumstances, Mr Gray was not entitled to be told in advance precisely what the lines of cross-examination against him would be, or how every point would be argued. The gravamen of the allegations against him and the type of arguments which were being deployed by Mr Boreh to set aside the freezing order, moreover, were clearly spelt out in Mr Boreh's skeleton argument dated and served on 26 February 2015 shortly before the hearing began on 2 March 2015."

Mr Willan KC submitted that that was plainly right. Article 8 does not give one the right to notice of the precise arguments or lines of cross-examination, but to the gravamen or gist of the allegations.

81. At [42] Gloster LJ said:

> "Nor am I impressed by the argument that Flaux J "made numerous findings of fact which were not pleaded or put to Mr Gray, in relation to which disclosure was not given, witnesses were not called and which Mr Gray had no adequate opportunity to meet". It is apparent from the judge's detailed and careful judgment that he was meticulously fair in his assessment of the evidence in relation to the alleged dishonesty of Mr Gray. It was legitimate for the judge to make findings of fact irrespective of whether they were points which had been relied upon by Mr Boreh as one of the grounds in his application. On analysis of the transcripts, it is clear that Mr Gray had every opportunity to deal in the course of his evidence with those aspects of the evidence in relation to which the judge made adverse findings against him, notwithstanding they were collateral matters which did not form the primary focus of Mr Boreh's grounds for setting aside the freezing order."

Mr Willan KC submitted that there was nothing in Article 8 which meant that the court could not make findings of fact. Mr Andrew had every opportunity to deal with the allegations.

82. He also relied on [46] to [48] of the judgment where Gloster LJ set out why the Court would have refused permission to appeal even if there had been a sufficiently arguable case of breach of an Article 8 right. At [46] she said:

> "as a matter of discretion it would, in my judgment, be wholly inappropriate in the circumstances of this case to afford Mr Gray,

> who was not a party to the proceedings, a remedy by way of an appeal to this court to challenge the decision reached by Flaux J, after a full evidentiary hearing, that Mr Gray had been dishonest. Not only has no actual party to the proceedings any interest whatsoever in such an issue being litigated, since neither the claimants nor Gibson Dunn have sought to appeal Flaux J's interlocutory decision that the freezing order should be set aside, but, most importantly, the trial of the main action itself has concluded with the claimants' claim against Mr Boreh being dismissed. The litigation as between the claimants and Mr Boreh is over, the claimants having failed to obtain permission to appeal."

83. Mr Willan KC also emphasised the reference at [48] to the proceedings before the Solicitors Disciplinary Tribunal ("SDT") which provided Mr Gray with another route by which he could seek to vindicate his reputation. The position was the same here. Mr Andrew would have the opportunity to present his case to the SDT.

84. In relation to Article 6 of the ECHR, Mr Willan KC relied upon the decision of the ECtHR in *Grzęda v Poland* (2022) 53 BHRC 631 at [257] setting out the three requirements for Article 6 to be engaged:

> "For art 6(1) in its 'civil' limb to be applicable, there must be a dispute over a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring art 6(1) into play…Lastly, the right must be a 'civil' right…" [omitting the authorities cited]

85. Mr Willan KC emphasised the requirement that the proceedings must be directly decisive of the right in question, submitting that that requirement was not satisfied here. Whereas Mr Andrew has a legal right to work as a solicitor, that right was not being determined by the judge and certainly not decisively. That right will be determined by the SDT which will determine whether he can continue to practise. It can have regard to the judge's findings but cannot simply adopt them. It has to form its own judgment as to the facts and whether they are sufficiently serious to justify striking off.

86. The matter was not put on that basis by Mr Wardell KC but on the basis of a legal right to reputation relying on the *Fayed* case. Mr Willan KC pointed out that the problem with that reliance was that the inquiry by the DTI inspectors did not determine the applicant's civil right to a reputation. As the ECtHR said at [61]:

> "In short. it cannot be said that the Inspectors' inquiry "determined" the applicants' civil right to a good reputation, for the purposes of Article 6(1). or that its result was directly decisive for that right."

87. Mr Willan KC submitted that Mr Wardell KC had then tried to shift and say if the decision impacts on the person's reputation, it is determining it, but that is not what *Fayed* is saying at all. He also referred the Court to the decision of the Supreme Court in *R (G) v Governors of X School* [2011] UKSC 30; [2012] AC 167. That concerned disciplinary proceedings against a teacher which resulted in a reference to the Independent Safeguarding Authority. The Supreme Court held by a majority that Article 6 did not apply to the original disciplinary proceedings before the school governors because the Independent Safeguarding Authority had to make its own findings of fact and form its own judgment as to the seriousness of the allegations. Mr Willan KC submitted that questions of impact on reputation should be dealt with under Article 8 which is not concerned with the determination of civil rights as such.

88. If, contrary to his submission, Article 6 was in play, he submitted that what was required by way of reasons was summarised by this Court in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 WLR 2409 where at [8] Lord Phillips MR giving the judgment of the Court quoted from *Ruiz Torija v Spain* (1994) 19 EHRR 553, 562, at [29]:

> "The court reiterates that article 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision."

89. At [12] the Court summarised the position under the Strasbourg jurisprudence as follows:

> "The Strasbourg court, when considering article 6, is not concerned with the merits of the decision of the domestic court that is under attack. It is concerned to see that the procedure has been fair. It requires that a judgment contains reasons that are sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved. It does not seem to us that the Strasbourg jurisprudence goes further and requires a judgment to explain why one contention, or piece of evidence, has been preferred to another."

90. Mr Willan KC then turned to consider Article 8. In relation to the first question, whether it was engaged at all, he accepted that, as *In re W* holds, the making by a court of severe criticisms of a professional person falling outside the four corners of the case has the potential to engage Article 8, but he submitted that Article 8 has no application when the court is simply determining issues which fall within the four corners of the case on which it has heard evidence from the professional person. This is essentially because, as was said in *Del Campo v Spain* (2019) 68 E.H.R.R. 27 at [41]:

> "The Court also reiterates that art.8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence. The Court is of the opinion that in the instant case it can reasonably be supposed that the

> applicant could not have foreseen the consequences that the judgment of the High Court of Justice entailed for him. On the one hand, he was reportedly unaware of the proceedings. He had not been summoned to appear and was not a party to the proceedings, which in addition were solely aimed at determining the strict liability of the public administration concerned as a result of professional acts and omissions by public officials in the exercise of their duties. Furthermore, the complaint lodged against him by his colleague for psychological harassment in the workplace had been previously dismissed, and the colleague concerned had not taken further action against him. The Court also lays emphasis on the fact that the applicant was never charged with or proved to have committed any criminal offence. It follows that the disclosure of the applicant's identity in the reasoning of the judgment of the High Court of Justice cannot be considered to be a foreseeable consequence of the applicant's own doing."

91. The position was quite the opposite here. It was entirely foreseeable that, if a lawyer receives and retains the other side's privileged documents and then voluntarily chooses to appear as a witness for the client company of which he is now the majority owner, in order to defend allegations of impropriety in relation to those privileged documents, the court may reject his evidence and make adverse findings about his conduct. Mr Andrew cannot complain that his private life has been invaded by virtue of the foreseeable consequence of coming to a public hearing to assert that he had done nothing wrong and the court disagreeing.

92. The second question is if, contrary to that submission, Article 8 is engaged at all, what is its scope? Mr Willan KC submitted that it was important for the Court not to read judicial type protections into Article 8 which is not limited to proceedings. All that Article 8 requires is a right to make meaningful representations before a decision is taken and in the context of a non-party witness that means they must know the gist of what is being alleged against them and have a sufficient opportunity to respond. That should not include a right to detailed reasons for any criticism the court chooses to make, since a non-party has no right of appeal.

