



Neutral Citation Number: [2026] EWCA Civ 261

Appeal Ref No: CA-2025-003195

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 CBE
CL-2024-000260

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2026

Before :

LORD JUSTICE PHILLIPS
and
LORD JUSTICE FOXTON

Between :

K1
- and -
B

Applicant

Respondent

Mark Wassouf (instructed by **Mayer Brown International LLP**) for the **Applicant**
Jamie Carpenter KC (instructed by **W Legal Limited**) for the **Respondent**

Hearing date : 5 March 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Foxton :

1. The Applicant (“**K1**”) seeks permission to appeal against the decision of Mr Justice Robin Knowles refusing its application to amend K1’s challenge to an arbitration award of 10 April 2024 (“**the Award**”) made in favour of the Respondent (“**B**”).
2. K1 brought an in-time challenge to the Award under s.67 of the Arbitration Act 1996 (“**the 1996 Act**”). Before that challenge had been determined, it applied to amend the s.67 challenge to bring an “out of time” challenge to the Award under s.68(2)(g) of the 1996 Act. That application was dismissed by Mr Justice Robin Knowles in a judgment reported as *K1 v B* [2025] EWHC 2539 (Comm), who held that the proposed amendment was not arguable because a complaint of the type made did not fall within s.68(2)(g). The Judge refused K1 permission to appeal.
3. K1 now renews that application to this court. However, an issue arises as to whether the Court of Appeal has jurisdiction to grant permission to appeal, having regard to s.68(4) of the 1996 Act which provides:

“The leave of the court is required for any appeal from a decision of the court under this section”.
4. Males LJ directed that the application for permission to appeal should be considered at an oral hearing.

The background in brief

5. On 28 May 2018, B entered into a letter of engagement counter-signed by C, a law firm, to provide “business intelligence services” to assist in a dispute in which C was acting for K1 (“**the LOE**”). The LOE contained an LCIA arbitration agreement. On B’s case, the “business intelligence services” provided included soliciting information from individuals on the basis of so-called “pretext” enquiries (which involved giving misleading accounts of the purpose for which information was being sought and the identity of the persons seeking it). B claims to have obtained useful information which was deployed both for the purpose of K1 commencing an investment treaty arbitration against a state, and in the context of an ongoing commercial arbitration between a company associated with K1, A3, and a state-owned port authority. Both arbitrations were eventually settled on terms which involved payments in favour of K1 or A3.
6. B commenced an arbitration against K1, A3 and another associated company, A1, alleging that they were all parties to the LOE, and liable to pay B 2% of the amounts received in settlement of the two arbitrations. The arbitration was defended on various grounds, including in the case of A1 and A3 (but not K1), on the basis that the tribunal lacked jurisdiction. However, no defence was advanced by reference to the argument K1 seeks to raise by its proposed amendment to the s.68 application.
7. In the Award, the tribunal found in favour of B on all points.
8. On 8 May 2024, K1, A1 and A3 brought a s.67 challenge to the Award.
9. On 16 April 2025, K1, A1 and A3 applied to add a further ground of challenge to the Award under s.68 of the 1996 Act. Section 68 of the 1996 Act permits a party to challenge an award “on the grounds of serious irregularity affecting the tribunal, the

proceedings or the award”. Section 68(2) contains a “closed list” of “serious irregularities” including at s.68(2)(g):

“the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.”

10. The basis for s.68 challenge was the contention that the LOE was “a contract for fraud”, being a contract for provision of services to “obtain information from targets by deception”, and was performed in that way. The “targets” were said to be foreign state officials or authorities possessing confidential information about foreign state entities.
11. K1 also applied for an order that the time limit for bringing a s.68 challenge imposed by s.70(3) be extended.
12. The application was opposed by B on three grounds:
 - i) The proposed challenge did not fall within s.68(2)(g) on its proper construction.
 - ii) The challenge was barred by s.73(1) of the 1996 Act.
 - iii) The extension of time should be refused, there being no justification for the 11-month delay.
13. That application was heard by Mr Justice Robin Knowles on 13 June 2025. It was rejected by a judgment handed down on 13 October 2025. Applying the principles set out in his judgment in *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm), [475]-[476], the Judge held that s.68(2)(g) was not engaged by the assertion that the arbitral proceedings involved a claim to enforce an illegal or unenforceable contract. In the Judge’s determination, the focus of s.68(2)(g) was on the parties’ conduct in the arbitration and the process by which the award was obtained ([14]). In short, the Judge refused the application because he found that it was not arguable as a matter of law. The Judge did not address the s.73(1) or delay issues.
14. On 13 November 2025, the Judge approved a consequential order made by consent. This provided:

“The 21-day period in which a party may seek permission to appeal from the Court of Appeal for purposes of CPR 52.12(2)(b) shall start to run from the day after the Judge's written decision on any application for permission to appeal made in the Consequential Submissions.”
15. On 1 December 2025, the Judge refused K1, A1 and A3 permission to appeal.
16. On 19 December 2025, Mr Justice Henshaw handed down judgment upholding the s.67 challenge in the case of two of the arbitral respondents, but dismissing it in the case of K1 (there referred to as A2) (*A1, A2, A3 v P* [2025] EWHC 3372). As a result, this application is only made by K1.

The issues before the court

17. It is not in dispute that, where it applies, s.68(4) limits the power to give permission to appeal from a decision under that section to the first instance judge. That is a consequence of s.105 of the 1996 Act which defines the court as “the High Court or the County Court”.
18. K1 advances two arguments as to why s.68(4) does not prevent it from seeking permission to appeal from the Court of Appeal in this case:
 - i) First, it is suggested that, by the terms of the consent order of 13 November 2025 approved by the Judge when judgment was handed down, the Judge has himself given K1 the right to seek permission to appeal from the Court of Appeal.
 - ii) Second, it is said that the decision appealed against is not “a decision of the court under [s.68]” because it is a decision that the court has no jurisdiction to grant s.68 relief on the facts as alleged and, for that reason, a decision as to the court’s jurisdiction.

The applicable legal principles

19. Section 68(4) is one of seventeen provisions of the 1996 Act which limit the power to give permission to appeal from a decision under the relevant section to the first instance judge. Others include s.67(4) (a challenge to an award on jurisdictional grounds), s.69(6) (the grant of leave to appeal on a point of law under s.69) and s.69(8) (an appeal from a decision of a point of law).
20. The limitation reflects the policy of the 1996 Act. As Waller LJ noted in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388, 396:

“Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible: see generally section 1(a) of the Arbitration Act 1996. Limitation on the rights of appeal is consistent with that philosophy and one tribunal dealing with the question is also consistent with that philosophy.”
21. The Departmental Advisory Committee on Arbitration Law in their Supplementary Report on the Arbitration Act 1996 (1997), p 10, para 27 explained the intention behind the provisions limiting the power to grant permission to appeal in the 1996 Act as follows:

“This amendment was made to make clear that where an appeal is desired from a decision of the court, leave must be obtained from that court itself, and will always be required. Leave may not be obtained from the Court of Appeal”.
22. The scope of these limitations on the ability to seek permission to appeal has been considered in a number of authorities. Given the refinement in the course of Mr Wassouf’s oral argument, it is only necessary to refer to three.
23. The first is *Cetelem SA v Roust Holdings* [2005] EWCA Civ 618. That case concerned the court’s power to make orders in support of arbitration proceedings under s.44 of the 1996 Act. Consistent with the policy stated in s.1 (“in matters governed by this Part, the court should not intervene except as provided by this Part”), this restricts the court’s power to grant relief as follows:

- i) First there is a distinction between urgent and non-urgent cases in s.44(3) and (4). In non-urgent cases, the court can only act with the agreement of both parties or the permission of the tribunal (s.44(4)).
 - ii) Second, in urgent cases, the type of order the court can make is limited to “such orders as it thinks necessary for the purpose of preserving evidence or assets” (s.44(3)).
24. In *Cetelem*, the first instance judge had made an order under s.44(3) requiring one party to perform a disputed obligation under the contract. The respondent sought to appeal on the basis that this was not an order “for the purpose of preserving evidence or assets”. The point taken in response was that s.44(7) (“the leave of the court is required for any appeal from a decision of the Court of Appeal under this section”) prevented the Court of Appeal granting permission to appeal (as Rix LJ had purported to do). Despite being initially attracted to that argument, Clarke LJ rejected it:
- i) He held that s.44(3) defined the types of order the court had power to make, and therefore the court’s jurisdiction ([47]).
 - ii) At [23], he held that “a decision under s.44 made without jurisdiction cannot fairly be held to have been made under the section within the meaning of s.44(7)”.
 - iii) At [24]-[25], he stated:

“I would draw a distinction between orders which are within the court’s jurisdiction and those which are not. Thus section 44(7) and its equivalents in other parts of the Act limit appeals on fact or law to cases in which the judge at first instance grants permission to appeal. As I see it, however strong the proposed appellant’s argument that the judge was wrong in law or on the facts, this court will have no jurisdiction. It will not be enough to show that the judge was plainly wrong in fact or law or that he made a decision which no reasonable judge could make. Parliament has limited the supervisory jurisdiction of the courts to one tier.

