In the Supreme Court

Suit No. M. 60 of 1974

In the Matter of an Arbitration

Between Raymond International (Jamaica) Ltd.
Raymond Concrete Pile Co. of the Americas and
Construction Emkay S.A. - Claimants

And The Government of Jamaica - Respondent

Ramon Alberga Q.C. & David Gardam Q.C. for Claimants

Carl Rattray Q.C., Shirley Miller Q.C. and Shirley Playfair for Respondent.

1975 - May 13, 14, 15, 16, 19, 20, 21, 22, 26, 27, 28, 29, 30, July 21, 22, 23, 24, 25, 28, 29, 30, 31 Sept. 22, 23, 24, 25, 26, 29. October 9.

Smith, C.J. :

On November 19, 1963, Raymond International (Jamaica) Ltd., a company registered in Jamaica, Raymond Concrete Pile Co. of the Americas and Construction Emkay S.A., both registered in the United States of America (hereinafter referred to as the Claimants) contracted jointly by deed with the Government of Jamaica (the Respondent) for the construction of drainage channels in the parish of Saint Andrew. These drainage channels were to form part of the Sandy Gully Drainage Scheme being carried out by the Government under the Flood Water Control Law, 1958, to provide proper drainage for flood and other water from areas of the parish of Saint Andrew into the Kingston harbour.

The main works to be executed under the contract were: the construction of the Constant Spring, Forest Hills and Sandy gully channels, the diversion of the Duhaney river into a new channel, the construction of two jetties extending into the harbour, of two railway bridges across the Sandy gully and diverted Duhaney river channels, of road bridges across the

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Sandy gully channel at the Spanish Town Road and the Constant Spring gully channel at the Washington Boulevard and the construction of maintenance roads alongside the channels. For 5,900 ft. from its start at the shore line the channel of the Sandy gully was to be an earth channel between levees constructed of earth and "rip rap". The railway bridge, at Riverton, was to be built across this section of the channel and "rip rap" were to be placed under, and on either side of, the bridge as protection against scour. The levees were to be of three designs - types A, B and C. The rest of this channel above 5,900 ft. and the Constant Spring and Forest Hills gully channels were to be of concrete between concrete rataining walls.

Clause 108(A) of the contract provided for the settlement of disputes. Any dispute or difference between the parties "arising out of or in any way relating to or connected with the Contract" was to be referred to the Consulting Engineers for decision. The clause provided that in dealing with any such dispute or difference the Consulting Engineers "shall not act as arbitrators but as engineers" and their decision was to be final unless the decision was disputed and notice of intention to appeal was given under the provisions of cl. 108(B). The Consulting Engineers were Messrs. Coode and Partners of No. 2, Victoria Street, London, and they were appointed by the Respondent. Disputes and differences which were the subject of appeal under cl. 108 were to be referred to arbitration under cl. 109.

Due mainly to changes and variations in the design of the works ordered by the engineers, acting on behalf of the Respondent, and to changed conditions affecting the works, questions, disputes and differences arose between the parties

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and were referred to the Consulting Engineers for decision under cl. 108. The Claimants disputed a number of the decisions of the Consulting Engineers and exercised their right of appeal under cl. 108(B). In due course the disputes and differences, the subject of appeal, were referred to arbitration. The parties failed to agree an arbitrator hence, as provided in cl. 109, the President of the Institution of Civil Engineers, England, was asked to appoint an arbitrator. Sir Duncan Anderson, K.B.E., was duly appointed and undertook the reference. Sir Duncan, having given directions for the exchange of pleadings between the Claimants and the Respondent, for the delivery of lists of documents and their inspection and for other preliminary matters, on March 26, 1973, commenced the hearing of the arbitration proceedings, which lasted for 162 days. The parties asked the arbitrator to make his award in the form of a Special Case and agreed that he should include a final award, being a global figure, which should have effect if the Special Case was not set down for hearing in due time.

The arbitrator made and published his award in the form requested, on November 20, 1974. He awarded the sum of £895,000 to be paid by the Respondent to the Claimants in respect of all matters raised in the arbitration in the event that neither party set down the Special Case for hearing within six weeks from the date when the same shall have been taken up. The award is now before me for consideration, firstly, because the Respondent, on December 24, 1974, set down the Special Case for hearing. Secondly, because the Claimants, by motion dated February 25, 1975, applied to set the award aside in part and/or to have it remitted in part on the several grounds set out in the motion.

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Though I heard the application on the motion before the arguments on the Special Case, I shall endeavour to answer the questions of law stated in the Case for the opinion of the Court before dealing with the application to set aside and/or remit the award.

- The Special Case -

There are twelve questions stated but I am not now required to answer five of them. The first three questions are concerned with the giving of notice of claims for additional payments under cl. 96 of the contract. In view of certain findings of fact made by the arbitrator in appendix A annexed to his award, the Respondent conceded that question 3 must be answered in favour of the Claimants. Because of this concession, the answers to the first two questions became academic. Question 5 is concerned with a claim under cl. 90(A) in respect of increase in the cost of reinforcing steel. The Respondent conceded that this question must also be answered in favour of the Claimants. Question 9 asked whether upon the basis of facts found by the arbitrator and upon a proper construction of the contract the Claimants are entitled to recover a sum in respect of profit in those claims in which a profit element forms a part of the claim. It was conceded that the answer to this question should be in the affirmative. The outstanding questions are, therefore, Nos. 4, 6, 7, 8, 10, 11 and 12 and I shall now deal with them seriatim.

Question 4:

This question is stated in the following terms :

" 4(a): Whether upon a proper construction of the Contract and in particular Clauses 84D, 85A, 101, 107, 108 and 109 thereof I have the power in respect of each and every claim referred to me for my Award to award to the Claimants such sum, if any, as I assess and judge to be right; or

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(b) Whether upon a proper construction of the Contract and Cls. 84D, 85A, 101, 107, 108 and 109 thereof in particular and upon the basis of the facts found by me and set out in Appendix B annexed hereto, and subject to question 4(c) the assessment decision certificate determination judgment or opinion of the Consulting Engineer or the Resident Engineer is final and conclusive in respect of the following matters :

(1) as to whether and how far the Schedule Rates can be made to apply to the work done upon the upper part of the A levee ;

(2) as to whether or not a daywork basis is to be used to evaluate work done by the Claimants in placing the rip rap blanket under and on either side of the Riverton Railroad Bridge ;

(3)(i) as to the length of any extension of time for completion of the works; and

(ii) as to whether or not such extension should be deemed to be in full compensation and satisfaction for and in respect of actual or probable loss or injury sustained or sustainable by the contractors in respect of any matter or thing in connection with which such extension shall have been granted.

(c) If the answer to either part of question 4(b)(3) is in the affirmative whether such finality extends to any decision (including any assessment of compensation) made by the Consulting Engineers consequent upon such extension".

Clause 108(A) of the contract makes provision for the settlement of disputes by reference to the Consulting Engineers, whose decision thereon shall be final and binding unless the right of appeal for which provision is made in cl. 108(B) is exercised. Clause 109 provides that all questions, disputes or differences in respect of which due notice of appeal has been given under cl. 108 shall be referred to arbitration. It is necessary to set out the provisions of cl. 108 in full :

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"108. (A) Settlement of disputes. - If at any time prior to the granting of the Final Certificate any question, dispute or difference shall arise between the Government or the Resident Engineer or any of their deputies on the one hand, and the Contractors or any person or persons, company or corporation claiming through and under the Contractors or any of their agents on the other hand, as to the construction, intent, meaning or effect of the Contract Documents or any of them or as to any further drawings to be prepared or as to the application of the Scehdule Rates to the monthly measurements or as to the materials or the quality thereof or as to the workmanship employed, or as to any other matter or thing, whether of the nature aforesaid or otherwise howsoever arising out of or in any way relating to or connected with the Contract then every such question, dispute or difference shall (except where otherwise herein expressly provided) be referred to the Consulting Engineer for decision, and in order to ensure the Works being proceeded with continuously the Contractors shall (in the case of any such question, dispute or difference) act upon and give effect to the orders of the Resident Engineer pending the decision of the Consulting Engineers being given and in any case act upon and give effect forthwith to any and every decision of the Consulting Engineers. In dealing with such disputes or differences the Consulting Engineers shall not act as arbitrators but as engineers as described in cl. 104 hereof, and their decisions shall be final and binding unless due notice of intention to appeal shall be given under sub-clause (B) of this clause.

(B) Appeals from decisions of Consulting Engineers - Should the Government or the Contractors dispute any decision of the Consulting Engineers (not being a decision made final by the Contract) given under the provisions of sub-clause (A) of this clause and they desire to appeal therefrom, they shall as a condition previous to any appeal give notice in writing to the Consulting Engineers of their intention to appeal from such decision within one month after the Consulting Engineers have made known their decision to the parties concerned. Any such appeal shall not be proceeded with until after the issue of the Completion Certificate unless the Consulting Engineers shall so agree. In the meantime the Works shall be carried on continuously and in accordance with the decision of the Consulting Engineers. Failing such written notice of appeal being given within one month as above required, any such question, dispute or difference shall be deemed to be determined by the decision of the Consulting Engineers and cannot thereafter be appealed against and such failure shall be an absolute bar to any further or other claim, action or proceeding by the parties concerned in respect of such question, dispute or difference.

Clauses 84(D), 85(A) and 101 of the contract relate to the matters referred to in paras. (1), (2) and (3), respectively, of question 4(b) and the general contention of the Respondent on this question is that by virtue of the provisions of cl. 107 of the contract the decision, opinion, determination and judgment of the

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Consulting Engineers in respect of the matters referred to in the paras. are final and conclusive and binding on the Claimants, that they are not matters to which the provisions of cl. 108 apply; and are, therefore, not the subject of appeal and of arbitration under cl. 109. Clause 107 provides as follows :

> " 107. Decisions to be final. - Whenever in the Contract provision is made for any question, arrangement, amount, matter or things being settled, decided, certified or determined by the Consulting Engineers or by the Engineer or by the Resident Engineer or resting upon or being governed or controlled by or submitted to the judgment or opinion of them, him, or any of them, their or his assessment, decision, certificate, determination, judgment or opinion shall be final and conclusive for all purposes and shall be binding on the Government and the Contractors notwithstanding anything in the Contract; provided always that the Consulting Engineers, the Engineer, or the Resident Engineer respectively shall have the power to cancel any decision, certificate or order made or issued by them or him or their or his predecessors in office and to make or issue any other decision, certificate or order in place thereof."

The Respondent's contention was resisted on behalf of the Claimants on three main grounds. Firstly, it was submitted that cl. 107 is contradictory of, and inconsistent with, cls. 108 and 109 and repugnant to clear intentions in the contract and, on these grounds, should be rejected. The most glaring inconsistency, it was said, is that by cl. 107 the decisions etc. of the Resident Engineer are to be conclusive and binding yet in cl. 108(A) disputes and differences between the Resident Engineer and the Contractors must be referred to the Consulting Engineers for decision. Another is that decisions of the Consulting Engineers are to be final, conclusive and binding under cl. 107 but in cl. 108(A) his decision is final and binding only if notice of appeal is not given.

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Then it was said that there are two clear intentions in the contract with which cl. 107 is repugnant. The first is that the Consulting Engineers are intended to be superior to the Resident Engineer, as is evident from the method of the latter's appointment (see cl. 1) and from the provisions of cl. 91(E), yet cl. 107 purports to make decisions of the Resident Engineer final, conclusive and binding and not subject to appeal to the Consulting Engineers thus, it was contended, elevating the Resident Engineer to the Consulting Engineer's position. Further, it was submitted, the clear intention of the contract is that disputes shall be settled by arbitration and a distinction is drawn in cls. 104 and 108(A) between the function of the Engineer and an arbitrator, but cl. 107, insofar as it purports to make the decisions of the Engineer final and binding, elevates those decisions to that of an arbitrator, contrary to the express intention of cls. 104 and 109.

As the second main ground on which the Respondent's contention was resisted, it was submitted that the two sets of words in parenthesis in cls. 108(A) and 108(B) do nothing to remove the inconsistency between the clauses. It was argued that the words "except where otherwise herein expressly provided", which are in parenthesis in cl. 108(A), are utterly meaningless words insofar as the contract is concerned as in their context they refer to a provision or provisions elsewhere in the contract where it is expressly provided that questions, disputes or differences shall not be referred to the Consulting Engineers for decision and there is no such provision. As regards the words in parenthesis in cl. 108(B), "not being a decision made final by the Contract", it was pointed out that

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this clause refers in terms only to decisions under cl. 108(A) and cannot, therefore, include decisions made final by cl. 107. It was said that if the words in question can properly be said to refer to other clauses, including cl. 107, the result would be that notice of appeal could never be given as cl. 107 would make the decisions of the Consulting Engineers under cl. 108(A) final and not subject to appeal under cl.108(B).

The words in parenthesis were relied on as supporting the Respondent's contention that decisions etc. made final and conclusive under cl. 107 are not the subject of appeal under cl. 108. It is, however, difficult to see how either set of words can be construed to include a reference to cl. 107. If that was the purpose of including them in cls. 108(A) and 108(B), it does not appear that the purpose was achieved; and, if the clauses are inconsistent as contended, I am bound to agree that the two sets of words do nothing to remove the inconsistency. However, with all due respect, I do not think that there is any merit in the contention that the clauses are inconsistent or repugnant.