93. A leading case on the scope of Article 8 was *In re W* which, as Mr Willan KC said, was a truly exceptional case where there was no notice whatsoever beforehand of the criticisms the judge was going to make of SW and PO. At [95] McFarlane LJ indicated what the judge should do where there are likely to be adverse findings outside the known parameters of the case:

> "Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following:
>
> a) Ensuring that the case in support of such adverse findings is adequately 'put' to the relevant witness(es), if necessary by recalling them to give further evidence;

> b) Prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material;
>
> c) Investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness."

94. McFarlane LJ went on to say at [98]:

> "This judgment should be seen by the profession and the family judiciary to be a particular, bespoke, response to a highly unusual combination of the following factors:
>
> a) a judge considering himself or herself to be driven to make highly critical findings against professional witnesses, where
>
> b) such findings have played no part in the case presented by any party during the proceedings, and where
>
> c) the judge has chosen not to raise the matters of criticism him/herself at any stage prior to judgment."

As Mr Willan KC submitted, the focus in that exceptional case is on serious criticisms that are not within the scope of the proceedings themselves and of which there has been no notice.

95. Mr Willan KC also asked the Court to note that at [101] McFarlane LJ made it clear that the judgment in that case would not require judges to alter their general approach to witnesses, referring to: "the strong caveat that I am attempting to attach to this judgment as to the highly unusual circumstances of this case and absence of any need, as I see it, for the profession and the judges to do anything to alter the approach to witnesses in general, and expert witnesses in particular."

96. He submitted that a judge will often deal with a witness's evidence briefly, saying for example, "I found Mr X wholly evasive and am placing no weight on what he says". The idea that Article 8 requires the judge to give some detailed analysis of specific examples where the witness was evasive is wholly unrealistic. The Article does not require the witness to have a right of effective participation before the criticism is made.

97. Mr Willan KC then highlighted some key points about the trial in this case. The first was that Mr Andrew, like Mr Gray in *Gray v Boreh*, was extremely close to the litigation and had full knowledge of everything that was happening in real time. He had been counsel in the arbitration and he was a director and the majority shareholder of P&ID throughout the court proceedings. As Mr Willan KC put it, he was inside the tent and knew precisely what was going on in the litigation. He saw the pleadings and the written submissions and was present throughout most of the trial. He accepted in cross-examination that important questions in the litigation were put to him and to VR Capital, the other shareholder in P&ID. He accepted that he discussed the law and the facts with P&ID's lawyers. He saw the draft judgment.

98. Second, he is a qualified solicitor and barrister with, in his own words, extensive experience of international high value commercial disputes. The judge was entitled to consider that he understood the risks of litigation and how to protect his own interests, if necessary. The third point was that he had been advised throughout the proceedings from around the time of the preliminary hearing before Sir Ross Cranston in July 2020 by leading counsel Mr Treverton-Jones KC who specialises in professional conduct matters. Both he and Mr Treverton-Jones KC had the draft judgment for some days before hand down and had the opportunity to make any representations he wanted to make about the findings against him.

99. Fourth, he was aware in granular detail of the allegations pleaded against him. Mr Willan KC referred to [37A] of the Re-Re-Amended Reply where FRN pleaded at (4) that: "It is obvious from the face of the FRN Privileged Documents that they are privileged and/or confidential in nature" and at (5) that:

> "Moreover, a substantial number of the FRN Privileged Documents were sent to Mr Andrew and Mr Burke QC, who are (and were at the time) experienced lawyers. It would have been obvious to any reasonable lawyer that the FRN Privileged Documents were privileged and/or confidential and that they had been improperly obtained."

100. Mr Willan KC also referred to [37E] where, at (5), FRN pleaded the very substantial financial interest which Mr Andrew and Mr Burke KC had in the outcome of the arbitration and of the litigation. As I pointed out during the argument, Mr Howard had put to Mr Andrew early on in the cross-examination that he had been promised a percentage of any recovery in the arbitration and so had a financial interest at all material times. As Mr Willan KC said, Mr Andrew clearly understood that it was being alleged he had a financial interest, because he addressed it in his witness statement.

101. Mr Willan KC also drew attention to [37E(7)] (quoted at [47] above) and to [37E(8)]. Mr Wardell KC had contended that it was never suggested that Mr Andrew had used the FRN internal legal documents but [37E(8)] did squarely plead such use: "Contrary to their professional and/or legal duties, Messrs Andrew and Burke QC made positive use of FRN Privileged Documents and, on occasion, distributed them to further persons." Two examples were then given. The first was one where, after receipt of the privileged document, Mr Burke KC sent an email asking Mr Andrew to call him. Mr Andrew had been cross-examined to the effect that that call must have taken place.

102. Mr Willan KC submitted that no-one who received those pleadings could have been in any doubt as to the seriousness of the allegations being made against Mr Andrew of a deliberate breach of professional duties, knowing these were documents which, on their face, were privileged and improperly obtained in circumstances where he had a very significant financial interest. Mr Willan KC pointed out that, in addition to the pleadings, before the trial FRN had served what was called a Statement of Facts which set out every privileged document which it could be shown Mr Andrew had received.

103. He took the Court to one of the documents by way of example. This was a letter of 6 May 2015 from the Ministry of Petroleum's in-house lawyer to Mr Shasore [their counsel in the arbitration] in which she instructs him to offer P&ID a figure of US$400 million in settlement and to negotiate a figure lower than US$500 million. A copy of

this email was received by Mr Andrew. The Statement of Facts also referred to Mr Andrew's purported explanation for having received this document, that it was provided by FRN voluntarily in order to convey its offer to him as a matter of urgency, rather than having to wait for Mr Shasore to write to him formally. Mr Willan KC submitted this explanation was so obviously incredible it barely needed to be cross-examined on, especially since on the same day Mr Shasore sent an email directly to Mr Andrew making an offer of US$400 million in settlement. This offer was rejected by Mr Andrew who, of course, knew from the privileged document that it was not FRN's best offer.

104. Mr Willan KC also took the Court to passages in Mr Andrew's trial witness statement where he dealt with the receipt of the FRN internal legal documents. At one point he said that he asked on one or two occasions who was continuing to provide these documents during the arbitration and that Mr Cahill and Mr Adebayo assured him that there was nothing untoward, but he did not give the subject much thought. Mr Willan KC placed particular emphasis on [63]-[64] of that statement. At [63] Mr Andrew set out extensively the allegation of breach of duty in the Reply:

> "Messrs Burke QC and Andrew were under a professional and/or a legal duty under English law, as soon as they became aware that the FRN Privileged Documents contained privileged and/or confidential information belonging to FRN, and in any event as soon as it became apparent (or ought reasonably to have become apparent) that the FRN Privileged Documents had been obtained improperly and/or through collusion (i) not to read any further FRN Privileged Documents; (ii) to return the FRN Privileged Documents to FRN and/or to instruct P&ID to do so (and to stop acting for P&ID (to the extent that Mr Burke QC was acting for P&ID at all) if it refused); and (iii) to notify FRN and the Tribunal that they had received the FRN Privileged Documents, and that those Documents appeared to have been obtained improperly and/or through collusion."

105. At [64] Mr Andrew took issue with those allegations in these terms:

> "I do not agree that I was either entitled or obliged to take any of these steps, given the context in which I received the internal FRN documents referred to above. I did not believe (let alone know) that the documents had been obtained unlawfully. Rather, I understood that there was a practice within the Nigerian Government of sharing internal FRN documents voluntarily for innocent reasons and that the documents in question had been provided to P&ID in accordance with that practice. In those circumstances, I did not (and do not) consider that I was obliged, or even entitled, to reveal to the opposition in commercial arbitral proceedings documents that had been sent to me by my client. Nor did I consider myself obliged to enquire into and try to determine precisely how such documents had in fact come to be provided to P&ID, with a view to returning them to the other side."

106. Mr Willan KC relied upon this to submit that it had not been Mr Andrew's evidence in his witness statement that, if he had believed the FRN internal legal documents had been illegally obtained, he would have been entitled to do nothing as he did, so that once the judge had rejected his evidence that he believed that there was a legitimate reason for having the FRN internal legal documents, a finding that his conduct was indefensible was inevitable on his own evidence.