So long as the judge could make the order in the sense that it was within the jurisdiction specified in the relevant section, the buck stops with him. The order is made under the section. It is only where the judge makes an order which is outwith his jurisdiction, so that he could not (as opposed to should not) make it, that section 44(7) and other similar provisions do not prevent an appeal to this court.”
25. The distinction made by Clarke LJ in *Cetelem* between orders a judge “could not make” and those he “should not make” is relatively easy to draw in s.44. That section, reflecting s.1(b), limited the court’s power in cases of urgency to making particular types of order. Clearly an order which is not one of the permitted kinds is an order that the court “could not make”. Indeed, the obvious purpose of s.44. was to prevent the court making orders other than of the relevant kind in a case of urgency, even though there would be no objection to the court making such an order if the s.44(4) requirements were satisfied. While it is not necessary to determine this point, I do not understand *Cetelem* to decide that the necessarily more evaluative question of whether

or not there is urgency also falls outside s.44(7) (as Mr Wassouf submitted). There is an obvious difference between an impressionistic question of that kind, and the harder-edged issue of the type of order a judge can make.

26. The second decision is *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243 which concerned s.69 of the 1996 Act. Section 69(1) provides:

“Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.”

27. It will be noted that the last sentence of s.69(1) characterises an agreement to contract out of s.69 as an agreement to “exclude the court’s jurisdiction under this section” (with similar language being used in the same context in s.45(1)).

28. In *Sumukan* the issue was whether Colman J’s decision that the parties had agreed to exclude the operation of s.69 was “a decision of this court under this section to grant or refuse leave” within s.69(6). The Court of Appeal held that it was not. At [7], Waller LJ said of the words “unless otherwise agreed” that they meant that “a decision which the judge must make before considering whether to grant leave to appeal is whether access to the court has been excluded by agreement”.

29. At [28], he drew the following distinction:

“But if the court has jurisdiction, as part of the section 69 process to decide, in the context of whether to grant permission to appeal, whether there is an exclusion agreement, it seems to me that the absence of jurisdiction argument fails. It is only if the decision as to whether there is an exclusion agreement is a preliminary decision to which section 69(6) does not apply, that an argument as to lack of jurisdiction for the decision as to whether to grant or refuse permission could succeed.”

30. He continued:

“If it were to be held that an appeal in relation to the existence or otherwise of an exclusion agreement is a matter over which the Court of Appeal retains jurisdiction, despite refusal of permission by the lower court, there will be a need to distinguish that type of ‘preliminary decision’, from the ‘preliminary decision’ that, for example, the application had been made outside the 28-day period laid down by section 70(3) as required under section 69(2).”

31. Waller LJ expanded on that distinction at [30], distinguishing between “those cases where the court is assisting or overseeing the arbitration process and the cases where the question is whether the jurisdiction of the court has been excluded.” At [31], he stated:

“It may thus be that one should not be surprised if as a matter of language a distinction is drawn between jurisdiction issues as preliminary decisions as to whether the section is to be applicable at all and other decisions” ;

and, after referring to s.45 by analogy:

“ ... There is a distinction between a decision as to whether the parties have agreed to exclude the court and (if they have not) the decision as to whether to grant or refuse permission to appeal. Until the court has decided whether there is an exclusion agreement it does not, in fact, engage on the considerations relevant to the question whether permission to appeal should be refused or granted.”

I would note that the references in s.69(1) and s.45(1) to “an agreement to exclude the court’s jurisdiction under this section” support Waller LJ’s view as to which side of the line the requirement arising from the words “unless otherwise agreed” sat.