It is quite clear that the Respondent proposed, and the Claimants agreed and accepted, a contract in which the supervising engineers were to have absolute authority in certain specified matters connected with the works, while in other matters, if there was a dispute or difference, this could lead to arbitration. There could have been no doubt in the minds of those acting for the Claimants in negotiating the contract that this was the kind of contract to which they were agreeing as there are several clauses which expressly make the decisions of both the Consulting Engineers and the Resident Engineer final

and conclusive or final and binding (see e.g. cls. 6(B) and 91(A) in respect of the Resident Engineer and cls. 35(B), 83(D) and 89(B) in respect of the Consulting Engineers). Besides these express clauses, there are others in which matters are referred or submitted to the Consulting Engineers or the Resident Engineer for their opinion, judgment, decision, etc. It is to these others that cl. 107 is said to apply. Matters in respect of which the decisions, judgment, opinion, etc. of the supervising engineers are final and conclusive, either by separate express provisions to that effect or by virtue of cl. 107, are, of course, not legally open to question; so no dispute or difference can properly arise under the contract in respect of them. This alone would be sufficient to exclude these matters from the provisions of cl. 108. But cl. 108(A) impliedly excludes them by specifying the matters in respect of which questions, disputes or differences may arise and the level at which they may arise. Though it includes a wide, general provision, this can only apply to matters in respect of which disputes or differences can properly arise. The juxtaposition of the provisions in cls. 107 and 108 emphasizes the distinction which the contract makes between the respective provisions; and it is not without significance that the decisions etc. which are not the subject of appeal are placed in the earlier of the two clauses. This contrast between provisions in respect of matters which are binding and others which may be the subject of appeal can be seen also in cl. 6(A), which, in the first part of the clause, makes the decision of the Consulting Engineers on a reference to them final and conclusive and, in the second part, makes another reference to them subject to the provisions of cl. 108. The contrast

is also evident in cl. 110. It is plain, in my opinion, that cl. 107 on the one hand and cls. 108 and 109 on the other deal with different matters entirely. I hold that there is no contradiction or inconsistency between them and that cl. 107 is not repugnant to clear intentions of the contract as contended. Nor is there any reason to read cl. 107 as subject to cls. 108 and 109, which is the third main ground on which the Respondent's general contention on ques. 4 was resisted.

I must now deal with the particular questions asked in sub-paras. (1), (2) and (3) of para. (b) of ques. 4.

Schedule Rates - Ques. 4(B)(1)

The question asked in sub-para. (1) is whether the decision of the Consulting Engineers as to whether and how far the schedule rates can be made to apply to the work done upon the upper part of the A levee is final and conclusive and is binding on the Claimants.

The facts out of which this question arises are stated and found by the arbitrator in section B of Appendix B annexed to his award. They are as follows : The Engineer ordered the Claimants to carry out extra or varied work in connection with the revised design of the upper part of the A levee. The Consulting Engineers submitted a supplementary bill of quantities for the amended work to the Claimants, who returned it with the prices they proposed entered therein. The Consulting Engineers rejected the proposed rates and issued a variation order fixing the rates as they were empowered to do under cl. 84.

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The Claimants notified the Consulting Engineers that they proposed to appeal against the rates fixed by them. It was agreed that detailed accounts and records of costs incurred in carrying out the extra work should be kept on daywork sheets. Later, the Claimants made a formal claim at rates allegedly computed from the records kept and requested the Consulting Engineers to reconsider the rates in their variation order. This the Consulting Engineers did and they increased a number of the rates in a decision on March 18, 1968. The Claimants did not accept the amended rates and gave notice of appeal.

Clause 89(A) of the contract provides that "the price to be paid by the (Respondent) to the (Claimants) for the whole of the work to be done and for the performance of all the obligations undertaken by the Claimants under the contract documents shall be ascertained by the measurement of the work in the Bill of Quantities and by the application to the quantities and weights so obtained of the several Schedule Rates ..... appropriate thereto. The sums so ascertained shall ..... constitute the sole and inclusive remuneration of the (Claimants) under the Contract and no further or other payment whatsoever shall be or become due or payable to the (Claimants) under the Contract." Clause 89(F) provides that no alteration will be allowed in the schedule rates by reason of the works being altered or extended etc.; that they are full inclusive rates "which have been fixed by the (Claimants) and agreed to by the (Respondent) and cannot be altered". The schedule rates here referred to are the rates specified in the Bill of Quantities annexed to the contract (see cl. 1).

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Clause 84 deals with "alterations and extras". Clause 84(A) authorises the Engineer by variation order to modify or alter the works described in the contract or to order additional works and cls. 84(C) and (D) make provisions for payment for such altered and/or extra work. These clauses provide as follows :

> " (C) Payment for alterations and extras. - All altered or additional works ordered shall be deemed to be part of the Works for all purposes hereof and shall be paid for at the Schedule Rates where applicable; where the same do not apply payment will be made at other rates as may be arranged in accordance with sub-clause (D) of this clause.
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> (D) Arrangement of special rates - Any extra work or permanent work ordered which is not covered by the Schedule Rates (other than daywork rates) and to which the same cannot be made to apply (as to whether or how far the Schedule Rates can be applied shall be decided by the Engineer) may be made the subject of special arrangements or rates to be arranged between the Engineer and the Contractors before the work in question is put in hand or a special lump sum may be agreed before any special piece of work is commenced. Provided that in no circumstances shall any such extra work or permanent work be postponed or delayed on account of any dispute or difference as to the price to be paid for any extra work or permanent work ordered, but should no arrangement be come to such work shall be carried out at such rates as the Consulting Engineers shall decide subject to the provisions of Clause 108 hereof relating to the settlement of disputes. "

"Engineer" is defined in cl. 1 to "mean and include the Consulting Engineers and/or the Resident Engineer". The Claimants contend that the dispute with the Consulting Engineers over the rates payable for the extra or varied work on the A levee is properly the subject of appeal and arbitration under cls. 108 and 109. The Respondent resists the Claimants' claim and contention under this head on the ground that insofar as the Consulting Engineers decided that the schedule rates applied to the varied or extra work, that decision, made under cl. 84(D), is rendered final, conclusive and binding by the provisions of cl. 107.

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In addition to the general or main argument on inconsistences and contradictions, with which I have dealt already, the Claimants pointed to what was said to be a marked inconsistency between the provisions of cls. 84(D) and 107 on the one hand and cl. 108(A) on the other. It was argued that both cl. 84(D) and cl. 108(A) deal with the same matter, viz., the applicability of schedule rates to monthly measurements yet in one case the decision of the Engineer is final and conclusive while in the other it is subject to arbitration. What was said was that if schedule rates cannot be applied to monthly measurements they cannot be applied to any measurements; that the whole basis of valuation is that you measure and value monthly (vide cls. 91(A) and 91(H)); so both cls. 84(D) and 108(A) are dealing with the same matter. In my view, there is no substance in this argument. Quite clearly, the two clauses are not dealing with the same matter. Clauses 84(C) and 84(D), are concerned with the rates to be paid for altered or extra work, which 84(D) requires to be arranged before the work is put in hand. When the rates to be paid are being considered, the Engineer may decide that the schedule rates annexed to the contract are applicable to the work to be done. This is the decision with which cl. 84(D) deals. Clause 91(A) provides that all completed permanent work as executed, including any extra work, shall be measured monthly by the Resident Engineer and cl. 89(A) provides for the price to be paid for the measured work to be ascertained by the application of the schedule rates to the quantities and weights so obtained by measurement. It is this exercise which is referred to in cl. 108(A) as "the application of Schedule Rates to the monthly measurements", which is clearly quite different from the matter with which cl. 84(D) deals. In the case of extra

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work, the rates fixed under the provisions of cl. 84(D) would be applied to the measured work when completed.

It was submitted further, on behalf of the Claimants, that cl. 107 is also inconsistent with cl. 84(D) in that the former, as the Respondent contends, makes the Engineer's decision as to the applicability of the schedule rates final and conclusive yet the proviso to cl. 84(D) makes the Consulting Engineers' decision on the rates for extra work subject to cl. 108. Here again, this submission is without substance. The two matters are not the same. What the proviso is dealing with is the special rates to be arranged under 84(D). The entire clause, except for the words in parenthesis (which would make for tidier drafting if they had been placed in cl. 84(C)), deals solely with those rates, which are arranged in the absence of the applicability of schedule rates. All that the proviso is saying is that in case of dispute in the arrangement or agreement of special rates the works are not to be held up but, rather, the Consulting Engineers shall decide the rates and their decision is to be subject to appeal. This decision has nothing to do with the applicability of schedule rates. I hold that the decision of the Consulting Engineers, given under cl. 84(D), as to whether or how far the schedule rates can be made to apply to the work done upon the upper part of the A levee is final and conclusive and binding on the parties by virtue of the provisions of cl. 107 of the contract.

Before formally stating my answer to the question which I have just considered, I must deal with a submission, on behalf of the Claimants, that the arbitrator erred in asking the question and that I should consider remitting the matter to him for clarification on my own motion. It was pointed out that it followed from the artibrator's award that an amount was to be deducted if

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ques. 4(b)(1) is answered in favour of the Respondent ; that he has found that the Consulting Engineers decided that schedule rates were applicable at least to some extent and had valued the work to the upper part of the A levee at schedule rates. But, it was said, when the Consulting Engineers' decision on this question (in the correspondence referred to in Appendix B annexed to the award) is looked at and the rates which they applied are compared with the rates for the A levee in the schedule rates (at p. 127 of the contract documents) one does not find the rates applied by the Consulting Engineers in the schedule rates. So, it was said, the Consulting Engineers did not apply the schedule rates, as the arbitrator found, and the question stated in 4(b)(1) does not, therefore, arise on the findings of fact. With respect, I think this submission is misconceived. It is clear from the comments made by the Consulting Engineers in their letter of June 17, 1965, on the rates fixed by them in variation order CE 15 in respect of the A levees, that they applied the schedule rates. The rate for Item B 7 in the schedule rates (p. 127 of the contract documents) was expressly applied to Item 3 for the East levee. The rates for Items B3 and B11 were applied to Items 2 and 3 for the West levee. When, on the application of the Claimants, the Consulting Engineers revised the rates in variation order CE 15 on March 18, 1968, the rate previously allowed for Item 3, East levee, was increased, resulting in a different rate to the rate for Item B7. Similarly, Item 3 for the West levee was increased over the rate for Item B 11; but the rate for Item 2 was maintained, a rate identical to the rate for Item B3. The Consulting Engineers gave detailed reasons for increasing or maintaining the rates fixed in variation order CE 15. At para. 5 of their decision of March 18,

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1968, they said: "In fixing the Schedule Rates quoted in Variation Order No. CE 15 the Consulting Engineers took into account the Schedule Rates quoted by the Contractors in their tender for similar items of work, which is completely in accordance with the provisions of Clause 84(C) of the Contract, but at the same time made allowances where necessary for any changed conditions or operations" (see p. 7223 of the correspondence to Appendix B). It was the revised rates in the decision of March 18, 1968 (at p. 7234 and p. 7235 of the correspondence) which were compared before me with the schedule rates in the contract documents to show that the Consulting Engineers did not apply the schedule rates. But there was one rate in the decision of March 18 (on p. 7234) which was the same as a rate in the schedule rates (on p. 127 of the contract documents), namely, the rate for Item 2, West levee to which, as stated above, the Consulting Engineers had applied the rate for Item B3. This was obviously overlooked when the submission was being made.

In his statement of facts and findings in section B of Appendix B annexed to his award, the arbitrator stated: "Although the rates so fixed (i.e. in variation order CE 15) were based on Schedule Rates many were in excess of them for a variety of reasons". In my view, there are sufficient facts in the correspondence, which are expressly incorporated in the award, to support the finding, implicit in the award made in respect of this question, that the Consulting Engineers had applied the schedule rates in valuing the extra work on the A levee. In any event, as was submitted on behalf of the Respondent, whether the Consulting Engineers applied the schedule rates or not is a question of fact and the arbitrator's clear finding that they did is final (see Parker, L.J's statement in Universal Cargo Carriers Corporation v. Citati (1957)

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1 W.L.R. 979,983 cited in S.J. & M.M. Price Ltd. v. Milner, (1966) 1 W.L.R. 1235, 1238). In my judgment, the answer to ques. 4(b)(1) is in the affirmative.

Daywork basis - Ques. 4(b)(2):

This question is whether the decision or opinion of the Consulting Engineers as to whether or not a daywork basis is to be used to evaluate work done by the Claimants in placing the rip rap blanket under and on either side of the Riverton railroad bridge is final and conclusive.

The facts relevant to this question, as stated and found by the arbitrator in section A of Appendix B annexed to his award, are as follows : The Engineer varied the works by ordering the Claimants to place a blanket of rip rap under and around the supports of the new Riverton bridge, before it was opened to traffic and out of sequence with the Claimants' planned method of operation. The Claimants carried out the work at times and in the manner instructed but, on the basis that their work had been disorganised and their programme upset, gave notice that they would claim payment of the additional cost of the work and for resulting delay. On March 24, 1966 the Claimants presented an account claiming extra payment of £41,022 for the work. This figure was subsequently altered to £48,638 because of an error in the earlier claim. The Consulting Engineers gave their decision on March 18, 1968, that the Claimants were entitled to an extra payment of £2,879, "on the basis of adjusted scheduled rates". (The words "adjusted scheduled rates" are the arbitrator's as they do not appear in the decision of March 18, 1968). The Claimants indicated that they were unable to accept the decision and gave notice of appeal in accordance with cl. 108(B). The arbitrator found "that the scheduled rates are not applicable to the work carried out, and that payment can only

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properly be made on the basis of recorded costs".

On these facts, the issue raised could be resolved by the question being asked and answered in respect of the application of the schedule rates by the Consulting Engineers, as was done in question 4(b)(1). In which event, the answer would be favourable to the Respondent. However, the correspondence to which the arbitrator referred in his statement and findings of facts, and which are expressly incorporated in his award, show that the claim made by the Claimants was based on daywork rates and that their claim on this basis was rejected, except for the work done in the placing of rip rap under the bridge. It is apparently because of these facts that the question is framed as it is.