107. He submitted that Mr Andrew having been given the opportunity to provide detailed evidence would have satisfied the requirements of Article 8 of the ECHR on its own but that was not the end of the matter, as he had the opportunity to give oral evidence and was cross-examined over two and a half days, the majority of which was spent on the FRN internal legal documents. No-one suggested during that cross-examination that the case being put went beyond the pleaded case or was an unfair ambush.

108. Mr Willan KC took the Court to those parts of the cross-examination where Mr Howard KC put to Mr Andrew fairly and squarely the allegations of dishonesty. It emerged at an early stage that Mr Andrew was not only dedicating a significant proportion of his professional time to the arbitration but was meeting the disbursements, including the fees of Harcus Sinclair, from his own office account. He effectively admitted that, from the outset of the arbitration, it was envisaged that he would become the funder of the arbitration and get a share of the recoveries. As Mr Willan KC said, although one of Mr Andrew's refrains was that he did not take the promise of some sort of payment very seriously, one might have thought that he did take it fairly seriously given the amount of time he was dedicating to the case and the fact he was funding the disbursements.

109. Mr Howard KC also put to him the link between his financial interest and the FRN internal legal documents, suggesting that Mr Andrew would have been acutely interested in knowing what FRN knew and what they were being advised in the arbitration, given his financial interest in a successful result. Mr Howard KC also put the allegations about Mr Andrew's knowledge that the FRN internal legal documents were not being legitimately provided both thematically and by reference to individual documents.

110. An example of a thematic challenge was that it was put that over the years there was not a single document where P&ID explained the position about the documents to him or he asked a question, and the reason was that he knew full well throughout that they were being improperly obtained, which is why there was nothing on the file. In relation to the individual documents, Mr Willan KC took the Court to the copy of a letter from FRN's legal expert in the arbitration to Mr Shasore in which he said the Ministry was in a very difficult legal position and P&ID's expert's statement was quite formidable. Mr Willan KC said no-one could have struggled to understand the judge's finding that it could not have been thought that documents like these were being provided to advance settlement. Mr Andrew accepted there could be absolutely no reason why the disclosure of that document was in FRN's interest. He also accepted that at least the receipt of that document on its own would appear to have been wholly improper. He could not explain how it could have been provided to facilitate settlement.

111. The other individual document to which Mr Willan KC took the Court was the letter of 6 May 2015 referred to at [103] above. Mr Andrew accepted that it would be wholly improper for P&ID to be sent that unless FRN had given permission, which, as Mr Willan KC said, was implausible. He accepted that he knew the contents of that letter

during the settlement negotiations which Mr Willan KC submitted was plainly a use of the document. It was clearly put to Mr Andrew that his explanation in his witness statement that this document had been sent to convey the settlement offer urgently was patently false and that it was as plain as a pikestaff that insiders in FRN were interested in tipping P&ID off that there was more money to be had than the offer of US$400 million.

112. It was also clearly put in cross-examination that Mr Andrew thought that he did not have a duty to do anything and that it was fine for the documents to continue flowing to him throughout the course of the arbitration. He accepted that the same duties imposed on barristers under the Bar Standards Board written standards applied to solicitors. He was asked whether he accepted that P&ID, on receipt of the material, should have informed FRN and the tribunal that it had material that might at the very least have been improperly provided and that was confidential and privileged and should have returned the copies to FRN. He did not agree and was then asked if he really thought that he was entitled to keep the documents and make use of them and keep quiet without letting FRN know. His answer was not "yes, that is fine" but that, in the circumstances explained to him, he thought there was an innocent motivation for the documents being shared. Mr Howard KC then asked what was the difficulty in disclosing to FRN he had the documents if he thought their receipt was above board, to which his answer was that even if the motivation was innocent as he believed it to be, these documents might not have been provided to P&ID with the strict authority of FRN. As Phillips LJ said in argument, this showed that he suspected that the authority of FRN had not been obtained. As Mr Willan KC put it, the evidence compelled the conclusion that he knew he was not entitled to these documents.

113. Mr Willan KC also drew attention to a passage in the cross-examination where Mr Andrew said that he owed a strict duty of confidentiality as a solicitor in relation to communications from his client to him but it would be different if he suspected something terrible was going on. The judge had rejected his evidence that he thought the documents were being provided to facilitate settlement, so Mr Andrew did know they were privileged and had no genuine belief they were being provided legitimately. For that reason, his retention of the documents was, as the judge found, indefensible, not least because he did not try to defend the position of sitting on his hands and getting a flow of documents if there was some suspicion about their provenance.

114. Mr Willan KC also drew attention to passages in the written closings which Mr Andrew read and in relation to which, if he had thought the judge was being invited to make damaging findings against him which he had not had the opportunity to answer, then he could have objected. The case against Mr Andrew was squarely put at the outset by FRN in [3]:

> "The second sorry part of the story is P&ID's own lawyers. As with the corrupted officials and legal advisors of FRN, so too was the integrity of Mr Andrew and Mr Burke compromised. They were offered life-changing sums of money, contingent upon success in the claim, which induced them to look past evidence of blatant corruption (most obviously in the form of the FRN Privileged Documents) in the hope of reaching their promised pots of gold. They did so at the expense of their professional obligations. It is a cautionary tale of why lawyers

> are not, subject to tightly-defined exceptions, permitted to take personal stakes in their own cases: their judgment was blinded by the prospect of riches beyond the dreams of avarice."

As Jeremy Baker LJ said in argument what was clearly being put there was that the corruption included the obtaining of illicit documents. Mr Willan KC submitted that the receipt of the documents was corrupt in how it arose and corrupt in its effect: it corrupted the arbitration.

115. At [18] the case against Mr Andrew was again squarely put:

> "Mr Andrew was presented by P&ID to Sir Ross Cranston as a "thoroughly respectable, highly regarded and senior lawyer both solicitor and barrister". Unfortunately, that charade has crumbled to reveal the true Mr Andrew: he was an evasive and dishonest witness. His motivation to lie is not in doubt….
>
> Fundamentally, he lied in his professed belief that those Documents had been obtained legitimately. The truth is that Mr Andrew had several billion reasons to withhold from this Court what he knew about how the Documents had been obtained and indeed to withhold from FRN and the Tribunal during the arbitration, in breach of his professional duties, the fact that such documents were being provided to P&ID."

116. At [210] the criticism of Mr Andrew's speculations as to why the FRN internal legal documents had been obtained is squarely put:

> "It follows that (i) P&ID has not put forward any actual first-hand evidence about why it came into possession of the FRN Privileged Documents; and (ii) Mr Andrew's "best speculations" about why they might have done so must be rejected. They are nothing more than that and do not make sense on their own terms in any event: they are contrived and are falsely intended to mask the reality that it would have been obvious to those involved at the time that the Documents were being obtained as a result of corruption."

Later in the closing submissions there was a detailed rebuttal of the evidence he had given about the documents.

117. Mr Willan KC also referred to P&ID's written closing, where at [154] it was said:

> "As a final point, FRN cross-examined Mr Andrew and Mr Burke at great length on the extent to which they did or did not investigate the provenance of the FRN PDs and what they did or did not know about them. It is accepted that they could have done more to investigate, and that questions may be asked as to whether they complied with their respective professional duties (although the Court may consider that this is not the right forum in which to make definitive findings in that regard)."

He noted that Mr Andrew tried to rely upon this to say that he had been thrown under the bus at this stage, but as Mr Willan KC said, Mr Andrew read this, he was an experienced litigator and must have known there was a real risk the judge would come to the same conclusion and yet, he did nothing. It was not for the judge to say your company's legal team are no longer defending your honour. It was for Mr Andrew himself to do something about it.