32. The final decision is *National Iranian Oil Company v Crescent Petroleum Co International Ltd* [2023] EWCA Civ 826. That case concerned a decision in the context of a s.67 challenge that the applicant’s right to challenge jurisdiction had not been lost by virtue of s.73 of the 1996 Act (a decision made after a freestanding preliminary hearing of that question rather than, as is often the case, at the hearing where the s.67 challenge was determined).
33. Males LJ reviewed a number of authorities on the scope of the limitation of the right to appeal, which included *ASM Shipping Ltd v TTM Ltd* [2007] 1 Lloyd’s Rep 16. In that case, when holding that s.68(4) extended to a decision that the relevant challenge had been waived either at common law or under the 1996 Act, Longmore LJ held at [9] that “a decision to refuse relief (for whatever reason) is still a decision under section 68 just as much as a decision to grant relief would have been”.
34. At [60], Males LJ noted that the “policy underlying section 67(4) and other equivalent provisions has consistently been stated as being to avoid delay and expense ... by making the first instance court the sole gatekeeper to control whether permission to appeal should be given.”
35. Males LJ then referred at [62] to decisions in other cases “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 section 68”. At [65] he concluded:

“In my judgment it is clear that section 73 is entirely ancillary to sections 67 and 68. It has no relevance or application independent of a challenge to an award under one or both of those sections. A decision whether a party has lost the right to challenge an award is undoubtedly ‘part of the process’ for determining a challenge under section 67 or 68 and is ‘within the compass’ of those sections. It is a preliminary question, but not a question going to the court’s jurisdiction, the answer to which determines whether the court needs to consider the merits of the section 67 or section 68 challenge.”

36. At [66], he rejected an argument much pressed by Mr Wassouf on the court in this case that the usual requirements for obtaining leave from the Court of Appeal sufficiently served the policy of finality in the 1996 Act, stating:

“Although it may be said that the Court of Appeal could be trusted not to give permission in unmeritorious cases, and would be unlikely to do so on case management decisions, even the process of applying for such permission would

cause delay and expense, while leaving the status of the award in limbo until the application had been determined.”

37. Finally, it should be noted that provisions in the 1996 Act limiting the jurisdiction to grant permission to appeal to the first instance judge are subject to certain very limited exceptions. In addition to decisions made without jurisdiction, as in *Cetelem*, that is also the position where the purported decision is not a decision at all, or the hearing infringed the applicant’s right to a fair trial: *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405; *CGU International Insurance Plc v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340.

K1’s first argument: the effect of the Consent Order

38. As noted above, the consent order submitted to and approved by the Judge contained the form of wording generally adopted when a judgment is handed down prior to the hearing at which an application will be made to the trial judge for permission to appeal, and the parties wish to avoid time running for the renewal of any such application to the Court of Appeal from the date of hand-down (*McDonald v Rose* [2019] EWC Civ 4).
39. It is not arguable that the provision relied upon had the effect of conferring a right to apply to the Court of Appeal for permission to appeal if permission was refused by the Judge:
- i) The wording says nothing about whether or not a party has a right to seek permission to appeal, but simply extends the time for making such application as it is entitled to make. As noted above, there are exceptional circumstances in which the Court of Appeal can grant permission to appeal against the determination of a s.68 application, and this provision would have preserved time for such an application. This paragraph of the order would also have extended time for filing an Appellant’s Notice if the Judge had subsequently granted permission to appeal.
 - ii) There was no suggestion to the Judge that he was being asked to make an order varying s.68(4), and there can be little doubt that he would have refused to make such an order if asked to do it. Indeed he had not yet been asked to address the issue of permission to appeal himself at that stage.
 - iii) In any event, the limitation on the Court of Appeal’s power arises as a matter of statute. A consent order cannot override that statutory limitation nor could the order of the first instance judge confer a jurisdiction on the Court of Appeal which the 1996 Act makes clear it does not have. Even where the Court of Appeal has purported to grant leave to appeal (a stronger case than that suggested here), the statutory limitation would prevent the court from hearing any appeal: see *Osler v Osler* [2024] EWCA Civ 516.
 - iv) It is important to note that s.68 (and therefore the limitation in s.68(4)) is a mandatory provision of the 1996 Act which has effect “notwithstanding any agreement to the contrary”: section 4(1) and schedule 1. The parties could not confer jurisdiction on the Court of Appeal to grant permission to appeal by agreement, nor can an estoppel have this effect.

Is the Judge's ruling caught by s.68(4)?