Clause 85(A) is the clause relevant to this question. It provides as follows :

> " 85(A) Work executed by day labour - Any altered or additional work which in the opinion of the Engineer is of such a complicated, miscellaneous or disjointed nature that it cannot be valued by measurement shall, if so ordered by the Engineer, be executed by day labour under the daywork rates and conditions given in the Bill of Quantities. Before any work, to be paid for at daywork rates, is put in hand an order in writing must be obtained by the Contractors from the Engineer. "

This clause may be regarded as supplementary to cls. 84(C) and (D), which provide for payment for altered or additional work which can be valued by measurement.

The effect of the facts stated in respect of this question is that the Consulting Engineers were of opinion that, apart from that under the bridge, the work done as a result of the variation of the works was not "of such a complicated, miscellaneous or disjointed nature" that it could not be valued by measurement. The Respondent contends that the Consulting Engineers' opinion is final and conclusive by virtue of the provisions of cl. 107.

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The Claimants seek to resist this contention on the same grounds as the question in respect of schedule rates dealt with above. I hold that the Respondent's contention is right. That the Consulting Engineers' opinion given under cl. 85(A) is final is supported by the subsequent provision in the clause for an order in writing to be obtained from the Engineer before any altered or additional work to be paid for at daywork rates is put in hand. In my judgment, the answer to question 4(b)(2) is also in the affirmative.

Extension of time - Ques. 4(b)(3):

There are two parts to this question. Firstly, whether the determination of the Consulting Engineers as to the length of any extension of time for completion of the works is final and conclusive. Secondly, whether the Consulting Engineers' judgment as to whether or not such extension of time should be deemed to be in full compensation and satisfaction for and in respect of actual or probable loss or injury sustained or sustainable by the Claimants is final and conclusive.

Section C of Appendix B sets out the facts found by the arbitrator. He found that, on the application of the Claimants, the Consulting Engineers granted extensions of time in respect of hurricane Flora, labour disputes and other matters. No compensation was awarded in respect of the extensions for hurricane Flora and the labour disputes. These applications were made and granted under the provisions of cl. 101, which are as follows :

> " 101. Extension of time - If by reason of additions, enlargements or alterations required by the Government to be made to or in the Works or of disputes not properly attributable to the improper conduct or to acts of commission or omissions of the Contractors or if by reason of an Act of God, ...
> .....
> or if from any other cause which in the opinion of the Consulting Engineers could not reasonably have been foreseen by the Contractors, the Contractors shall, in the opinion of the Consulting Engineers, have been unduly delayed in the

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completion of the Works, then in each and every such case it shall be lawful for the Consulting Engineers to determine upon the written request of the Contractors signed by a principal whether the date as provided by Clause 97 hereof limited for completing the Works shall be extended for any and if any for what period but no such extension of time shall be allowed to the Contractors except in writing under the hand of the Consulting Engineers. No such extension of time shall in any way affect the adequacy of the Schedule Rates or derogate in any way from the rights of the Government under any of the provisions of the Contract, and, unless the Contractors shall show just and reasonable cause to the contrary, as to which the Consulting Engineers shall be the sole judge, every such extension as aforesaid shall be deemed to be in full compensation and satisfaction for and in respect of actual or probable loss or injury sustained or sustainable by the Contractors in respect of any matter or thing in connection with which such extension as last aforesaid shall have been granted and every such extension shall exonerate the Contractors from any claims or demands on the part of the Government for or in respect of any delay during the period of such extension but not further or otherwise nor for any delay continued beyond such period. "

As to the first part of the question, it was submitted on behalf of the Respondent that the combined effect of cls. 101 and 107 makes the determination of the Consulting Engineers final and conclusive. In answer, as an extension of the general submission on inconsistency, it was submitted for the Claimants that cls. 101 and 107 combined are inconsistent with cl. 108(A) in that the Consulting Engineers' opinion as to foreseeability of delay etc. and his determination as to extension of time are said to be final under cl. 107 but under cl. 108(A) matters relating to or connected with the contract which are necessary to a decision on extension of time are only binding in a qualified sense. For reasons already given, I disagree with this submission. I hold that the determination by the Consulting Engineers under cl. 101 of the period for which the date limited for completing the works should be extended, on a grant by him of such extension, is rendered final and conclusive by the provisions of cl. 107. The answer to this part of the question is, therefore, in the affirmative.

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As to the second part of the question, the answer must, clearly, also be in the affirmative. In my opinion, it was not necessary for the Respondent to rely, as it has done, on cl. 107 to establish the finality of the Consulting Engineers' judgment. Clause 101 itself makes them sole judge in the matter. If I am wrong in this opinion then there can be no doubt that cl. 107 makes their judgment final and conclusive.

Assessment of Compensation - Ques. 4(c):

To repeat the question, as stated: "If the answer to either part of ques. 4(b)(3) is in the affirmative whether such finality extends to any decision (including any assessment of compensation) made by the Consulting Engineers consequent upon such extension". The issue here is confined to the question of the assessment of compensation resulting from an extension of time.

On behalf of the Respondent, it was submitted that the Consulting Engineers have the power not only to decide finally that an extension of time granted by them is full compensation, but implicit in cl. 101 is the power also to award the amount of compensation, where they decide that the extension of time is not full compensation and satisfaction. It was contended that the amount awarded would also be final by virtue of cl. 107. The argument on this submission ran thus: One starts with the presumption that an extension of time is full compensation and satisfaction. In order to displace the deeming provision of cl. 101, it is necessary for the Claimants to show the extent to which the extension of time does not constitute compensation and satisfaction for loss or injury. The Consulting Engineers cannot know, it was said, whether the loss or injury is compensated for and satisfied unless and until they know what the extent of that loss is or is estimated

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to be. So that the "just and reasonable cause" which the Claimants have to establish to displace the deeming provisions, the argument continued, must necessarily relate to the fact that they have sustained loss or injury and the nature and extent of it. This, it was said, would enable the Consulting Engineers to determine whether or not the Claimants are fully compensated by the mere extension of time and, if not, to quantify the extent to which they are not.

In my opinion, the relevant passage in cl. 101 is not capable of the construction which the Respondent seeks to put upon it in the submission above. I agree with the submission, on behalf of the Claimants that the clause constitutes the Consulting Engineers sole judge of one matter only i.e. whether the Claimants have or have not shown that the extension of time should not be deemed to be in full compensation and satisfaction. This is made clear if the relevant words are transposed thus: "every such extension as aforesaid shall be deemed to be in full compensation and satisfaction for and in respect of actual or probable loss or injury sustained ..... by the Contractors ....., unless the Contractors shall show just and reasonable cause to the contrary, as to which the Consulting Engineers shall be the sole judge..... ". Read in this way, it is plain that the only matter of which the Consulting Engineers are sole judge is whether or not just and reasonable cause to the contrary has been shown by the Contractors. In my opinion, there are no words from which any power to assess compensation payable to the Claimants can be implied. As I understand the Respondent's argument, the implication arises from the fact, as is contended, that there is a burden on the Claimants to quantify the loss or injury so that the Consulting Engineers may be able to judge whether or not the extension of time granted is itself sufficient

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compensation. Arising from this, it was said that it would lead to absurd results if the Consulting Engineers were not the final judges of the amount of compensation. It would be absurd, it was said, because if they say the period of extension compensates fully the Claimants would be bound by that decision but if they say it does not and assess the compensation the Claimants would then not be bound. I am afraid I do not see the absurdity, but, assuming the Respondent's contention as to this is right, this is no ground for reading into the clause words that are not there. As was submitted for the Claimants, if it was intended to give the Consulting Engineers final powers over the amount of compensation it would have been quite easy for the draftsman to say so in cl. 101. I hold that if the Consulting Engineers assumed a power under cl. 101 to decide the amount of compensation payable to the Claimants consequent on a grant by them of extension of time then that decision is not final. In my judgment, the answer to question 4(c) is in the negative.

Question 6 :

The question is :

> "Whether upon a proper construction of the contract and upon the basis of the facts found by me and set out in Appendix D annexed hereto, the Claimants are entitled to be reimbursed by the Respondent the sum of £12,142.10.10. pursuant to Clause 90C of the said Contract".

The facts found by the arbitrator, as set out in Appendix D, are that a dispute arose between the Claimants and the trade union (the B.I.T.U.) representing certain employees of the Claimants about the entitlement of those employees to premium pay for working in swampy conditions. The dispute led to a strike. The strike was settled upon terms that the dispute should be settled by an arbitrator to be appointed by the

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Minister of Labour and National Insurance, a Minister of Government. The Minister appointed Mr. Emile George, Q.C. to be arbitrator. Mr. George was asked to settle the terms of reference and on January 8, 1965, he made an award, which he sent to the Ministry of Labour and National Insurance. On or about January 15, 1965, the permanent secretary of the Ministry sent the award to the Claimants' resident manager. Mr. George awarded that various categories of workmen should be paid premium rates of pay, retrospective to April 27, 1965 (sic). The Claimants complied with the terms of the award and in consequence incurred an increased cost amounting to £12,142.10.10: The Claimants claim a re-imbursement of this sum by the Respondent by virtue of the provisions of cl. 90(C) of the contract.

Clause 90(C), on which the Claimants rely, provides as follows :

> " (C) Variations in cost of labour - The Contractors' remuneration shall be increased or decreased should there be any increase or decrease in the official rates of wages paid to labour of any kind employed at the Site by the Contractors in connection with the Works, due to any labour laws, orders or regulations, made from time to time by the Government, the municipality or any recognised association causing a variation in the rates of wages prevailing at the 1st day of February, 1963. Any such increase or decrease shall form an addition to or a deduction from the price ascertained in accordance with the provisions of the last preceding clause. The Contractors have submitted with their tender a schedule giving the rates of wages for skilled and unskilled labour on which their tender was based. Any such increase or decrease shall not apply to the Contractors' supervisory staff, expatriate foremen or expatriate gangers. The Contractors shall supply to the Engineer copies of labour laws, orders and regulations when any modification of the rates of wages occur. The Contractors shall keep and render weekly to the Engineer such accounts and other documents and records as are necessary to show any increase in cost incurred or reduction obtainable under this sub-clause, and, if required by the Engineer, shall furnish such further documents or records as he may deem necessary. The fact that the Contractors elect to pay their labour rates of wages in excess of the approved rates of wages in Kingston will not be a justification for claiming an increase in the cost of labour."

The Claimants put forward three alternative contentions on this question. Firstly, that the increased rates of

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wages paid as a result of Mr. George's award were increases in the official rates of wages due to a labour law made by the Government. Secondly, that the increases were due to an order of the Government. Thirdly, that the increases were due to an order of a recognised association. It was conceded that the swamp workers had been in receipt of "official rates of wages" before Mr. George's award.

As regards the first contention, it was submitted that the Trade Disputes (Arbitration and Enquiry) Law, Cap. 386 (1953 edition), under which the Minister acted in appointing the arbitrator, is a labour law made by the Government and that the award made was a consequence of the operation of that Law. Reference was made to the Memorandum of Agreement and Terms of Reference to the arbitrator (which was expressly incorporated in the award now under consideration). It was pointed out that the terms of reference were not agreed between the parties but were settled by the arbitrator himself and that the parties were, in effect, forced to consent to the arbitrator who the Minister had appointed, using his statutory power under s. 3 of the Law, for had they not consented, a board of enquiry could have been appointed under a later section. Accordingly, it was submitted, because the arbitrator was appointed in that way, the increased wages were due to the operation of the labour law; Mr. George would not have been appointed and the award would not have been made but for the law. This is an ingenious argument but, in my view, it is not sound. The increase in the rates of wages was not due to any labour laws made by the Government. It was due to Mr. George's award. The memorandum of agreement, to which reference was made during the argument, shows on its face that the parties "voluntarily agreed" to refer the dispute between them to a sole arbitrator, that they undertook to "abide by and follow the decisions arrived at by such

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arbitrator" and agreed that "the award of the arbitrator shall be final and binding on the parties to the dispute". The findings of fact in Appendix D show that it was a term of the settlement of the strike that the arbitrator should be appointed by the Minister. The memorandum further shows, and it has been so found, that the terms of reference were settled by the arbitrator (Mr. George) because the parties expressly agreed that he should do so. There is no finding by the arbitrator in Appendix D that the Claimants were coerced into signing the memorandum of agreement. The trend of the argument for the Claimants suggested that the Minister imposed his will upon the parties to the dispute and so caused the Claimants to pay increased wages. The facts just stated show the contrary and that the exercise of the Minister's statutory powers was to accommodate the disputants. In my opinion, in order to succeed on this first contention the Claimants would have to show that a labour law was enacted by the Government containing provisions which were the direct cause of the increase in the official rates of wages. In other words, that the statute itself, or regulations made under it, increased the official rates. The provision in cl. 90(C) that "the Contractors shall supply to the Engineer copies of labour laws, orders and regulations when any modification of the rates of wages occur" supports this view of the clause. The Claimants have not shown that the increases in rates were due to any such law so this contention fails.

The second contention was based on the following argument. Under the Trade Disputes (Arbitration and Enquiry) Law, the Minister, as representative of the Government, appoints the arbitrator, the arbitrator submits his award to the Minister, who causes it to be published in such manner as he thinks fit; in any ordinary sense of awards it is the person whose award it

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s who publishes it. It was submitted that when ss. 3 to 6 are read together the true view to take of them is that the Minister in form undertakes to settle the dispute and he appoints the tribunal to act on his behalf. It was said that it appears that Mr. George's award was the award of the Minister and, therefore, an order by him. In my opinion, the fact that the award was submitted to the Minister and he caused it to be published does not make it his award. The facts and document referred to above show beyond doubt that the award was Mr. George's and not the Minister's. When Mr. George was appointed by the Minister he was not appointed to act on his, the Minister's behalf. As the findings of fact show, the Minister made the appointment because under the terms of settlement of the strike he was required to do so. The provisions of the Law to which reference was made are merely designed to promote the settlement of trade disputes between private parties. The Minister has no power to act until the disputes are reported to him by the parties (see s. 3). The disputes remain private disputes and the awards are private awards, in the sense that they affect the parties only. They are not orders made by the Minister. In my view, it is clear beyond doubt that the increases in rates of wages awarded by Mr. George were not due to any order made by the Government. The second contention also fails.