118. Having shown the Court in detail what had happened at trial, Mr Willan KC dealt with the grounds of appeal relatively briefly. He started with ground 4, the challenge to the finding that Mr Andrew's evidence about the FRN internal legal documents being shared for settlement purposes was untrue, because in his submission, this was the lynchpin finding. Once that was rejected, the whole house of cards comes tumbling down because there is no possible legitimate explanation for what Mr Andrew did. The judge's reasoning process was clear from [210] and [213]-[214]: he had looked at the documents and at least some of them are so obviously not capable of being provided for settlement purposes that Mr Andrew's evidence that that is what he thought cannot be true. The only challenge is a reasons challenge under Article 8 but there was no obligation for Mr Andrew to be given reasons why his evidence was accepted or rejected. Even if there were, the reasons given are more than adequate. Even under Article 6 all that is needed is sufficient to show that the judge has considered the fundamental issues and how he has resolved them, which was done here.

119. Even if there were a problem with the adequacy of reasons, the answer was that Mr Andrew should have asked for further reasons when he received the draft judgment. It is only the procedure as a whole that need be fair under the ECHR and the procedure was fair in circumstances where he had the opportunity to review the judgment from his personal perspective. His choice not to ask for further reasons does not indicate any defect in the procedure.

120. Mr Willan KC turned to ground 2, the finding that Mr Andrew's conduct in not returning the documents was indefensible. This is put as a notice or warning challenge and as a reasons challenge. The former is totally without merit since, as Mr Willan KC had shown, the breach of duty allegations were fairly and squarely put in cross-examination, having been pleaded. Any suggestion that the judge had to warn Mr Andrew that there might be a finding against him has no basis in the ECHR at all. This seems to be linked to the fact that P&ID had abandoned its defence of Mr Andrew by the time of closing, but he knew that and had an opportunity to set out his position.

121. The reasons challenge should also be rejected. The finding at [215] is clear and adequately reasoned. As Mr Willan KC had said when going through the evidence, Mr Andrew had not sought to defend his conduct and had accepted that the position would have been different if he had had a suspicion that the documents were improperly obtained as was effectively found by the judge. He submitted that there was no world in which a lawyer who, while acting as counsel, receives on a continuing basis self-evidently privileged and damaging documents belonging to the other party without any genuine belief that they have been properly provided, can do absolutely nothing about it.

122. As Mr Willan KC said, whatever interesting arguments there might be on the basis of *White* and *Tchenguiz*, cases where the documents were not privileged but only confidential, once there are privileged documents flowing on a continuing basis to a

lawyer involved for the other side in the litigation to which they relate, the decision to do nothing, not to try to put a stop to it is, as the judge found, indefensible. The lawyer's duty is to see that the documents are returned to the party to whom they belong unless satisfied they have been properly obtained and, if he cannot do that, he has to walk away.

123. Mr Willan KC then turned to ground 3 concerned with Mr Andrew's financial motivation, on which there is both a notice challenge and a reasons challenge. He submitted that stepping back, a witness's motivation for doing or not doing something is always in play as part of the judge's evaluation of the facts. Motivation was always in issue here, not least because P&ID at least in opening argued that one starts from the presumption that legal professionals are unlikely to have acted dishonestly. Article 8 of the ECHR certainly did not require notice to be given of the motivation issue, given that it was always in play. In any event, notice was given since it was pleaded that he had a financial interest in the outcome of the arbitration, he dealt with it in his witness statement and he was cross-examined about it. It was clearly put to him that he was interested in the FRN internal legal documents because of his financial interest in the outcome of the arbitration. Mr Willan KC submitted that there was no obligation to give more detailed reasons. The judge clearly found at [215] that Mr Andrew's misconduct was motivated by the money he hoped to make.

124. In relation to ground 5, there is only a reasons challenge to the finding at [216] rejecting as untruthful Mr Andrew's evidence that he did not pay particular attention to the FRN internal legal documents or did not read some of them in full. Mr Willan KC submitted that this was the sort of finding which did not need to go further. Mr Andrew was making self-serving denials about not looking at the documents and the judge was entitled to say I do not believe it without saying more.

125. Mr Willan KC then dealt with ground 1. In relation to [592], he submitted that to any reasonable reader this was simply a collective reference to findings made in the course of the judgment and not making a specific new finding beyond the matters already addressed. It also has to be read in the context of [593]. If [592] had been a finding of corruption in the sense of bribery against Mr Andrew, when the judge came to deal with Mr Andrew specifically in [593], he would not have just referred to the FRN internal legal documents. He would obviously have had to refer to Mr Andrew's involvement in bribery. Mr Willan KC noted that when Mr Andrew and Mr Treverton-Jones KC reviewed the draft judgment there was no complaint about a finding of bribery against him. In the original grounds of appeal there was a complaint about the reference to "greed" in [592] but no complaint about the finding of corruption.

126. He submitted that Article 8 has no relevance to this paragraph. It is in a generic end note and not making any additional finding against Mr Andrew. In any event, the judge was entitled to include Mr Andrew within a general criticism of the use of corruption in this case. Corruption is not limited to or coterminous with bribery. The receiving and retaining of FRN's privileged documents, being deliberately provided by individuals in FRN with no authority to do so, was corrupt behaviour. If there had been any issue with [592], Mr Andrew had a remedy. He could have raised his concern when he received and read the draft judgment. He had sent an email to the judge asking for permission to share the draft judgment with Mr Treverton-Jones KC whom he said sometimes makes submissions about findings of professional misconduct in draft judgments. The judge's response, after Mr Howard KC had objected to the draft judgment being shared, as set

out at [8] above, was not shutting the door to such an application but simply indicating that the judge was not prejudging whether an application would be appropriate. Mr Andrew decided not to make an application before hand down. Mr Andrew had not waived privilege as to why that decision was taken and what advice he was given, but Mr Willan KC submitted that either the decision was tactical or the understanding was, correctly, that so far as Mr Andrew was concerned, [592] was no more than a reference to the receipt and use of the FRN internal legal documents. Whatever the explanation, there was nothing unfair in the process.

127. Mr Willan KC then submitted that, even if the grounds of appeal were otherwise arguable, this Court should refuse permission to appeal on discretionary grounds. He relied essentially on what this Court had said at [46] to [48] of *Gray v Boreh* referred to at [82]-[83] above, all of which applied equally in the present case. There had been a full trial, none of the litigating parties had any interest in the appeal, the proceedings were over and the judge had refused permission to appeal under section 68(4) of the Arbitration Act, which was final as regards the parties. Mr Willan KC emphasised what Gloster LJ said at [47}:

> "[The parties] are entitled to finality in their litigation, within a reasonable time, and not to be subjected to further appeals at the suit of a non-party, with the consequent risk as to costs, merely on the basis of Mr Gray's contention that the process was unfair to him as a witness and that the judge came to the wrong conclusion on the totality of the evidence."

128. FRN has a very strong interest in nothing being done which may affect the finality of the judgment it has obtained, and the possibility of challenges to the section 68 decision if this appeal were allowed to proceed could not be ruled out. As Mr Willan KC put it, the ingenuity of lawyers knows few bounds. There could also in theory be proceedings in other jurisdictions seeking to enforce the Award and there might be questions about the effectiveness of the set aside judgment under section 68 if this Court had said part of the reasoning was not appropriate. FRN was entitled to finality and not having to spend more money on these proceedings. He submitted that in this situation, FRN's Article 6 rights were engaged and, as in *Gray v Boreh*, far outweighed Mr Andrew's Article 8 rights.

129. Mr Willan KC also relied on the point made at [48] of *Gray v Boreh* about the availability of an alternative remedy to Mr Andrew before the SDT if his Article 8 rights had been breached. Mr Gray did have a hearing before the SDT which upheld the allegations of dishonesty and ordered that he be struck off the roll. He then sought a judicial review of the decision of the SDT which was dismissed by Linden J (*Gray v Solicitors Regulation Authority* [2022] EWHC 624 (Admin)). He held that the SDT would not have been entitled to simply rubber stamp my decision against Mr Gray and had not done so. It follows that it would be open to Mr Andrew before the SDT to challenge the reasoning of the judge in his judgment. Mr Willan KC pointed out that in the last sentence of [48] Gloster LJ said: "In my judgment [the SDT] is the appropriate forum for Mr Gray to defend his professional reputation; a non-party appeal to this court is not an appropriate forum." That was clearly right. The Court of Appeal is not a good place to be descending into these sorts of arguments, whereas the SDT is a fact-finding tribunal which will also decide culpability and sanction, so best placed to investigate the matters raised by Mr Andrew.