40. The essence of Mr Wassouf's principal argument is that Judge's decision was jurisdictional in nature, being a decision that had the effect that s.68 was not available to K1, rather than a decision on the merits of the s.68 application. He submitted that the issue of whether, on the facts as alleged by K1, s.68(2)(g) was capable of being engaged on its proper interpretation, was akin to the issue of the court's power to make a particular type of order in *Cetelem* or as to the existence of an exclusion agreement in *Sumukan*.
41. Notwithstanding Mr Wassouf's resolute submissions, I am satisfied that this argument is without merit, involving a confusion between the question of whether the court's statutory powers under the 1996 Act are engaged at all, and whether the pre-conditions for granting relief are met in a particular case. As I have stated, *Cetelem* was concerned with a statutory provision which had expressly limited the power of the court to making particular kinds of order in a case of urgency. *Sumukan* concerned a provision which the statute treated as excluding the court's jurisdiction under that section. In each of those cases, there was a readily discernible distinction between those matters which were found to be jurisdictional, and the "merits" of the decision to exercise such powers as the court had.
42. In the present case, by contrast, the relief available under s.68 requires an applicant both to establish the existence of one of the closed list of irregularities in s.68(2), and that any such irregularity has caused substantial injustice. In relation to both of those matters, the issue of whether they are made out in any particular case does not constitute a preliminary issue of whether the court's jurisdiction to address the merits of the s.68 application is engaged. The determination of those issues *is* the determination of the merits of the s.68 challenge. Adopting Waller LJ's language in *Sumukan*, in holding that s.68(2)(g) was not engaged by K1's challenge, the Judge was "overseeing the arbitration process" rather than determining whether or not the court's jurisdiction was excluded ([30]).
43. That is as true of an argument as to the scope of the relevant sub-paragraph of s.68(2) as it is of whether the factual predicates for the application of a sub-paragraph are made out, or whether the matter(s) complained of have caused substantial injustice. Mr Wassouf's argument that some parts of what will frequently be a composite exercise fall within s.68(4), and others do not, is wholly artificial and unworkable.
44. Focussing solely on s.68 for the moment, the consequences of K1's argument would be wholly to undermine the finality which s.68(4) is intended to bring, for the reasons the DAC set out and which Males LJ emphasised in *NIOC*. In short, it was suggested that any case in which the court found that, even if the facts were as contended for by applicant, s.68 did not offer relief fell outside s.68(4). That would be equally true of any argument by an unsuccessful s.68 respondent that, even if the facts as alleged by the applicant were true, s.68 was not engaged. This would include, for example, arguments as to whether the matters relied on for a s.68(2)(c) challenge involved "a procedure agreed by the parties"; whether on the facts alleged by the applicant, issues had been put to the tribunal for the purpose of s.68(2)(d); and whether a complaint about the clarity of the award (which will rarely if ever involve a factual dispute) gives rise to "uncertainty or ambiguity" for the purposes of s.68(2)f). That would be equally true

of the question of whether the irregularity relied upon had occasioned “substantial injustice”.

45. However, Mr Wassouf’s argument would have wider consequences than that. He accepted that, if he was right, then the issue of whether the subject of a proposed s.69 challenge constituted “a question of law” and whether it arose “out of the award” (both conditions of s.69 relief set out in s.69(1)) would fall outside s.69(6) so far as an appeal by either party is concerned. So, presumably, would the same issues in s.45. Similar issues would arise under many, if not most, of the rest of the 17 provisions which limit the right to seek permission to appeal.
46. Further, if Mr Wassouf is correct that these points go to the Judge’s jurisdiction, it would seem to follow that the point could be taken by way of an appeal even if not taken before or raised by the Judge.
47. There is no support in the language of s.68(4) or the associated provisions of the 1996 Act for this outcome, which would be wholly inimical to the policy of the 1996 Act. I therefore reject the argument that K1’s application is not caught by s.68(4).

Conclusion

48. For these reasons, the Court of Appeal does not have jurisdiction to grant permission to appeal in this case, and the application for permission is dismissed. In these circumstances, and having heard no argument on the point, I offer no views on the arguability of the proposed appeal.

Confidentiality

49. Finally K1 and B sought an order that the permission to appeal application and any resultant order remain confidential. The court was referred to the applicable principles in *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Company* [2004] EWCA Civ 314, [11]-[43].
50. In this case, both Commercial Court judges were satisfied that it was appropriate to protect the confidential nature of the arbitral proceedings by holding the proceedings in private and anonymising the judgments. This court having no jurisdiction to grant permission to appeal, it would not in my view be appropriate to allow the fact of this application to provide a basis for revisiting the Commercial Court’s orders on confidentiality. Any public interest in the resolution of the issue raised on the application is appropriately reflected in the publication of an anonymised judgment. For that reason, I would make the order for confidentiality sought.

Lord Justice Phillips

51. I agree.