In support of the third contention, it was argued that the Minister, the B.I.T.U., the Claimants and Mr. George all came together with the object of defining the terms upon which the trade disputes should be settled; this made them an "association", in the ordinary English meaning of that word; they all recognised the validity and existence of the association and this made them "a recognised association"; the award being published as a result of that association is an order of the association; so the increases in rates were due to an order of a recognised association under c.l 90(C). It is only necessary to say that this contention is entirely without merit.

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There was a fourth contention on this question. It was submitted for the Claimants that the spirit of cl. 90(C) is that the Claimants are obliged to pay certain rates of wages and if they become obliged to pay increases in wages the increased cost is to be added to their remuneration. That that is the intention and spirit of the clause is made clear, it was said, by the last sentence of the clause, which shows that an election to pay increased rates does not entitle them to claim but "compulsion to pay" does. It was said that, on the facts found, the Claimants were asked to pay more; they refused; there was a strike; the Minister intervened and the Claimants "were compelled" to agree to arbitration; even the terms of reference were disputed; the claim was resisted at the arbitration; the arbitration resulted in an award which the Claimants were obliged to honour. It was submitted that it is doing violence to the spirit and intention of the contract for the Government, "who brought this state of affairs about", to refuse to pay the increase. As already shown, much of what is stated here as facts found is contrary to the true facts. But, this apart, it cannot assist the Claimants to bring themselves within the spirit only of cl. 90(C) where the relevant words of the clause are clear and unambiguous. They must bring themselves within the letter of the clause. I hold that they have not done so and it is therefore plain, in my judgment, that the answer to question 6 must be in the negative.

Question 7:

This question is also concerned with the construction of cl. 90(C). The question is :

> " Whether upon a proper construction of the Contract and upon the basis of the facts found by me and set out in Appendix E annexed hereto the Claimants are entitled to recover the sums of :

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(a) £2,923. 2. 8
(b) £6,855.13.11.

pursuant to Clause 90(C) of the said Contract".

The following are the relevant facts stated in Appendix E: In January, 1966 the Joint Industrial Council for the Building and Construction Industry of Jamaica (hereinafter the J.I.C.) reached tentative agreement on a new labour-management contract for the industry and by a letter dated January 12, 1966 the Claimants gave notice to the Resident Engineer that they would forward accounts for labour escalation costs in accordance with cls. 90(C) and (D) of the contract. On March 23, 1966, the J.I.C. ratified the increases in rates of pay for clerical and technical staff and other unclassified categories of employees which had been negotiated between the Bustamente Industrial Trade Union and the Claimants and which were set out in the J.I.C.'s letter dated March 24, 1966, to the Claimants' resident manager. The Claimants paid the ratified increased rates of pay to their clerical and technical staff and, in consequence, incurred increased costs of carrying out the work as follows :

in respect of technical employees .. £2,865.16.7
in respect of clerical employees .. £6,721. 5.6

to each of which must be added 2 per cent for workmen's compensation (£57.6.1 and £134.8.5 respectively) making a total of £9,778.16.11.

The Claimants claim that they are entitled to reimbursement by the Respondent of the sums stated in the question under clause 90(C) on the ground that the increases in rates of pay to the clerical and technical staff were increases "in the official rates of wages paid to labour of any kind employed at the Site" by them. The claim is resisted by the Respondent on two grounds. Firstly, that clerical and technical staff are not "labour of any kind" within the meaning of that term in the clause. Secondly,

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if they are within the term, that there has been no increase in the "official" rates of wages in respect of them.

On the first ground, I was referred by learned counsel for the Respondent to dictionary definitions of "labour" and to Hudson's Building and Engineering Contracts (10th edn.) p. 566 and it was submitted that when the word "labour" is referred to in the clause, particularly when the word "wages" is used in relation to it, that word does not "cover" clerical and technical staff. In answer, learned counsel for the Claimants referred to various clauses in the contract dealing with labour and submitted that from those provisions clerical and technical staff are clearly within the phrase "labour of any kind". I agree with the latter submission and so hold.

On the second ground, the Respondent's argument was put in two ways. It was said, firstly, that cl. 90(C) establishes that the Claimants' schedule giving rates of wages, to which reference is made in the clause, is a base document which has to be looked at when there is an increase; and it is the increases over and above the wages listed in that document which can be passed on by the Claimants to the Respondent. It was pointed out that the Claimants' schedule (at pp. 191 to 194 of the contract documents) makes no reference to technical workers and no award was made in it to clerical workers. It was submitted that if no base is established for those workers they cannot fall within the fluctuation cl. 90(C). Secondly, it was argued that there were no official rates of wages paid to clerical and technical staff prior to the ratification by the J.I.C. on March 23, 1966 so, it followed, that there could be no increases in the official rates of wates for the purposes of cl. 90(C).

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The Claimants' answer to the Respondent's submissions on the second ground was, firstly, that the base rates of wages is not limited to the categories stated in the Claimants' schedule, which only gives the rates of wages for skilled and unskilled labour on which the tender was based. It was submitted that when one looks at cl. 53(E) it is clear from the last paragraph of the clause that classes of labour may be employed on the contract in respect of which the J.I.C. do not prescribe a rate; so that the words "labour of any kind" in cl. 90(C) must include classes of labour for whom the J.I.C. do not prescribe a rate. There is no difficulty in ascertaining the base rates of the clerical and technical staff in question, it was said, because these are stated in the J.I.C's letter of March 24, 1966. As regards the argument that there were no existing base official rates, it was submitted for the Claimants that the official rates for the categories concerned were the general level of wages in other trades and industry. It was argued that since those were the rates of wages which the contract stipulates, in cl. 53(E), the Claimants are to pay, they are "official rates of wages" for purposes of cl. 90(C).

I shall deal first with the submissions as to the existence or not of base official rates of wages in respect of the clerical and technical staff. It seems to me that the key to this problem is the meaning of the word "official" in the phrase "official rates of wages" in cl. 90(C), if the meaning can be found. Reference was made during the argument to cl. 53(E) and it is necessary now to state its provisions in greater detail. The first paragraph of the clause required the Claimants to pay rates of wages and observe hours and conditions of labour "not less favourable than those established for the trade or industry in the district where the work is carried out by machinery of negotiation or arbitration to which the parties are organisa-

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tions of employers and trade unions representative of substantial proportions of the employers and workers engaged in the trade or industry in the district". The second paragraph provides that in the absence of any rates of wages etc. established under the first paragraph, the Claimants shall pay rates of wages and observe hours and conditions of labour which are not less favourable than the general level of wages etc. observed by other employers whose general circumstances in the trade or industry in which the Claimants are engaged are similar. The third (and last) paragraph of the clause provides as follows :

> " The rates of wages, hours and conditions of employment shall be those prescribed for the time being by the Joint Industrial Council for the Building and Construction Industry save that the rates of wages payable to any class of labour in respect of which the said Council does not prescribe a rate shall be governed by the provisions of the preceding paragraph of this sub-clause".

It is common ground that the labour rates on which the Claimants' tender was based (the Allen Award), and which is referred to in cl. 90(C), were, at the time of tender, the rates of wages prescribed by the J.I.C. and are the rates of wages etc. referred to in the third paragraph of cl. 53(E). It is also common ground that the clerical and technical staff were not originally in receipt of J.I.C. rates of wages.

The word "official" is not defined anywhere in the contract. It was submitted for the Respondent that the J.I.C. rates of wages, referred to in cl. 53(E), are the official rates and since those rates did not originally include clerical and technical staff they were not being paid official rates of wages prior to March 23, 1966. As I have already stated, the contention of the Claimants is that the phrase is not confined to the J.I.C. rates but includes rates of wages paid in obedience to the provisions of the second paragraph of cl. 53(E).

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It seems to me that if this contention is right then the word "official" is otiose in its context in cl. 90(C), as all rates of wages paid to labour would, because of the provisions of cl. 53(E), fall within the provisions of cl. 90(C). In other words, the word adds nothing to the meaning of the words "rates of wages" which it purports to qualify and may just as well have been omitted. I do not think that it is permissible to ignore the word without endeavouring to give it a meaning, if it is possible to do so.

The relevant adjectival dictionary definitions of "official" are :

> " Derived from, or having the sanction of, persons in office; authorised or supported by the government etc.; hence authorised" (Oxford English Dictionary).
> " Derived from the proper office or officer, or from the proper authority; made or communicated by virtue of authority. " (Webster's International Dictionary).

It is easy to see that the J.I.C. rates of wages are authorised, or derived from the proper authority, and are, therefore, official rates of wages under cl. 90(C). They were established in the manner described in the first paragraph of cl. 53(E) (see the description of the parties to the award on p. 191 of the contract documents) and are accepted throughout the building and construction industry. The rates themselves bear the character of being authorised. In the case of the rates of wages required by the second paragraph of cl. 53(E) to be paid by the Claimants in the absence of J.I.C. rates, the rates themselves cannot be said to be authorised. In fact no specific rates of wages are identified - it is the <u>general</u> level of wages paid by other employers whose <u>general</u> circumstances in the industry are similar. These criteria seem to me to be too indefinite to make rates of wages arrived at by the Claimants on that basis authorised. In my view, rates of wages which were unspecified when the contract was made did not become authorised because the contract stated

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the basis upon which they were to be determined and paid by the Claimants. In my opinion, to be official, the rates of wages must have inherent authority independently of their adoption by the Claimants for payment to their employees. The authorities named in cl. 90(C), who must be responsible for increases in rates of wages before the Claimants are entitled to recover any increased remuneration, can probably be said to indicate the kind of sources from which rates of wages must be established before they can be said to be official. The matter is not free from difficulty but I am of the firm opinion, for the reasons which I hope I have made clear, that the clerical and technical staff in question were not being paid official rates of wages prior to March 23, 1966. The increases in the rates of wages ratified by the J.I.C. on March 23, 1966, were not, therefore, increases in official rates of wages under cl. 90(C).

Because of my conclusions on this aspect of the argument, I do not find it necessary to deal with the first part of the submissions on the second ground of the Respondent's contention. In my judgment, the answer to question 7 is in the negative.

Question 8 :

The question as stated is :

" 8(a) Whether upon a proper construction of the Contract, "the Site" as defined in Clause 1 of the said Contract includes areas which the Resident Engineer pursuant to Clause 195 of the Specification indicated as areas to be filled with surplus excavated material which were :

(i) areas within the Declared Areas but outside the Reservation Area ;

(ii) areas outside the Declared Areas but adjoining the same.

(b) If the areas defined in the previous question or either of them are not included in the "Site", are the Claimants on the facts found by me and stated in Appendix F annexed hereto and upon a proper construction

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of the Contract entitled to be paid at the rates contained in items D3 and E3 for surplus excavated material hauled and deposited by them in those areas".

The facts stated in Appendix F are :

The Resident Engineer, by letter dated June 19, 1964, sent drawing RE 101 to the Claimants on which he indicated areas which were to be filled with surplus excavated material. Parts of those areas were within the reservation area, parts were within the declared area but outside the reservation area, and parts (in particular the area consisting of or including the gore between the Constant Spring and Forest Hills gullies, hereinafter referred to as "Drew's Land") were outside the declared area but adjoined the same. The drawing did not indicate the levels or gradients towhich the surplus material was to be placed. The acting Resident Engineer, by letter dated August 20, 1965 indicated to the Claimants that they were to tip excavated surplus materials in the areas therein described, which included Drew's land, and asked that the land should be surveyed jointly, if possible. The Claimants, by letter dated September 11, 1965, contended that the said areas were outside the site and that they should be paid for hauling the said materials to such areas under item E3 of the bill of quantities and agreed that the areas should be surveyed. The Resident Engineer disputed the Claimants' contention by letter dated September 14, 1965. On October 11, 1965, the Resident Engineer issued drawing RE 330 showing details of the tip areas (including Drew's land) and instructed the Claimants on the areas to be filled. The Claimants did in fact haul material to Drew's land. The value of the work is assessed at £17,425 in excess of what has already been paid.

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As indicated in the question, the Resident Engineer's instructions to the Claimants were given pursuant to cl. 195 which deals with spoil tips and surplus excavation. The first paragraph of the clause provides as follows :

> " All surplus excavated material that is unsuitable for incorporation in the permanent works is to be disposed of in approved spoil tips either on or off the Site. In general the surplus excavation will be used on the Site for reclaiming swampy ground in the lower portions of the work and for filling old gully courses in the upper portions. Excess material that cannot be so used shall be removed from the Site and "Extra Over" items are included under appropriate sections of the Bill of Quantities to cover all additional costs incurred by the Contractors in the transport and disposal of this material to sites for which the Contractors shall make their own arrangements subject to the approval of the Resident Engineer ..... "

The next two paragraphs of the clause deal with tip areas in the lower portions of the work and then para. 4 provides :

> " In the upper portions of the work the Resident Engineer will indicate areas in or adjoining the Declared Areas that are to be filled with surplus excavated material and the Contractors will be required to supply details and the sequence of filling that they propose to use for the approval of the Resident Engineer before tipping commences. The Resident Engineer's decision as to the location, extent, top levels and falls of all tips shall be final. No spoil is to be removed from the Site until the available tips on the Site have been completed unless otherwise allowed by the Resident Engineer. "

It is under this paragraph that the Resident Engineer acted and it is admitted that the areas "in the upper portions of the work" referred to in the paragraph are the "old gully courses" referred to in the first paragraph of the clause.

> " The Site" is defined in cl. 1 to mean :
> " The Reservation Area, referred to in Clause 52(P) hereof, the land made available to the Contractors by the Government for workyards, etc., as referred to in Clause 52(**C**), and any other land in the Island made available to the Contractors by the Government ."