130. Mr Willan KC also submitted that it was relevant as a matter of discretion that Mr Andrew did not avail himself of the mechanisms available before the judge of making representations when he received the draft judgment or taking up the judge's express invitation to make a written application for permission to appeal. As a matter of discretion, this Court should not exceptionally make available a right of appeal where Mr Andrew had not availed himself of those opportunities.

131. Finally on discretion, Mr Willan KC relied on [50] of Gloster LJ's judgment:

> "Finally, although every case depends on its own facts, I express my concern that to permit a non-party witness in a commercial case of this type to exercise an independent right of appeal, in which he is free to challenge adverse factual findings made against him by a first instance judge, merely on the grounds that such findings have reputational consequences for him, has the potential to lead to highly undesirable satellite litigation. That in my judgment would be likely to waste court resources contrary to the interests of other litigants and to bring the administration of justice into disrepute."

132. He submitted that, save in the most extraordinary case, this sort of satellite litigation was not to be tolerated. Other than in such a case, which this was not, the Court should firmly discourage the extension of the *In re W* jurisdiction.

133. Submissions on the absence of any justification for an extension of time and on section 68(4) of the Arbitration Act were made on behalf of FRN by Mr Tom Ford. He took the Court through the procedural history set out at [6] to [14] above starting with the receipt by Mr Andrew of a copy of the draft judgment on 16 October 2023. He referred to the Practice Note in *Re A (Children)* [2011] EWCA Civ 1205; [2012] 1 WLR 595 where at [16] Munby LJ emphasised:

> "First, it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process."

As Mr Ford pointed out, that was not done.

134. In relation to the judge's statement at the consequentials hearing on 8 December 2023 that there would need to be a formal written application by Mr Andrew, Mr Ford submitted that the judge was entitled to determine, in the exercise of his case management powers, how the application should be made, particularly in the unusual circumstances of an application for permission to appeal by a non-party. The judge reserved the matter to himself and also reserved judgment on the application for permission to appeal by P&ID which he did hear, without indicating what his answer would be. Mr Ford submitted that the judge was implicitly reserving jurisdiction in respect of any application for permission to appeal that Mr Andrew might make after 8 December 2023. The judge's clerk contacted Mr Andrew's counsel on 21 December 2023 to ask whether such an application would be made, a further indication that he

retained jurisdiction. The judge himself drew up the consequentials order the same day which included at [12] an express liberty to apply to him.

135. Mr Ford submitted that, having waited for the consequentials order to be circulated, Mr Andrew issued his Appellant's Notice out of time on 21 December 2023 seeking an extension of time. Then on 22 December 2023, Mr Lee wrote to the judge's clerk in the terms set out at [13] above saying that the judge was *functus*. However, this suggestion is misconceived.

136. Mr Ford submitted that Mr Andrew should have taken up the opportunity of making a formal written application which would have given the judge the opportunity to give further reasons if he thought it appropriate or to explain what he meant by [592].

137. He submitted that, as was accepted by Mr Andrew, the Appellant's Notice was out of time and, accordingly, he had to satisfy the criteria for relief from sanctions under CPR 3.9 if an extension of time is to be granted. Not knowing or being confused about the deadline for applying for permission to appeal is not a sufficient excuse for failing to comply. He referred to the statement to that effect by Murray J in *Jamous v Mercouris* [2020] EWHC 2814 (QB) at [112]. Mr Ford submitted that, in so far as Mr Andrew's position is that the judge did not retain jurisdiction after the hearing on 8 December 2023, he has put forward no proper justification or excuse for holding off filing his Appellant's Notice until 21 December 2023.

138. Mr Ford submitted that there was a serious breach of the CPR here and no good reason shown for the failure to comply with the deadline for service of the Appellant's Notice which was 13 November 2023. In evaluating all the circumstances of the case as required by CPR 3.9, he submitted that the course which Mr Andrew took was disruptive: he only provided the judge with his grounds on the afternoon of 6 December 2023, after the deadline set by the judge; he failed to take the judge up on the opportunity to issue a formal written application, which could then have been dealt with in an orderly way rather than adding to an already over-burdened consequentials hearing; and his course was also prejudicial in that had he proceeded with an application before the trial judge, the judge could have provided any clarity about his findings which he thought appropriate.

139. In relation to section 68(4) of the Arbitration Act which provides: "The leave of the court is required for any appeal from a decision of the court under this section", Mr Ford submitted first that the words "any appeal" were not limited to an appeal by the parties and second that "any appeal from a decision of the court under this section" must include seeking to challenge the findings that are part and parcel of the court's reasoning as to whether to grant or refuse a section 68 application. Those findings include the ones made against Mr Andrew whose actions and knowledge were relied on by FRN as being those of P&ID. It was pleaded that Mr Andrew was one of the people who received FRN internal legal documents on behalf of P&ID.

140. Mr Ford referred the Court to the decision of this Court in *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2023] EWCA Civ 826; [2024] 1 WLR 71 ("*NIOC*"). In *NIOC* the Commercial Court held that a party had not, by reason of section 73 of the Arbitration Act, lost the right to object under section 67 that an arbitral tribunal had exceeded its substantive jurisdiction and then refused permission to appeal that decision. The Court of Appeal held that the decision that the right to object under

section 67 had not been lost was a decision of the court under that section for the purposes of section 67(4) and hence could not be appealed to this Court without the permission of the Commercial Court. Males LJ set out at [60]-[63] a number of applicable principles derived from earlier authorities, including the decision of this Court in *Manchester City*:

> "60. First, the policy underlying section 67(4) and other equivalent provisions has consistently been stated as being to avoid delay and expense…
>
> 62. Second, there are statements which suggest that a decision which is part of the process of reaching a final decision on a challenge to an award is a decision under section 67 or 68, as the case may be…
>
> 63. Third, there is no support in these cases for the view that only a decision finally disposing of a challenge to an award is capable of being a decision under section 67 or section 68. Nor is any distinction drawn between a decision that a party has lost the right to object and a decision that it has not done so."

141. Mr Ford also referred to the earlier decision of this Court in the present case where, at [30]–[32] Snowden LJ said:

> "30 …the question of whether an appeal against the Judge's decision on the currency of the Costs Order falls within section 68(4) is a matter of statutory interpretation. This requires the court to identify the meaning of the words used in section 68(4) in context, having regard to the purpose and scheme of the Arbitration Act.
>
> 31. Applying that approach, there are a number of factors that point to a conclusion that the restriction in section 68(4) is not meant to apply to the Judge's decision to make the Costs Order in sterling.
>
> 32 First, as explained in *NIOC* at para 60, the policy underlying section 67(4) and section 68(4) is to limit the potential for appeals to cause delay and expense in the resolution of disputes that have been referred to arbitration."

142. As Mr Ford pointed out, in that case this Court concluded at [41] that the decision on the final costs order following the determination of the section 68 application could not be regarded as "part of the process" of reaching a decision on a section 68 application or "within the compass" of a section 68 challenge. The present case is very different. Mr Andrew is attacking the judgment on the section 68 application which is part of the process or within the compass by which the judge resolved the section 68 application. Mr Ford submitted that when the Court is construing the proper scope of the restriction in section 68(4), the potential in a case for an attack on the findings of the judge on the section 68 application by a non-party to lead to setting aside the Award or a remittal of

the outcome does indicate that the power to allow an appeal in such circumstances could lead to additional costs and extend delay in the arbitral process.