The contention of the Respondent on this question is that the entire area indicated by the Resident Engineer in the upper portions of the work was on "the Site", as defined. It is not clear from the facts found and stated in Appendix F whether the drawings

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Re 101 and Re 330 were in respect of identical areas. If they were, parts of the area were within the Reservation Area, parts within the Declared Areas but outside the Reservation Area and parts (Drew's land in particular) were outside the Declared Areas but adjoining them. The parts within the Reservation Area were clearly on "Site" so this is not questioned. The question is asked in respect of the remaining parts of the area.

Question 8(a)(i) is in respect of the Declared Areas. In the argument before me, it did not seem that the Respondent's contention that this part of the question should be answered in the affirmative was being contested. The Claimants addressed no argument to me against that contention. It will be seen that whereas the Reservation Area is expressly included in the definition of "the Site" the Declared Areas as such are not. Clause 52(B) states, in the first paragraph ,that "certain areas within the vicinity of the Works are Declared Areas, which are areas reserved under the provisions of the Flood-Water Control Law (1958) within which the Government has the power to construct, improve and maintain the Works". The statement continues that "these Declared Areas are bounded by a line which is 200 ft. outside the limits of the Reservation Area". The second paragraph of cl. 52(B) states that "the Reservation Area is defined in the schedule attached to the Sandy Gully Flood Water Control Scheme (No. 3)" and that "the Reservation Area, under the provisions of the above-mentioned Law, is an area of land within the Declared Area originally required for the actual occupation of the permanent work. "

The Respondent contends that the Declared Areas are parts of "the Site" because they are "land made available to the Contractors by the Government for workyards, etc., as referred to in Clause 52(C)." (See definition of "the Site").

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The first paragraph of cl. 52(C) states :

> " During the continuance of the Contract the Contractors will be granted by the Government the free use of the areas of land lying between the limits of the Declared Areas and the Boundary fence, or the reservation line where no boundary fence is to be erected. "

The areas of land described in this paragraph are part of "the Site" because the fourth paragraph of cl. 52(C) states that "these areas (which include the areas in the first paragraph) are provided for the purposes of access and for the erection of temporary works, plant, offices, etc." and this, therefore, brings them within the second type of land described in the definition of "the Site". If, as appears from the first and second paragraphs of cl. 52(B), the Reservation Area is not only within the Declared Area but is a part of it, why are the areas of land in the first paragraph of cl. 52(C) not described simply as, e.g., "the areas of land in the Declared Areas outside the limits of the Reservation Area"? The answer appears to lie in the last sentence in the second paragraph of cl. 52(B). This sentence states: "The line of the boundary fence to be erected under the Contract, and which delineates the actual area required for the occupation of the permanent work, does not in all cases coincide with the reservation lines marking the limits of the Reserved Area". It will be seen that the description of the area of land in the first paragraph of cl. 52(C) does not coincide with the description of the Declared Areas in cl. 52(B). It follows from all this that question 8(a)(i) cannot be answered simply in the affirmative.

There is another reason why this question cannot be so answered. The fifth paragraph of cl. 52(C) provides that: "certain portions of the Declared Areas are occupied by permanent buildings or are in the final stage of development and such

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areas will only be made available to the Contractors in exceptional circumstances." It is provided in the fourth paragraph of cl. 52(C) that "before any such areas (referring to areas described in the first two paragraphs of the clause) are entered the Contractors shall make written application to the Engineer at least 14 days before they wish to enter upon the land." The answer to the question whether any of the portions of the Declared Areas occupied by permanent buildings etc. were part of "the Site" will depend on the answer to another question, one of fact, namely, whether any such portion of the Declared Areas were made available to the Contractors by permission of the Engineer. As will appear when I deal with the second part of question 8(a), I am of the firm opinion that areas within the Declared Areas did not become part of "the Site" merely because the Resident Engineer indicated them as areas to be filled with surplus excavated material. Unless the answer to question 8(a)(i) is being conceded by the Claimants, I can only answer the question by saying that, in my judgment, the areas within the Declared Areas but outside the Reservation Area which the Resident Engineer indicated as areas to be filled with surplus excavated material are included in "the Site" as defined if the Engineer, pursuant to cl. 52(C) of the contract, had given his consent or permission for the Contractors to enter those areas. If no such consent or permission was given then the answer to question 8(a)(i) is in the negative.

It is really in respect of "Drew's land" that issue on question 8(a) was joined. This is question 8(a)(ii). The arbitrator found that "Drew's land" was outside the Declared Areas but adjoining the same. The Respondent contends that this land is part of "the Site" because it comes within the third type of land described in the definition i.e. "any other

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land in the Island made available to the Contractors by the Government." On the face of it, whether or not any other land was so made available is a question of fact and, as pointed out on behalf of the Claimants, there is no express finding by the arbitrator to this effect in respect of "Drew's land". Because of this, it was submitted for the Claimants that the Respondent cannot succeed on this question unless the fact that "Drew's land" was so made available is to be inferred from the fact that the Resident Engineer indicated, pursuant to cl. 195, that that land was to be filled with surplus excavated material. That is what the Respondent sought to establish before me and it will be seen that question 8(a)(ii) is posed in that way.

I shall deal briefly with an aspect of the argument which, as I see the matter, does not really affect the final decision on this question. It was submitted for the Claimants that the words "made available" in the definition of "the Site" clearly mean " made available at the time of tender" and do not mean land which may be made available during execution of the Works. In support of this submission reference was made to cl. 10, where it is deemed that, before tender, the Claimants had visited and carefully examined the Site and its surroundings; and to cl. 11, where they are deemed to have investigated and formed their own opinion on all matters and things which could in any way influence them in the carrying out of the Works or fixing the schedule rates. For the Respondent it was submitted that the provisions of cl. 10 do not prevent "the Site" from being added to during the currency of the contract and is no real reason for cutting down the clear meaning of the words. In spite of the cogent reasoning based on cls. 10 and 11, I am bound to say that I think the relevant words in the definition clearly contemplate land being made available to the Contractors after the contract is signed.

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The entire argument on which the Respondent relies to establish that "Drew's land" is part of "the Site" is based on the provisions of Cl. 195. It is common ground that "Drew's land" is in "the upper portions of the work" referred to in para. 4 of cl. 195 and it was submitted that the areas indicated by the Resident Engineer as areas to be filled with surplus excavated material would "fall squarely in the definition of "the Site" as "other land made available to the Contractors by the Government". It was said that there is a control in relation to the user of this land - the Contractors are required to supply details and the sequence of filling before tipping commences. It was pointed out that the areas referred to in para. 4 of cl. 195 can be in or adjoining the Declared Areas and there is no distinction made between them as on Site or off Site. Based on this, it was submitted that if the Court is satisfied that the areas in the Declared Areas were on Site it would be strange that those adjoining would be off Site when both fall under the same clause and are both areas of land which the Resident Engineer could indicate were to be filled with surplus material. As a matter of interest, the Resident Engineer, in his letter of September 14, 1965, claimed that this area of land was on Site because it adjoined the Declared Area and "are therefore covered by paragraph 4 of Clause 195 of the Contract".

It was further submitted for the Respondent that the criteria for off Site payment is the deposit of materials on sites on which the Contractors made their own arrangements, subject to approval. That, it was said, is quite separate and distinct from areas adjoining the Declared Areas which the Resident Engineer indicated were to be filled. It was submitted that it is clear that the Contractors had not made their own arrangements for "Drew's land" and the clear implication, therefore, is that this

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land was made available by the Government.

In my opinion, with due respect, the argument based on Cl. 195 is entirely misconceived. This argument completely ignores the definition of "the Site". What is said is that because the Resident Engineer indicated areas in and adjoining the Declared Areas these areas, including "Drew's land", are "other land made available to the Contractors by the Government". In my view this is a non sequitur. As was pointed out in the argument for the Claimants, the definition of "the Site" does not include areas of land which the Resident Engineer indicates to be filled under Cl. 195. The statement in para.1 of Cl. 195 that "in general the surplus excavation will be used on the Site for reclaiming swampy ground in the lower portions of the work and for filling old gully courses in the upper portions" appears to suggest that the old gully courses referred to were "on the Site" but, in answer to a question from me, it was conceded by learned Counsel for the Respondent that in spite of the statement the definition of "the Site" has to be used to decide whether the old gully courses were on or off the Site. The concession is right, in my view but, in any event, it is under para. 4 of Cl. 195 that the Resident Engineer acted and there is no express reference in that paragraph to the old gully courses. Nor does it help the Respondent's argument that "Drew's land" adjoins the Declared Areas. As I have endeavoured to show above, the Declared Areas are not per se parts of the Site. There is no proper basis for saying that lands adjoining the Declared Areas are parts of the Site. Similarly, it does not necessarily follow from the fact that the Claimants did not make their own arrangements for the use of "Drew's land" as a spoil tip area that that area is not off the Site. Clause 195 may have been framed as it is so as to give absolute control to the Resident Engineer over spoil tips

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on or near the Site.

In my opinion, the true answer to this question is not to be found in Cl. 195 but in a proper construction of the words of the definition of "the Site". Apart from the Reservation Area, it will be seen that the rest of the Site is to consist entirely of land made available to the Contractors by the Government. For what purpose was this land to be made available ? The answer, in my view, is to be found in Cl. 52. Sub-clause (A) of this clause states that, except as provided for in sub-clauses (B) and (C), the Contractors shall make their own arrangements for the acquisition of such areas as they may require for workyards, depots, warehouses etc. as may be required for the satisfactory, convenient and expeditious execution and completion of the Works. It provides that the onus of finding suitable workyard sites and the laying out and maintenance thereof shall be borne by the Contractors. Sub-clause (B) merely defines the Declared Areas and states that the Government has the power within those areas to construct, improve and maintain the Works. Then sub-clause (C) provides in the first paragraph for the grant by the Government to the Contractors of the free use of parts of the Declared Areas and in para. 2 of an area of 10 acres of land, all to be used (see para. 4) for the purposes of access and for the erection of temporary works, plant, offices, etc. The last paragraph of sub-clause (C) provides that the Contractors will be permitted to use suitable portions of the land provided as spoil tips for the disposal of surplus material, subject to obtaining the Engineer's prior approval in writing. The areas of land made available to the Contractors under cl. 52(C) are expressly referred to as the second type of land forming part of the Site, as defined. The purpose of making those areas of land available was to relieve the Contractors of part, or all, of the

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burden, placed on them by cl. 52(A), of finding suitable workyard sites etc. In other words, the land was made available under cl. 52(C) for the benefit of the Claimants (Contractors). In my opinion, and I so hold, the words used to describe the third type of land in the definition, namely, "any other land in the Island made available to the Contractors by the Government", are used in the same sense and are for the same purpose as the second type of land in the definition. So, to come within the definition of "the Site", any other land made available must be so made available for the benefit of the Contractors. It is doing violence to the meaning of words to say that the directions given by the Resident Engineer under cl. 195 "made land available to the Contractors". If, however, by any extension of meaning, the areas indicated can properly be said to have been made available, they were certainly not made available for the benefit of the Contractors. In my judgment, the answer to question 8(a)(ii) is clearly in the negative. It was conceded that if question 8(a) is answered in favour of the Claimants the answer to question 8(b) must be in the affirmative.

Question 10:

This question is :

> "Whether upon the basis of the facts found by me and stated in Appendix H annexed hereto and upon a proper construction of the Contract (and Clauses 24 and 73 thereof in particular) the Claimants are entitled to be paid for the work done by them in repairing the cracks in the concrete of the walls and sills which are referred to in paragraph 1 of the said Appendix H."

The facts stated in Appendix H are as follows :

During the construction of the works cracks appeared in the concrete mainly above the weep holes in the retaining walls and in the centre of the sills. The cracks did not extend right through the wall, although they appeared on either face. The Resident Engineer required the cracks to be repaired in the parts of the works which were liable to inundation by the sea. The

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Respondent refused to pay the Claimants the cost of repairing the cracks, maintaining that they were caused in whole or in part by faulty or unsatisfactory workmanship or materials. The Claimants maintained that they were solely due to the design of the works. The finding of the arbitrator in para. 4 of the Appendix is best stated verbatim :

> " I find that cracks must be expected in a long length of relatively slender concrete wall cast in a high ambient temperature, especially where the design has been weakened by weep holes. The Claimants were not responsible for the design of the works, and did not, I hold, cause or contribute to the cause of the cracks by faulty or unsatisfactory workmanship or materials."

The value of the work of rectification of the cracking was assessed at £2,000.

The terms in which the arbitrator recorded his findings in para. 4 expressly rejected the basis upon which the Respondent refused to pay the Claimants' claim, namely, the provisions of cl. 35(B), which states that should any permanent work executed by the Contractors be found to be faulty as regards workmanship or materials the Contractors shall at their own cost rectify the same either in whole or in part as may be directed by the Engineer. This clause makes the decision of the Consulting Engineer as to any question arising under it final and conclusive but this was not relied on by the Respondent before me. The terms of the arbitrator's findings make it unnecessary to consider cl. 24, which deals with the Claimants' responsibility for the quality of work.

The Claimants' claim that the Respondent was liable to pay them the cost of repairing the cracks was based on cl. 73, the relevant parts of which are as follows :

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" 73. Everything at Contractors' risks - Except as regards riot, civil commotion ..... or a cause which is proved to be solely due to design of the Works ..... the Contractors shall until the date of issue of the Completion Certificate undertake all risks and liabilities of whatever kind arising out of or incidental to or connected with the construction and completion of the Works ..... "

It was submitted, for the Respondent, that the Respondent can be called upon to pay for repairing the cracks only if the arbitrator found that the cracks were caused solely by the design of the works and he has not so found. For the Claimants, it was submitted that the words "solely due to design of the Works" mean damage which is the consequence of the design and is not contributed to at all by defective work, bad materials or other causes which are the Claimants' responsibility. It was contended that this is quite plainly what the arbitrator found in para. 4 of Appendix H. Reference was made to the facts found and stated in the first sentence of this paragraph and it was submitted that that is the clearest possible finding that the cracks were due to the design. The rest of the paragraph, it was said, rules out the Claimants' liability under cl. 35(B). It was submitted that on those findings the arbitrator was bound to find, as a matter of law, that the cracks were solely due to the design of the Works. It was contended, further, that the issue between the parties being whether the cracks were solely due to the design of the Works or contributed to by the Claimants' fault, when the arbitrator rules out the Claimants' fault he, in effect, finds that the cracks were solely due to the design. In answer to the Claimants interpretation of the first sentence of para. 4 of Appendix H, it was submitted for the Respondent that that sentence means that the Claimants undertook the risk that cracks would occur in the circumstances described, that it was an expected risk and the Claimants should have met it by placing a value on it and take it into account in tendering.