Discussion

143. As a matter of analysis, two preliminary questions arise before consideration of whether the grounds of appeal are sufficiently arguable for permission to appeal to be given. They are, first whether Mr Andrew is entitled to an extension of time for serving his Appellant's Notice and Grounds of Appeal and second whether or not this Court has jurisdiction to entertain an appeal, because Mr Andrew does not have permission to appeal from the Commercial Court under section 68(4) of the Arbitration Act. If this Court does not extend time or if this Court does not have jurisdiction, then the proposed grounds of appeal are academic. Accordingly, I propose to address those two preliminary questions first.

144. The judgment was handed down on 23 October 2023. Accordingly, the time within which any Appellant's Notice under CPR 52.12(2)(b) had to be filed was 21 days thereafter, on or before 13 November 2023. In his ninth witness statement, Mr Andrew says that he assumed that the "date of decision" from which the 21-day period would run was 8 December 2023, the date fixed on 8 November 2023 for the consequentials hearing. However, that was an error as the "decision" he was seeking to appeal was the findings against him in the judgment. Before 13 November 2023, he could and should have sought a direction from the judge under CPR 52.12(2)(a) to extend time for service of any Appellant's Notice until after the consequentials hearing. As Mr Ford submitted correctly, not knowing or being confused about the deadline for applying for permission to appeal is not a sufficient excuse for failing to comply.

145. Given that Mr Andrew was a director of P&ID with the conduct of the litigation, he must have known about the judge's request on 24 November 2023 that any grounds of appeal be provided to the judge by 1 December 2023. However, he did not comply with that deadline or ask the judge for more time. It was not until the afternoon of 6 December 2023, less than two days before the consequentials hearing, that, completely unheralded, he sent the judge the draft grounds of appeal and skeleton argument drafted by Mr Wardell KC and Mr Lee. Even then, the grounds of appeal were not actually filed.

146. As noted above, Mr Lee attended the consequentials hearing on 8 December 2023, but there was insufficient time to deal with Mr Andrew's case and, in any event, the judge had indicated before the hearing that he would require a formal written application to be made before he would consider Mr Andrew's proposed appeal further. No such application was issued before the hearing or at all. At the hearing, as set out at [10] above, the judge reiterated that he would first require a formal application supported by evidence and if that were done, he would reserve the matter to himself. He also indicated that, if an application were issued, he would give it consideration as there was a whole range of things he could do at that point. It is not clear exactly what the judge had in mind, although it may be that he had considered *Gray v Boreh*, where Mr Gray was joined as a defendant.

147. The suggestion that, after the hearing on 8 December 2023, the judge was somehow *functus officio*, is completely misconceived. Nothing in either *Lisle-Mainwaring* or *McDonald v Rose* relied upon by Mr Wardell KC would support that conclusion.

Clearly, the consequentials hearing itself was an adjournment of the "hearing" at which the judgment was handed down, so that, if there had been time, the judge would have had jurisdiction to deal with any formal application for permission to appeal by Mr Andrew at the consequentials hearing. Because he required a formal application before he would consider Mr Andrew's grounds and reserved the matter to himself, the judge was clearly adjourning any application by Mr Andrew to further consideration by himself or a further hearing before himself, necessarily implicitly retaining jurisdiction in respect of any formal application for permission to appeal which Mr Andrew made after 8 December 2023. The contrary argument is unsustainable, not least because that is exactly what Mr Lee was asking for on 8 December 2023 as set out at [10] above: an adjournment of Mr Andrew's application for it to be dealt with at a later hearing.

148. Furthermore, the judge reserved judgment from the consequentials hearing, which he did not hand down until 21 December 2023 and no Order in respect of the set aside application was made by the judge until that date. Plainly, so far as the parties are concerned, the judge retained jurisdiction over the matter at least until that hand down and, in any event, his Order contained an express liberty to apply to him. If either party had had an issue about the consequentials judgment or the Order, they could have raised it with the judge after 21 December 2023 and he would have had jurisdiction to deal with it. Any suggestion that he retained jurisdiction so far as the parties are concerned but was *functus* so far as Mr Andrew is concerned is frankly nonsensical.

149. What should have happened in the light of the judge's indication at the hearing on 8 December 2023 is that, promptly thereafter, Mr Andrew should have issued the formal written application the judge required and asked for a further hearing to be fixed. He did not do that, apparently because of the mistaken assumption that the judge was *functus*. However, neither did he promptly issue his Appellant's Notice and Grounds of Appeal in this Court but waited until 21 December 2023. No excuse or explanation has been provided for the additional delay of 15 days from 6 December 2023 when drafts of the Appellant's Notice and Grounds of Appeal were sent to FRN and the Court.

150. I agree with Mr Ford that this all amounted to a serious breach of the CPR and that Mr Andrew has shown no good reason for his failure to comply with the deadline for issuing and filing his Appellant's Notice under CPR 52.12(2)(b) which expired on 13 November 2023. The Appellant's Notice was served 38 days late. I also agree with Mr Ford that, in evaluating all the circumstances of the case for the purpose of determining whether to grant relief from sanctions under CPR 3.9 the course Mr Andrew adopted was disruptive for the reasons Mr Ford gave, summarised at [138] above. Accordingly, I am not prepared to grant such relief from sanctions and conclude that the application for permission to appeal is out of time and should be refused on that ground alone.

151. The second preliminary question is whether this Court does not have jurisdiction to entertain the proposed appeal because Mr Andrew has failed to obtain permission to appeal the judge's decision from the judge himself, as required by section 68(4) of the Arbitration Act. In my judgment, the answer to this question is very clear. The proposed appeal seeks to challenge the judge's findings against Mr Andrew in his judgment, which form an integral part of his decision setting aside the Award under section 68. The findings are "part of the process of reaching the substantive decision" as I put it in [40] of *Manchester City* or "within the compass of section 68" as Males LJ put it in *NIOC*. The matter can be tested simply in this way: if P&ID itself had sought to appeal these findings in the judgment, it would have been inevitable that they could not do so

without the permission of the judge because of section 68(4). How can the position be any different for Mr Andrew who is a non-party, but who had the conduct of the arbitration on behalf of P&ID and who gave evidence at the section 68 hearing?

152. In the circumstances, I consider that this Court does not have jurisdiction to entertain this application for permission to appeal, permission to appeal not having been obtained from the judge.

153. Mr Wardell KC sought to avoid that conclusion by arguing that section 68(4) could and should be "read down" under section 3 of the Human Rights Act because Mr Andrew's rights under Articles 6 and/or 8 of the ECHR had been breached. For the reasons set out below, this argument is without merit.

154. This case is a very long way from *In re W*, on which Mr Wardell KC relied in support of his case that the rights of Mr Andrew under Articles 6 and/or 8 of the ECHR had been breached. In that case PO and SW were witnesses who had no warning of the findings of mendacity the judge found against them or of the allegations of emotional abuse by them, which were not pleaded. The findings against then were also extraneous and outside the four corners of the case the judge had to decide. The contrast with the position in the present case could not be greater: (i) the allegations of improper conduct by Mr Andrew in relation to the FRN internal legal documents were specifically pleaded in detail as summarised at [4] above; (ii) Mr Andrew dealt with the pleaded allegations in his witness statements; (iii) he was cross-examined in relation to those allegations over 2½ days and had every opportunity to put forward his explanations for his conduct, which were challenged in the cross-examination; (iv) Mr Howard KC made trenchant criticism of Mr Andrew's conduct in his closing submissions; (v) Mr Andrew had the benefit of advice from Mr Treverton-Jones KC and had had the opportunity to consult him during the trial; and (vi) far from the findings against Mr Andrew being outside the four corners of FRN's case, the criticisms of his conduct were an integral part of that case. Far from there being any similarity between the present case and *In re W*, the parallels between this case and the circumstances in *Gray v Boreh*, as set out in the passages from Gloster LJ's judgment cited at [80] to [82] above, are obvious and striking.

155. In relation to Article 6 of the ECHR, I agree with Mr Willan KC that there is no question of breach of that Article in the present case. As he submitted, the third requirement for the Article to be engaged, as set out in *Grzeda v Poland* cited at [84] above, that the proceedings must be directly decisive of the right in question, cannot be satisfied in the present circumstances. Whilst Mr Andrew has a legal right to work as a solicitor, that right has not been determined by the proceedings or the judgment but can only be determined by the SDT in future disciplinary proceedings. Whilst the SDT can have regard to the judge's findings, it cannot simply adopt them but has to form its own judgment on the facts.

156. Although Mr Wardell KC sought to contend that the relevant civil right for the purposes of Article 6 was Mr Andrew's right to a good reputation which had been destroyed by the judge's findings, I agree with Mr Willan KC that questions of impact on reputation should be dealt with under Article 8 rather than Article 6, although for the reasons set out in the next paragraph, Article 8 is not applicable here since the findings made against Mr Andrew were within the four corners of the case before the judge as Mr Andrew well knew.

157. However, even if Article 6 or Article 8 were engaged in these circumstances, there is no question of any breach of the ECHR. Mr Andrew's conduct was determined at a fair and public hearing by an independent and impartial judge. As the Strasbourg jurisprudence makes clear, the ECHR is not concerned with the merits of the decision but the fairness of the process. Mr Andrew's attempt to argue that the process here had been unfair because the judge had not given adequate reasons for his findings against Mr Andrew is misconceived. The requirement for reasons, as was stated by this Court in *English v Emery Reimbold* quoted at [89] above, is to demonstrate that the essential issues have been addressed by the court and how they have been resolved. Although the judge's findings are not elaborate, they are clearly adequate for the purposes of Article 6. This case is a long way from *Simetra* and *Popely.* The gravamen of the allegations being made by FRN was clear from the pleadings, the cross-examination and the closing submissions and, against that background, Mr Andrew must have been well aware of what the judge was finding against him and why. If he had considered that clarification was needed of the findings and the reasons for them, he could and should have raised any concern with the judge between receipt of the draft judgment and its formal hand down. He had the benefit of sharing the draft judgment with his counsel, Mr Treverton-Jones KC. Privilege has not been waived in respect of any advice he gave, but it is a fair assumption that if he had thought the judge's reasons for his findings were inadequate, Mr Treverton-Jones KC would have advised Mr Andrew accordingly. This makes it all the more striking that Mr Andrew did not raise any concern with the judge before hand down.

158. So far as concerns Article 8 of the ECHR, I agree with Mr Willan KC that it has no application where, as in the present case, the Court is determining issues which fall within the four corners of the case on which Mr Andrew had given evidence. What the ECtHR said in *Del Campo v Spain* quoted at [90] above is entirely apt: "The Court also reiterates that art.8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions…" As Mr Willan KC said, Mr Andrew can hardly complain that his private life has been invaded by virtue of the foreseeable consequence of his coming to the hearing to assert in his evidence that he had done nothing wrong and the court disagreeing and disbelieving him.

159. As Gloster LJ made clear in the passage at [35] of *Gray v Boreh* quoted at [77] above, in the context of legal proceedings, Article 8 provides procedural safeguards in terms of the right to a fair process, not a guarantee that, if the court operates a fair process, it will reach a particular conclusion on the substance of the case. In the present case, the decision-making process was clearly fair, for the reasons summarised at [154] above. Mr Andrew had ample notice of the allegations against him which were fully pleaded and he had a full opportunity to address them in his evidence. The course of the trial, as helpfully set out in Mr Willan KC's submissions (summarised at [97] to [117] above), demonstrates convincingly how fair the process was throughout.

160. It follows that, even if factors which McFarlane LJ identified at [95] of *In re W* (set out at [93] above) were applicable (which they are not because the allegations of misconduct were an integral part of FRN's case), they were satisfied here. There is no question of the judge having to warn Mr Andrew about the adverse findings against him which might be made. It must have been blindingly obvious from the pleaded case, the cross-examination and Mr Howard KC's trenchant closing submissions about Mr Andrew's conduct that there was a serious risk that, if the judge accepted FRN's case,

he would make adverse findings against Mr Andrew. Furthermore, Mr Andrew had the opportunity throughout to take advice from Mr Treverton-Jones KC who would have been well aware of that risk from his professional experience of acting in such cases.

161. Accordingly, in the present case, unlike in *In re W*, either Articles 6 and 8 of the ECHR are not engaged at all or, if they are engaged, were not breached, from which it follows that there is no question of section 68(4) of the Arbitration Act being read down under the Human Rights Act as Mr Wardell KC sought to argue. Given that Mr Andrew does not have permission to appeal from the judge under that sub-section, the position is that this Court does not have jurisdiction to entertain an appeal by Mr Andrew.

162. In the circumstances, the proposed grounds of appeal can be addressed relatively briefly. As regards Ground 1, the suggestion that, in [592] and [593] of the Endnote, the judge was finding that Mr Andrew was implicated in the overarching corrupt scheme involving bribery by P&ID of FRN officials is entirely misconceived. There is no hint of any pleaded case to that effect or that the judge's findings against Mr Andrew earlier in the judgment related to corruption in that sense. Of the three possible interpretations of [592] postulated by Mr Wardell KC set out at [46] above, the first is simply not arguable. [592] was not making any new or further finding against Mr Andrew and if the judge had been making a finding of corruption in the sense of bribery against Mr Andrew, it is inconceivable that, when the judge came to refer to Mr Andrew specifically at [593], he would not have referred not only to his misconduct in relation to FRN internal legal documents, but also to his involvement in the bribery of FRN officials. It is also striking that, whatever misinterpretation there may have been of the judge's findings in media reporting, at the time that Mr Andrew and Mr Treverton-Jones KC saw the draft judgment prior to hand down, neither of them seems to have considered that in this part of the judgment the judge was making some new finding of involvement in bribery not previously addressed. If they had considered that this was so, Mr Andrew would surely have raised this with the judge to correct any misunderstanding before the judgment became public.

163. So far as concerns the other two possible interpretations of [592], in my judgment, the better reading is that "prepared to use corruption" is not intended to refer to Mr Andrew at all but only to those involved in the corrupt scheme of bribery. However, even if that were wrong and "prepared to use corruption" is a reference to Mr Andrew as well, the judge is clearly identifying Mr Andrew with corruption in the sense of his involvement in the improper obtaining and retention of FRN internal legal documents. In this context, it is striking that, as set out at [45] above, Mr Wardell KC was constrained to accept, in answer to Jeremy Baker LJ, that deliberately keeping the FRN internal legal documents and retaining them, as found in [214] and [216] of the judgment, could be described as corruption. That is obviously correct. What the judge describes in those paragraphs was clearly corrupt behaviour. Mr Wardell KC also accepted in answer to me that if the judge had said at [592] that Mr Andrew was "driven by greed and prepared to act dishonestly" there would be no ground for complaint. Any distinction between corruption and dishonesty is wafer-thin. Indeed, the Oxford English Dictionary definition of "corruption" includes "dishonest or illegal behaviour". Ground 1 of the proposed appeal is unarguable.

164. Ground 2 concerns the judge's finding at [215] that Mr Andrew's conduct in not stopping the use by P&ID of FRN internal legal documents and returning them to FRN was "indefensible". To the extent that this is put on the basis that the judge should have

warned Mr Andrew about the finding he proposed to make, it is unarguable. The allegations of misconduct in relation to the FRN internal legal documents were fairly and squarely pleaded and put in detail to Mr Andrew in cross-examination. There is no basis under the ECHR for requiring the judge to warn Mr Andrew of the findings he might make. As I said above, that the judge might make this finding must have been blindingly obvious to Mr Andrew.

165. To the extent that this is put as a "reasons" challenge, it is equally without merit. As set out at [113] above, although Mr Andrew maintained in cross-examination that he owed a duty of confidentiality to P&ID in relation to communications from P&ID, he accepted that it would be different if he suspected something terrible was going on. Given that the judge rejected his evidence that he thought the FRN internal legal documents were being provided for the purposes of facilitating settlement and found that, as a lawyer, Mr Andrew appreciated that the documents included ones which were privileged [214] and knew that he and P&ID were not entitled to see the documents [215], it necessarily follows from the totality of the findings that something terrible was going on and Mr Andrew knew it. As Mr Willan KC correctly put it, Mr Andrew's retention of the documents was indefensible not least because he did not seek to defend keeping them and continuing to receive them but doing nothing to return them when he knew they were privileged and he was not entitled to see them. As Mr Willan KC said, on the basis of Mr Andrew's own evidence, a finding that his conduct was indefensible was inevitable.