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I do not agree with the contention that because the issue between the parties was as stated above and as the Claimants were exonerated by the arbitrator, that he has found, in effect, that the cracks were solely due to the design of the Works. The matter is not that simple. Obviously, the Claimants having been exonerated, the question now is whether it has been proved that the Respondent is liable under cl. 73. I am afraid I do not agree with the meaning which the Claimants seek to put upon the words "solely due to design of the Works". In my view, the meaning of those words is plain. The Respondent is liable under the clause if it is proved that the cracks resulted from the design of the Works and from no other cause. The other cause is not limited to a cause for which the Claimants is responsible. This is a pure question of fact. The arbitrator is an expert. The words of cl. 73 and the evidence on this issue were before him. He knew that the Claimants based their claim against the Respondent on the allegation that the cracks were solely due to the design of the Works. No doubt he heard arguments from both sides on the matter. Why then did he not make an express finding, as he did in exonerating the Claimants from liability under cl. 35(B)? I am now being asked to interpret his findings in para. 4 of the Appendix and to decide whether or not they amount to a finding which would make the Respondent liable, under Cl. 73, to pay for repairing the cracks. I am tempted to ask why I, or anyone else, should be called upon to do this when the arbitrator had the opportunity, was required to make the finding and, obviously, declined to do so.

I can only answer the question affirmatively, as the Claimants have asked me to do, if I am able to hold that the facts found in para. 4 of the Appendix amount in law to a finding that the cracks were solely due to the design of the Works. The terms in which the arbitrator recorded his findings in the first sentence

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of para. 4 suggest, in my view, that the design of the Works was not the sole cause of the cracks. I do not think it was clear to the arbitrator himself that the design was the sole cause and that must be his reason for stating his findings in this way rather than make an express finding. If the matter was as plain as was put in the argument for the Claimants before me, I can think of no reason why he did not find against the Respondent, and none was suggested to me. I am unable to hold that on the findings of fact in Appendix H the Respondent has been proved liable under cl. 73. Question 10 must, therefore, be answered in the negative.

Question 11:

Questions 11 and 12 are concerned with the arbitrator's power to award interest. Question 11 is stated as follows :

> " Whether as a matter of law (disregarding for the purpose of this question the terms of the said Contract) I have the power to award to the Claimants interest upon the amount of any Award made by me in their favour. "

This question depends largely for its answer upon the answer to the question whether the provisions of the Interest (Allowance by Jury) Act, which was passed in 1908, remained in force after the passing, in 1955, of the Law Reform (Miscellaneous Provisions) Act.

The provisions of ss. 2 and 3 of the Act of 1908 are as follows :

> " [illegible]l debts or sums certain, payable at a certain time 2. [illegible], the jury, on the trial of any issue or inquisition [illegible] damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding six per centum per annum, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment:
>
> Provided that interest shall be payable in all cases in which it is now payable by law.
>
> 3. The jury on the trial of any issue or inquisition of damages may, if they think fit, give damages in the

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> nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of insurance made after the passing of this Act."

It is conceded that if the provisions of the Act are still in force the Claimants cannot bring their claims within the provisions of s. 2.

Sections 2 and 3 of the Act of 1908 are, in terms, identical to the provisions of ss. 28 and 29 of the (U.K.) Civil Procedure Act, 1833 (3 and 4 Will. 4. C. 42) except that the rate of interest was not fixed in s. 28 of the latter Act as it was in s. 2 of the former. No provisions were made in the (U.K.) Act of 1833 for the award of interest by an arbitrator, but in 1851 in Edwards v Great Western Ry. (1851) 11 C.B. 588 it was held that, in a matter with regard to which a jury could have given interest under the (U.K.) Act of 1833, an arbitrator could equally give interest, despite the language used in the Act. In the Act of 1908, express power to award interest was given to an arbitrator by s. 4, which provided as follows :

> " 4. In all cases where resort shall be had to arbitration in order to settle the sum payable to any creditor or claimant, the arbitrator, arbitrators or their umpire, shall have the like power of allowing interest as a jury has under this Act. "

In 1934 the (U.K.) Law Reform (Miscellaneous Provisions) Act, 1934 was passed. It provided, in s. 3(1), as follows :

> " 3.(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment :
>
> Provided ..... "

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Section 3(2) of the Act provided that ss. 28 and 29 of the (U.K.) Act of 1833 "shall cease to have effect." In 1950, in Chandris v Isbrandtsen - Moller Co. Inc., (1951) 1 K.B. 240 it was held by the Court of Appeal in England that, by implication from the submission to him, an arbitrator is deemed to have the same powers to award interest as a court of record has under the (U.K.) Act of 1934. In 1955 the Law Reform (Miscellaneous Provisions) Act was passed in Jamaica. Except for the amending and repealing provisions of the (U.K.) Act of 1934, the Act of 1955 was identical in terms with the provisions of that Act. The provisions of s. 3(1) of the (U.K.) Act of 1934 were repeated as s. 3 of the Act of 1955; but the express repeal of ss. 28 and 29 of the (U.K.) Act of 1833 in s. 3(2) of the (U.K.) Act of 1934 was not repeated in the 1955 Act in respect of ss. 2 and 3 of the Act of 1908. It is conceded by the Respondent that if the entire Act of 1908 ceased to have effect when the Act of 1955 was passed then, applying the reasoning in the Chandris case, and subject to the provisions of ques. 12, the arbitrator in the case under consideration had the same power to award interest as a court under the provisions of the Act of 1955.

It was contended for the Claimants that the Act of 1908 was impliedly repealed in its entirety by the Act of 1955. It was submitted that the two Acts are wholly incompatable, that they are repugnant and inconsistent, that they cannot stand together and if allowed to do so would lead to absurd consequences. It was argued that what was done in Jamaica in 1955 was to confer powers upon a court of record which were broader than, and included, the powers given by the Act of 1908, the same as was done in the United Kingdom in 1934. Therefore, it was argued, in the same way that it was logical for Parliament in the United Kingdom to repeal ss. 28 and 29 of their Act of 1833, it was

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logical for the Act of 1908 to be repealed. Since there was no express repeal, the argument continued, there was clearly an implied repeal as the inconsistent provisions cannot stand together. It was submitted that the omission expressly to repeal the Act of 1908 was an oversight by the legislature. As regards the provisions of s. 4 of the Act of 1908, dealing with the powers of arbitrators, it was submitted that the implied repeal of s. 2 also impliedly repealed s. 4 or, at any rate, made it of no effect.

For the Respondent, the contention that the Act of 1908 was impliedly repealed was strenuously disputed on two main grounds. It was contended, firstly, that the circumstances under consideration do not come within the well established principles relating to implied repeals of statutes. Secondly, and alternatively, that they are within the equally well established rule that a subsequent general Act does not affect a prior special Act by implication.

In support of the first contention, it was pointed out that the Act of 1955 followed closely the (U.K.) Act of 1934 and it was clearly open to the legislature in Jamaica, if it so desired, expressly to repeal the Act of 1908 in the same way that the (U.K.) Act of 1934 repealed the (U.K.) Act of 1833. The Jamaican legislature, it was said, must be presumed to have been aware of the earlier statute and if they intended to repeal it they would have done so. On the question of repugnancy and inconsistency between the two Acts, it was submitted that a sensible meaning can be given to both enactments by allowing the earlier statute to operate in the special areas defined in it, leaving the later to operate in the general area it defines. It was argued that there is a duty on the Court to give to both statutes a sensible meaning; so the Act of 1955 should be read as applying to a court of record sitting without a jury, taking out the special area covered by the Act of 1908. Looked at in /.....

that way, it was argued, there is no inconsistency; both statutes can take effect together so there can be no implied repeal.

The principles of construction relating to repeals by implication have been variously stated in the authorities, except that all are agreed that the courts lean against implying a repeal. The statement of the principle which seems to be most relied on by text-book writers on the subject is that of A.L. Smith, J. in Kutner v Phillips (1891) 2 Q.B. 267 at 271, 272: "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together ..... Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied ....." Learned counsel for the Respondent relied on statements by Farwell, J. in In re Chance (1936) Ch. 266. At p. 270 the learned judge said: "I think that if it is possible it is my duty so to read the section; that is to say, so to read it as not to effect an implied repeal of the earlier Act. Reading the section in this way makes the form of it somewhat inconvenient, but I do not think that is sufficient to justify me in saying that the effect of the second proviso is a partial repeal of the earlier Act." Earlier, at p. 268, Farwell, J. had said: " ..... but it may be that the terms of s. 195 are so inconsistent with the provisions of the earlier Act that the effect of it is that impliedly s. 4, or some portion of that section, must be treated as having been repealed, although not expressly so stated. " Two days after his statements were made in In re Chance, Farwell, J. had occasion to deal with the question of implied repeals again in Re Berrey, Lewis v Berrey (1935) All E.R. Rep. 826. He stated the principle thus, at p. 829: "The rule is clearly settled now - that the court does not construe

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a later Act as repealing an earlier Act unless it is impossible to make the two Acts stand together and the later section can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act." This statement was also relied on by the Respondent in support of the submission, already stated, that a sensible meaning can be given to both the enactments in question.

The first sentence of Farwell, J's statement at p. 270 in In re Chance merely repeats the rule that the courts lean against implying a repeal. With all due respect, if his statement of the rule in Re Berrey is taken literally then many of the cases in which it has been held that a later Act impliedly repealed an earlier one would have been wrongly decided. This is so because in most cases of implied repeals, it is possible to make the two Acts stand together, though to do so would lead to unreasonable and absurd consequences. It seems to me that the rule is stated too rigidly. I find the statement of the rule by Dr. Lushington in The India (1864) 1 B. & L. 221, cited by learned counsel for the Claimants, to be particularly helpful. At p. 224 of the report Dr. Lushington said :

> " What words will constitute a repeal by implication, it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would be declared in express terms; so on the other, it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would I conceive be repealed by implication, if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject-matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject-matter has been so dealt with in subsequent statutes, that, according to all ordinary reasoning, the particular provision in the prior statute would not have been intended to subsist, and yet if it were left subsisting no palpable absurdity would be occasioned. "

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A statement which bears upon the case under consideration appears in Craies on Statute Law (7th edn.) at p. 367: "But where the terms of a later enactment, taken in their primary meaning, are wide enough to abrogate a prior enactment, they will be read as repealing it, unless it is fairly open to hold on the words of the later Act that an intention is manifested to cut down or restrict the primary meaning." This must, of course, be read subject to the rule against the repeal of a prior special enactment by a subsequent general one.

I will now examine the provisions of the Acts in question in the light of the principles stated above. At common law there was no power in a court to award interest in an action for the recovery of a debt or damages (see Jefford v Gee (1970) 1 All E.R. 1202, 1205). The (U.K.) Act of 1833 was passed to give this power. Although the power was given to a jury only, this had the effect of giving the power to the court as all issues of fact at that time in the United Kingdom were tried by a jury (see the Chandris case (supra) at p. 257). In Jamaica in 1908 the Civil Procedure Code provided for issues of fact to be tried either by judge alone or by judge and jury. So when the Act of 1908 followed the (U.K.) Act of 1833 and gave the power to award interest to a jury the effect was not the same. A judge sitting without a jury did not have a like power. Yet an arbitrator had, by s. 4. This absurdity can, perhaps, be explained by the practice, which existed in Jamaica and perhaps other colonial territories, of Colonial legislatures copying United Kingdom legislation without sufficiently considering the local circumstances in which the legislation will have effect.

Sections 2 and 4 of the Act of 1908 are the provisions with which we are directly concerned. When s. 2 is examined it will be seen that it gave a discretionary power to a jury to allow interest "upon all debts or sums certain." It then proceeded to

cut down on the power. First of all, the rate was not to exceed six per cent per annum. Then the period for which the interest could be awarded depended upon whether the debt was payable at a certain time by virtue of a written instrument or whether it was payable otherwise. If payable "otherwise", demand for payment had to be made in writing or interest could not be awarded since the period ran from the time when the demand was made. Lastly, the written demand must give notice to the debtor "that interest will be claimed from the date of such demand until the time of payment" or no interest could be awarded.

Contrast the provisions of s. 3 of the Act of 1955. On the face of it, the section gives Courts of Record an unrestricted discretionary power to award interest in actions for the recovery of debt or damages. It speaks of "any Court of Record" so this must, in the context, mean all Courts of Record, which, it is conceded, includes a judge sitting with a jury. It speaks of "any proceedings", which must also mean all proceedings tried in a Court of Record. The rate of interest is not fixed but left to the discretion of the court. The period runs from the date when the cause of action arose and there is a discretion to let interest run for the whole or any part of that period. No written demand need be made nor notice given that interest will be claimed. Indeed, interest need not even be claimed in the pleadings (see Jefford v Gee at p. 1206).

One could not be blamed for thinking that the intention of the legislature is clear beyond doubt - an intention to give the unrestricted power to award interest to all Courts of Record in all proceedings for the recovery of debt or damages. On the face of it, there appears to be no reason why any exception should be implied. But the Respondent contends that the Act should be read so as to except from its provisions the "special area" covered by the Act of 1908, in which event, so it was said, there would be no inconsistency between the two Acts. This should be done, it

was said, as there is a duty on the Court to give both statutes a sensible meaning and a sensible meaning can be given to both if read in that way. The emphasis here must be on the word "sensible" or else this would be an easy way to get around an obvious repugnancy between two statutes. But what is the "special area" covered by the Act of 1908 ? It can only be the discretionary power of a jury to award interest in actions for debt or sum certain. As I have endeavoured to show, the rest of s. 2 ofthe Act merely puts limits on the power. These can hardly be parts of the special area. In my opinion, it would not be giving the Act of 1955 a sensible meaning if it is read so as to exclude actions for debt tried by a jury. I can think of no justifiable reason for so reading it and none has been suggested.

In my judgment, the provisions of s. 3 of the Act of 1955 are plainly repugnant to those of s. 2 of the Act of 1908. Both provisions cannot reasonably stand together. I find it impossible to impute to the legislature an intention to allow the severely restricted power contained in the Act of 1908 to continue in the face of the clearly unlimited powers which it conferred on Courts of Record by the Act of 1955. I need not deal with the absurd consequences which, it was pointed out, could result if the two sets of provisions were allowed to stand together. They are obvious; though learned counsel for the Respondent, on her part, pointed out that the Act of 1955 only perpetuated the absurdities created by the Act of 1908 and which existed while it stood alone.

In my opinion, s. 2 of the Act of 1908 is not saved from implied repeal, which would normally result from the judgment and views just expressed, by the application of the generalia specialibus non derogant principle of construction, relied on by the Respondent. The classic statement of the principle is that by the Earl of Selbourne, L.C. in Seward v Vera Cruz (1884)

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10 App. Cas. 59 at p. 68 :

> " Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed ..... merely by force of such general words, without any indication of a particular intention to do so. "

It is at least doubtful whether the Act of 1908 can be said to be a special Act. But assuming it is, I hold that the general words in the Act of 1955 are not capable of reasonable and sensible application without extending them to the trials by jury dealt with in the Act of 1908. It was submitted for the Claimants that if the Act of 1908 is a special Act, which was denied, then the relevant provisions of the Act of 1955 are absolutely repugnant and inconsistent with those of the Act of 1908 and the maxim, therefore, does not apply. Reliance was placed on a statement to this effect in Craies (op. cit.) at p. 381. Learned counsel for the Respondent did not dispute this exception but submitted that there is not any such absolute repugnancy or inconsistency in this case as would bring it within the exception. With all respect, I do not agree. In my opinion, there is absolute repugnancy between the provisions.

It was submitted for the Respondent that there is a clear indication that the Act of 1908 has not been impliedly repealed because it was recognized in the Crown Proceedings Act, passed in 1958, as being then in force. Section 19 of that Act provides that the Act of 1908 and s. 3 of the Act of 1955 shall apply to judgments given in proceedings by and against the Crown. It was said that here was the legislature in 1958 recognizing the Act of 1908 as still in force side by side with the Act of 1955; that this is the strongest indication that the former Act has not been impliedly repealed. In answer, it was submitted for the Claimants that the time to judge

whether or not there was an implied repeal of the Act of 1908 was just after the Act of 1955 was passed and that the mention of the former Act in subsequent legislation is irrelevant on this question. Reference was made to a statement by Tucker, L.J. in the Chandris case, at p. 260, that "it is not generally permissible to interpret a statute by seeing what has been done in subsequent statutes." In reply, learned counsel for the Respondent did not put her argument as forcefully as before. She conceded that if there was an implied repeal it took place in 1955 but argued that trying to decide whether or not there was an implied repeal involves a consideration of the intention of the legislature; i.e. whether if the legislature had the Act of 1908 in mind in 1955 it would have regarded the two Acts as so inconsistent or repugnant as to require repeal. It was submitted that in 1958 an insight was given into the mind of the legislature which puts the matter beyond doubt as when it had the two Acts before it they were regarded as statutes which could co-exist. I was referred to the passages in Craies (op. cit.) pp. 146 to 149 dealing with the use to which subsequent statutes may be put in interpreting earlier ones and it was submitted that the provision in the Act of 1958 is "something throwing light" on what happened in 1955 on the question of implied repeal. This submission is based on the opening statement on the subject on p. 146 of Craies, which repeats the statement of Tucker, L.J. relied on by the Claimants and goes on to say: "but sometimes light may be thrown upon the meaning of an Act by taking into consideration enactments contained in subsequent Acts." I think the principle to be gathered from the statements and the cases referred to in Craies is that, except for Acts passed for the purpose of explaining or declaring the meaning of provisions in

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earlier Acts, subsequent Acts may not be relied on as aids to the construction of prior unambiguous Acts. However, I do not think these principles of construction are strictly applicable to the case of implied repeals. It seems to me that the issue must be determined by the well established principles relating to implied repeals and if the application of those principles lead to the conclusion that an earlier Act has been impliedly repealed by a later, the repeal takes effect on the passing of the later Act. It would appear to be contrary to common sense to try to decide the effect of a later statute on an earlier , on the day the later was passed, by reference to something that the legislature did some years after. In Camille and Henry Dreyfus Foundation Inc. v. I.R.C. (1954) Ch. 672, a case referred to in Craies at p. 149, Evershed, M.R. said, at p. 687, 688, that the speeches of members of the House of Lords in two cases which he named "must be taken to have established clearly that an expression, explicit or implicit, by Parliament in a later Act of its intention in an earlier statute cannot be treated as altering, ex post facto, the effect of the earlier enactment according to the proper interpretation of the language therein used". This seems to be another answer to the contention based on s. 19 of the Act of 1958. In my judgment, and I so hold, s. 2 of the Act of 1908 was impliedly repealed by s. 3 of the Act of 1955.

What is the fate of s. 4 of the Act of 1908 if I am right that s. 2 of that Act is repealed? It was submitted for the Claimants that the Act of 1955 repealed the whole of the Act of 1908 by implication. I do not agree. The principles which I endeavoured to apply could only result in the repeal of s. 2. Section 3, for instance, is not affected because its provisions are not in conflict with those of the relevant provisions of the Act of 1955. The effect that this Act / ....

has on s. 3 is to render the provisions of the section otiose. Section 4, however, was not affected directly by anything in the Act of 1955 so it remains in force. The question is: does it have any effect ?

For the Respondent, it was submitted that s. 4 does have effect because its provisions incorporated the provisions of s. 2 by reference, which brings the case within the well established rule of construction that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second. For the Claimants, it was contended that this rule is not applicable because it only applies to express repeals and to different statutes. It was argued that it does not apply to separate sections of the same statute. I can see no reason why, in principle, the rule should not apply to cases of implied repeals and to different sections of the same statute, which are, legally, separate and substantive enactments.

The question, sometimes of great difficulty, which usually arises in applying the rule is whether the form of words used in the provisions being examined and construed are sufficient to incorporate the provisions which have been repealed. Section 4 provides that an arbitrator "shall have the like power of allowing interest as a jury has under this Act." It was submitted for the Claimants that these are not words of incorporation. What the legislature has done, it was argued is to vest the power of a jury to award interest in an arbitrator. So, the argument continued, if the power of the jury under the Act is removed the arbitrator has no power. It was submitted that s. 4, therefore, has no effect. The reply for the Respondent was that this is simply a case of giving the arbitrator a power in the terms of s. 2 and not tying

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the power of the arbitrator to that of a jury; that the words used in s. 4 are really words of incorporation to save repetition.

The issue is one of construction of the provisions of s.4. No help was obtained from the cases to which I was referred, as each case dealt with its own peculiar circumstances. No case was cited in which the words used in s. 4, or similar words, were construed. It is a matter of some difficulty, but I have reached the firm conclusion that the form of words in the section does not have the effect of incorporating the provisions of s. 2, as contended. To reverse a term used by learned counsel for the Respondent, the words used in the section tie the powers of an arbitrator to those of a jury under the Act. His powers are to be similar to those which a jury has and no more. This is what the words of the section say expressly. Remove the powers of the jury from the Act and there is nothing left to which the powers of the arbitrator can be similar. The section is left without legal effect.

In the result, I hold that there are no statutory provisions extant governing the powers of an arbitrator to award interest. This leaves the way clear for his powers in this regard to be implied from the terms of the submission, applying the reasoning in the Chandris case (supra), with which I respectfully agree. The result is that the arbitrator in this case had the same power to award interest as a court has under the provisions of the Act of 1955, unless this power was taken away by the terms of the contract. In my judgment, the answer to ques. 11 is in the affirmative.

Question 12 :

> " If the answer to question 11 is in the affirmative, whether upon a proper construction of the Contract and Clauses 92E and 95 in particular, my power to award interest is excluded by the express provisions of the Contract in respect of any, and if any, which of the claims made in this Arbitration. "

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Under the contract, payments were made to the Claimants on the basis of certificates signed by the Consulting Engineers, after monthly bills had been prepared, agreed by the Resident Engineer and the Claimants' Agent and submitted to the Consulting Engineers (see Cls. 91 and 92(A)). Clause 92(C) provided that payments should be made to the Claimants by Government within one month after the receipt by the latter of the Consulting Engineers' signed certificate. Clause 92(E) provided as follows :

> " (E) Overdue payments. - No omission or failure by the Government to make any payment at the time when the same shall be payable, nor any subsequent delay in such payments shall vitiate or void the Contract, but if any payment (the amount of which is not disputed) be not made within one month from the receipt by the Government of the Consulting Engineers' signed certificate the Contractors shall (on giving the Government one month's notice in writing and in default of payment during that period) be entitled to interest on the sums overdue at the rate of 5 per cent per annum until such overdue payment has been made. That is to say, the interest on such overdue payments shall not commence until at least two months after the receipt by the Government of the relevant signed certificate of the Consulting Engineers. "

It will be seen that this clause expressly excepts disputed payments from its provisions. Clause 92(D) provided as follows :

> " (D) Payment of disputed amounts. - If any dispute shall arise as to the amount of any payment to which the Contractors claim that they are presently entitled (including any question or dispute as to the amount of any deduction to be made under any provision of the Contract) the amount (if any) not in question or dispute shall be paid to the Contractors without waiting for the settlement of such question or dispute and the balance (if any) shall be paid within one month after such question or dispute has been finally settled and the amount payable ascertained."

and Clause 95 :

> " 95. No interest on retentions or payments. - Subject to the provisions of Clause 92(E) relating to overdue payments the Contractors shall not be entitled to interest on the Retention Fund or on any other retentions of payments in arrears or on any balances which may in the final settlement of accounts be found to be due to the Contractors. "

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It is contended by the Respondent that by cl. 92(D) the parties have by their agreement postponed the date at which the obligation arises on the part of the Respondent to make payment to the Claimants in the case of disputed amounts until within one month after the dispute has been finally settled. Until that time, it was argued, there is no obligation to pay, therefore no interest is to run. It was submitted that cl. 95 merely says expressly what is implied in cl. 92(D); that these clauses have, therefore, clearly taken away the power of the arbitrator to award interest, assuming he had this power before. Learned counsel for the Respondent submitted that on a proper interpretation of the contract the Claimants are not entitled to interest on any amount awarded by the arbitrator for periods prior to the date of his award.

The contention based on cl. 95 is that disputed amounts of payments which are referred for settlement under the provisions of cls. 108 and 109 of the contract, when finally settled, come within the phrase "any balances which may in the final settlement of accounts be found to be due to the Contractors". I have not the slightest doubt that this contention cannot possibly be right. Apart from the fact that it is impossible to believe that the Claimants would expressly deprive themselves of interest on the claims which they dispute while interest is payable on undisputed overdue amounts under cl. 92(E), the words in the phrase clearly do not include amounts ascertained after the settlement of disputed claims. It would be strange indeed if the parties used this oblique method of including disputed amounts in the clause when they could have included them expressly, as they did with other outstanding payments. In my opinion, in their context, the words in the phrase refer to miscellaneous amounts which, through errors or omissions or otherwise, were not /....

claimed at the proper time but which are discovered to be outstanding when the accounts are being finally settled. It is easy to see the reason why, like the Retention Fund and other retentions, no interest should be payable on these amounts so found due.

I do not think that it is a correct interpretation of cl. 92(D) to say, as contended, that it postpones the date at which the obligation arises on the part of the Respondent to make payment of disputed amounts. The clause starts off by referring to the amount of any payment "to which the Contractors claim that they are presently entitled". Note the word "presently". As far as the Claimants are concerned, that surely must be the time when the obligation to pay arises. Since the Respondent, or those acting on its behalf, the dispute/claim, it has to be ascertained whether the Claimants are in fact entitled to the amount claimed or any part of it. Clauses 108 and 109 are, accordingly, resorted to in order to decide the issue. If the issue was being settled by a court, the law would regard the obligation to pay as arising, not when the amount is ascertained, but, by relation back, at the time when the Claimants claimed they were entitled to be paid. This is the rationale for the enactment in s. 3(1) of the (U.K.) Act of 1934 and, it must be assumed, for that in s. 3 of the Act of 1955 (see Jefford v Gee (supra) pp. 1205, 1206). The legal position is no different when the issue is decided by an arbitrator (see the Chandris case). That is the position in this case, unless Cl. 92(D) says otherwise. In my opinion, it does not. What the clause says in the end is that the amount ascertained shall be paid within one month after the dispute has been finally settled. In my view, this does not mean that the amount is not "payable" until then. Indeed, the words at the end

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of the clause - "after such question or dispute has been finally settled and the amount payable ascertained" - show clearly, in my opinion, that what is settled is a dispute about the amount payable; payable in the past and resisted, hence a dispute which has to be settled, not payable in the future, as contended.