166. In my judgment, Mr Willan KC was also correct that neither of the cases relied on by Mr Andrew, *White* and *Tchenguiz*, assists his case, since they concerned documents which may have been confidential but not documents which were privileged. Where a solicitor obtains from his client the other side's privileged documents which he knows or suspects have been illicitly obtained without the consent of the other side, he cannot simply do nothing, let alone, as here, continue to use the documents. His duty is to ensure that these documents are returned to the party to whom they belong or, if his client refuses to return them, to cease to act. Mr Wardell KC's contention that there was no basis for any conclusion that Mr Andrew used the FRN internal legal documents is without merit. As was pleaded at [79J] of the Re-Re-Re-Amended Statement of Case, it is to be inferred that P&ID was making use of the privileged documents to gain knowledge of what FRN was being advised and of the steps FRN was taking or planning to take in the arbitration. Mr Andrew was one of the human agents through whom P&ID acted and, as the judge found, he read the FRN internal legal documents, sufficient "use" in and of itself. Overall, the finding that Mr Andrew's conduct was indefensible was plainly correct.

167. Ground 3 challenges the judge's findings at [215] and [592] that Mr Andrew's conduct in failing to return the FRN internal legal documents was motivated by greed. As Mr Willan KC noted, this is also put as a notice challenge and a reasons challenge. The notice challenge is misconceived. As Mr Willan KC pointed out, the motivation of a witness for doing or not doing something is always in play in litigation and does not require that notice be given. In any event, notice was given since the allegation of the substantial financial interest which Mr Andrew had in the outcome of the arbitration and litigation was pleaded at [37E(5)] of the Reply and Mr Andrew was aware of the allegation, since he addressed it in his witness statement. Furthermore, his financial interest was clearly put to Mr Andrew in cross-examination and the motivation by greed

was squarely set out in the closing submissions for FRN in the passage quoted at [114] above. The reasons challenge is equally misconceived. Mr Andrew was well aware of the allegations of financial interest being made against him and had ample opportunity to deal with them. There is simply no question of the judge's findings of motivation by greed requiring to be supported by more detailed reasons than the judge gave.

168. Ground 4 challenges the finding at [214] that Mr Andrew's evidence about the FRN internal legal documents being shared for settlement purposes was untrue. The challenge is solely a reasons one. However, looking at the judge's findings overall in [210] to [214], he had clearly considered the documents and concluded that some of them were so obviously not capable of being provided for settlement purposes that Mr Andrew's explanation for receiving them could not be true. One such document was the letter of 6 May 2015 from the Ministry of Petroleum in-house lawyer to Mr Shasore instructing him to offer US$400 million in settlement and to negotiate a figure lower than US$500 million, referred to at [103] and [111] above. As the judge found at [293] of the judgment, this letter was plainly privileged. It was clearly put to Mr Andrew in cross-examination that his evidence that this letter was given to him to convey the settlement offer urgently was patently false. Likewise in relation to the letter from FRN's legal expert to Mr Shasore referred to at [110] above, Mr Andrew accepted that there could be no reason why disclosure of that document to P&ID would be in FRN's interest and that receipt of that document on its own would appear to have been wholly improper. He could not explain how it could have been provided to facilitate settlement.

169. The judge was clearly entitled to disbelieve Mr Andrew's explanations for receiving and retaining the FRN internal legal documents and under Article 8 of the ECHR there was no obligation on the judge to give more detailed reasons as to why his evidence was being rejected. In any event, as Mr Willan KC correctly submitted, if Mr Andrew had considered the reasons inadequate, his remedy would have been to ask the judge to provide further reasons when he received the draft judgment. The litigation process overall was fair since Mr Andrew had the opportunity to ask for further reasons and the fact that he chose not to do so cannot make the process unfair.

170. In relation to ground 5, this was a reasons challenge to the judge's finding at [216] rejecting as untruthful Mr Andrew's evidence that he did not pay particular attention to the FRN internal legal documents he received or did not read some of them in full. I agree with Mr Willan KC that the judge's finding did not need to go further. The evidence consisted of self-serving denials which the judge did not believe and it was simply not necessary for the judge to say more than that this was not truthful evidence.

171. For all these reasons, even if this Court had jurisdiction to entertain the proposed appeal, on analysis none of the grounds is arguable. However, even if any of the grounds were otherwise arguable, I agree with Mr Willan KC that essentially for similar reasons to those given by this Court in *Gray v Boreh*, this Court should refuse permission to appeal on discretionary grounds. There was a full trial of FRN's section 68 set aside application which was successful. P&ID was refused permission to appeal by the judge and because section 68(4) applies, it cannot renew any application for permission to appeal to this Court. It follows that the actual proceedings in which Mr Andrew was a witness have concluded and neither of the parties to the proceedings has any interest in this appeal. As Mr Willan KC correctly submitted, what Gloster LJ said at [47] of her judgment in *Gray v Boreh* (quoted at [127] above) is equally applicable here.

172. As Mr Willan KC submitted, FRN has a very strong interest in nothing happening which might affect the finality of the judgment it obtained. Although Mr Wardell KC contended that, even if Mr Andrew's appeal against the judge's findings about his misconduct were successful, that could have no impact on the remainder of the judgment so far as P&ID itself is concerned, I am far from convinced that P&ID might not try to reopen the judgment if those findings were to be somehow excised from it. As I have said, the findings are an integral part of the judge's decision to set aside the Award under section 68 and I agree with Mr Willan KC that the ingenuity of lawyers knows no bounds, particularly where the sums at stake are so substantial. Although P&ID might not be able to persuade the judge to reopen the refusal of permission to appeal under section 68(4), FRN should not have to face the risk that it might do so. Furthermore, as Mr Willan KC pointed out, P&ID might launch proceedings in other jurisdictions seeking to enforce the Award and there might well be issues in such proceedings about the effectiveness of the judgment setting aside the Award if this Court had said that part of the reasoning was inappropriate. FRN is entitled to the finality of the judgment setting aside the Award which the judge's refusal of permission to appeal under section 68(4) was supposed to ensure.

173. Furthermore, as in *Gray v Boreh*, Mr Andrew has an alternative remedy here in the sense that if disciplinary proceedings are brought against him in the SDT it will be open to him to challenge the reasoning of the judge in making findings against him. I agree with what Gloster LJ said at [48] of that case, that the SDT, not the Court of Appeal, is the appropriate forum for the determination of issues of fact in relation to Mr Andrew's conduct and in that forum culpability and sanction will also be decided.

174. I also consider that what Gloster LJ said at [50] of her judgment (quoted at [131] above) about the undesirability of satellite litigation such as the present proposed appeal entails is equally apt here. Other than in the most extraordinary case (which this case is not) this sort of challenge by a witness against adverse findings made against him is to be firmly discouraged. Mr Andrew was well aware of the allegations against him from the detailed pleadings and the lengthy cross-examination so that he had ample opportunity to put forward his version of events. If there were any force in his criticisms of the judge's findings against him (which there is not) he could and should have raised those criticisms before the judge, either in submissions about the draft judgment before it was handed down or by making the appropriate written application for permission to appeal to the judge which he said that he required and then pursuing that application at a hearing before the judge. Whether for tactical reasons or otherwise, Mr Andrew did not pursue either course and, in my judgment, this application being made now to this Court should not be countenanced.

175. For all these reasons, I consider that the application for permission to appeal should be refused. Even if permission to appeal had been granted, I would have dismissed the appeal.

Lord Justice Phillips

176. I agree.

Lord Justice Jeremy Baker

177. I also agree.