What I have said, so far, sufficiently disposes of the Respondent's contention based on cl. 92(D). But it is interesting to see what would result if I am right in the answer I gave to ques. 11 and the contention of learned counsel for the Respondent is right that cls. 92(D) and 95 precludes the award of interest by the arbitrator. In respect of undisputed amounts, interest is payable on payments which are overdue for two months (cl. 92(E)). Disputed amounts must be referred for settlement. If the matter has to go on appeal to the arbitrator, cl. 108(B) says that the appeal shall not be proceeded with until after the issue of the Completion Certificate, unless the Consulting Engineers shall so agree. So, in the absence of agreement by the Consulting Engineers, the Claimants must wait for payment of amounts to which they say they are "presently" entitled until after the Works have been completed and the Consulting Engineers issue their certificate, under cl. 97(B). Yet when they substantiate their claim they can get no interest. Clause 92(D) does not even say, as cl. 92(E) does, that if payment is not made within one month notice may be given and interest then becomes payable.

I agree with the submission of learned counsel for the Claimants that the general power of the arbitrator to award interest, if it exists, cannot be taken away by the contract unless it is done either expressly or by necessary implication from words used in the contract. The parties

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were careful to make precise provisions for the payment of interest on overdue payments. They included cl. 95, which showed the amounts on which no interest is payable. If it was their intention that no interest should be paid on awards in respect of disputed claims one would have expected them to say so expressly in cl. 95. The careful provisions of cls. 92(E) and 95 with respect to the payment of interest are to be compared with the provisions of cl. 92(D), in which no mention of interest is made. It could well be argued that this silence, which can only be said to be deliberate in the circumstances, is indicative of the recognition by the parties, and their intention, that the general law governing the payment of interest would, and should, apply to disputed amounts which go to arbitration for settlement. However that may be, I hold that there is nothing either in cls. 92(D), 95, or any other clause to which I was referred which excludes the arbitrator's power to award interest on any of the amounts which in his award be found to be due to the Claimants from the Respondent. In my judgment, the answer to ques. 12 is in the negative.

- THE MOTION -

The Claimants applied for the award to be set aside and/or remitted in part on the grounds that :

(a) the award is upon its face erroneous, uncertain and/or contradictory ; and/or

(b) the arbitrator misconducted himself.

The motion set out in ten paragraphs the particular allegations upon which the grounds were based. Paras. (i), (ii), (ix), and (x) were not argued. Para. (i) was not argued because of the concession made by the Respondent in respect of ques. 3 of the Special Case. Para. (iii) was abandoned because of the Respondent's concession in respect of ques. 9 and para. (v) was also

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abandoned.

At the commencement of the hearing of the motion, application was made to delete para. (vi) of the particulars and to substitute therefor a new paragraph. Prior notice of the application was given in writing. The new paragraph alleged misconduct, with error on the face of the award and uncertainty as alternatives. Full particulars of the Claimants' contention in support of the allegations in this paragraph were given in writing as part of the proposed amendment. These particulars indicated that the Claimants proposed to rely, in support of their contention, on "the Coopers and Lybrand Report". Objection to the amendment was made on behalf of the Respondent insofar as it was sought to make reference to the Coopers and Lybrand report.

In para. 9 of the recitals to his award, the arbitrator stated that on September 11, 1973, by consent of the parties, he ordered that there be an investigation into and a report on the amount of the Claimants' claim by Messrs. Coopers and Lybrand, Chartered Accountants of London. It is this report to which the Claimants wished to refer and to which the Respondent objected.

It was submitted for the Claimants that the Coopers and Lybrand report could be looked at :

(a) because of the allegation of misconduct; and

(b) because it was incorporated in the award.

Both of these contentions were disputed on behalf of the Respondent. I reserved the point regarding the allegation of misconduct for further argument later in the proceedings and ruled on the point regarding incorporation. I had not the least difficulty in holding that the report was not incorporated in the award.

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Apart from the reference in para. 9 of the recitals, the only other reference to the Coopers and Lybrand report is in the introductory paragraph of the operative part of the award where the arbitrator said: "Now I, the said Sir Duncan Anderson ....., having taken upon myself the burden of this Reference and having heard and considered the said evidence and the Submissions of Counsel and the Report submitted to me by Messrs. Coopers and Lybrand aforesaid DO HEREBY MAKE THIS MY AWARD as follows:" In para. 11 of the recitals it was stated that "all documents specifically referred to and identified in this award and the appendices thereto are deemed to be incorporated in this award". The contract and the pleadings were also expressly incorporated.

The argument put forward for the Claimants was that the recitals are part of the award and since the Coopers and Lybrand report is specifically referred to, as indicated, it is expressly incorporated by the words "in this award" in para. 11 of the recitals. I do not agree. In my opinion, the words "in this award", which occur in four places in para. 11, refer in their context to the operative part of the award. Though the report is referred to a second time in the introductory paragraph, as I have indicated, that paragraph must be regarded as part of the recitals, especially in view of the words in capital letters which indicate quite clearly that the operative part of the award commences thereafter.

Nor can the report be said to be impliedly incorporated by reference. The fact that the arbitrator indicated that he considered it is not sufficient. He also indicated that he considered the evidence and the submissions of Counsel but the authorities make it quite clear that these are not matters at which a court can look for error on the face of an award. I

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was referred to a number of authorities but it is sufficient to refer to two only of them on this question of implied incorporation. In D.S. Blaiber & Co. Ltd. v Leopold Newborne (London) Ltd. (1953) 2 Ll.L. Rep. 427, Somervell, L.J. said, at p. 429 :

> " Having regard to those two cases, one on one side of the line and one on the other, I am clear myself that in this case we are not entitled to look at the contract. It is referred to generally in the recital and I do not think it would make any difference if it had been referred to generally in the award or in matters introductory to the finding which was not in form a recital. "

Romer, L.J. said at pp. 429, 430 :

> " I am quite satisfied, in view of the observations of the Privy Council and of Lord Russell of Killowen and Lord Wright in the House of Lords in the two cases to which my Lord has referred, that where you merely have in a recital to an award, as here, a reference in general terms to a document, then the Court is not entitled to look at the document itself upon an application to set aside the award as being bad in law on the face of it. "

In Nils Heime Akt. v. G. Merel & Co. Ltd. (1959) 2 Ll.L. Rep. 292 at p. 295 McNair, J. said :

> " I think it is clear, on the authority of the decision of the Court of Appeal in D.S. Blaiber and Co. Ltd. v. Leopold Newborne (London) Ltd. (supra) that the mere fact that the contract is referred to in the award, especially if it is referred to in a recital to an award, does not make that contract a document which is incorporated in the award so that the Court can look at it for the purposes of seeing whether there is an error of law. "

For the above reasons, and relying on the authorities cited, I ruled that the Coopers and Lybrand report was not incorporated in the award and could not be looked at in support of the allegation of error on the face of the award. Subject to this, leave to amend the motion was granted.

I next had to decide, as a preliminary issue, whether the allegations of misconduct contained in the motion were such as to allow the Claimants, in support of the allegations, to refer to affidavit evidence and to documents, including the Coopers and Lybrand report, which were not incorporated in the award. This

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issue arose on an application made by the Respondent to strike out parts of affidavits filed by the Claimants in support of the motion which showed that it was intended to refer to such evidence and documents.

Para. (iv) of the particulars of the grounds in support of the motion made no express allegation of misconduct. It alleged that the award was erroneous and/or contradictory and/or uncertain and gave details of the allegations. Learned counsel for the Claimants, however, prepared a summary of the contentions of misconduct to be made in support of the motion and in respect of para. (iv) the summary showed that it was intended to contend that the arbitrator misconducted himself in making a gross error in calculating his award; alternatively, in making an award calculated in a manner which contradicted the basis upon which he found the award should be calculated. Reference has already been made to the allegation of misconduct in para. (vi). The summary showed the nature of misconduct in this paragraph to be :

(a) in failing to make an award on the basis of quantum meruit although he had expressly found that the Claimants were entitled to such an award ;

(b) in disregarding admissions made by Respondent's counsel in the course of his closing address;

(c) in making an award said to be on the basis of quantum meruit which contained no sum in respect of profit, alternatively, a sum grossly inconsistent with that in another part of his award on a similar basis; and

(d) in awarding a sum which included a claim abandoned by the Claimants but which disregarded claims admitted by the Respondent.

Para. (viii) alleged error and/or misconduct in respect of a finding by the arbitrator which was said to be contrary to the weight of the evidence and/or unreasonable or perverse. In the summary, the contention to be put forward was that the finding

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referred to in para. (viii) amounted to misconduct because :

(i) it was contrary to the submissions of both parties ;

(ii) the arbitrator ignored the fact that the Respondent based its defence in a certain way (which was stated) ;

(iii) the arbitrator disregarded uncontradicted evidence ;

(iv) he disregarded admissions by the Respondent's witness; and

(v) his finding contradicted his own finding on another issue (which was stated).

In James Laing, Son and Co., Ltd. v Eastcheap Dried Fruit Co. (1961) 1 Ll.L. Rep. 142, at p. 145, Ashworth, J. said:

> " I am quite satisfied ..... that, if the ground on which a party seeks to set aside an award is that there is an error of law on the face of it, that party is by law limited in his address to the Court to the award itself and such documents as are incorporated in that award.
>
> On the other hand, in cases of misconduct, or, as I think, in cases alleging want of jurisdiction, the party challenging the award has a wider field over which he may roam. "

This statement was relied on by the Claimants for the submission that evidence extraneous to an award and incorporated documents is admissible in proof of an allegation of misconduct. For the Respondent it was contended that the statement was an obiter dictum and, in any event, is not as wide in its application as was contended for the Claimants. I agree that the part of the statement relied on by the Claimants was, strictly, an obiter dictum but I think that it accurately expresses the principle applicable to, whatI shall call, genuine cases of misconduct, (see Meyer v Leanse (1958) 2 Q.B. 371 at p. 383). It seems to me that most of the matters which can properly be regarded as misconduct in an arbitrator can usually only be proved by evidence extrinsic to the award.

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It was contended by learned counsel for the Respondent that the matters particularized above, which were alleged by the Claimants to be misconduct by the arbitrator, do not, on the authorities, constitute misconduct such as will allow evidence extraneous to the award to be admitted in support of them. A number of authorities were relied on in support of this contention. Reference was made first of all, to the statement in Russell on Arbitration (18th edn.) p. 391 that:

> " It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. "

Then a number of cases were referred to in order to show the way in which the Courts have dealt with similar allegations made to impugn the awards of arbitrators.

In Gillespie Bros. & Co. v. Thompson Bros. & Co. (1922) 13 Ll.L. Rep. 519, at p. 524, Atkin, L.J. said :

> " It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found ..... Nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award unless the error in law appeared on the face of it. "

In R.S. Hartley, Ltd. v. Provincial Ins. Co. Ltd. (1957) 1 Ll. L. Rep. 122, a motion was brought to set aside an award for misconduct in that :

(a) the arbitrator failed properly to interpret the law, as laid down in a case cited, to the facts of the claim as given in evidence;

(b) there was no evidence on which having regard to the law so laid down the arbitrator could find that the Claimants did not take reasonable steps to prevent accidents; and

(c) the arbitrator misdirected himself and failed properly to interpret and apply the law.

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Lord Goddard, C.J., held the motion to be misconceived and dismissed it. In spite of the fact that the allegations were alleged to be misconduct, Lord Goddard said that he had no jurisdiction to go into the facts and could not look at an affidavit as to facts which counsel said he had. He said that he could not go into the matter at all, that he had no findings of fact and that the award "is perfectly clean." It seems that the only reasonable conclusion from Lord Goddard's approach was that the matters alleged were not properly matters of misconduct but were such as could only avail the claimants if they appeared on the face of the award.

In Oleificio Zucchi S.P.A. v Northern Sales. Ltd. (1965) 2 Ll.L. Rep. 496 the motion to set aside the award alleged misconduct on the grounds that the award contained on its face inconsistencies, contradictions and errors of fact on material issues, that the Board of Appeal misconceived the nature of the contentions in the arbitration and wrongly decided the nature of that which was not referred to them and failed to decide the nature of that which was referred to them; and that certain findings were perverse in that no witnesses were called and no evidence was tendered on a material aspect of the case. It was submitted that the motion to set aside failed in limine, without any consideration of the merits of the points taken in the grounds, having regard to the decisions of the Courts on the meaning of misconduct in relation to an arbitrator. McNair, J, after citing the Gillespie Bros. case (supra) and Tersons, Ltd. v Stevenage Development Corporation (1965) 1.Q.B. 37, said at p. 521 :

> " The conclusions I have reached on these judgments and certain others I was referred to in the course of the argument may be summarized as follows :

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(1) the question whether there was evidence to support a particular finding can properly be raised in the form of a special case raising that as a question of law ....., and

(2) it is never possible to set aside an award merely because there was no evidence supporting a particular finding, unless it appears from the award itself that there was no evidence to support the finding; thirdly, subject thereto, the findings of the arbitrator are final, and it is of no avail to state on the grounds for setting aside the award that the findings were erroneous. "

The learned judge said further, on p. 522 :

" Now, admittedly, it is misconduct for an arbitrator to fail to decide issues in the sense of claims which have been submitted to him or to decide an issue in the sense of a claim which has not been submitted to him, but, as I see it, it cannot be misconduct for an arbitrator to wrongly decide or wrongly to state a contention or way in which a claim is put because that is not the issue which is referred to. "

Further, on the same page, he said :

" The remaining question on whether the motion fails in limine is whether it is a ground for setting aside an award on the ground of misconduct that the award contains inconsistencies and contradictions. "

After referring to Halsbury's Laws of England, Vol. 2, at p. 58, to which he was referred, and to Ames v Milward, (1818) 8 Taunt. 637 the learned judge concluded :

" It may well be the fact that if the operative part contains inconsistencies ....., then it might be set aside merely on that ground. But that is very far from saying that you can set aside an award in the form of a special case like this merely because you can find some contradictions or even inconsistencies in certain parts of the award, consisting partly of findings and partly of narrative. Accordingly, in my judgment, this motion does, in fact, fail in limine. "

Learned counsel for the Respondent referred to a statement in Halsbury's Laws of England (4th edn.), Vol. 2 p. 330, para. 622, which contradicted her contention. That paragraph deals with the matters which constitute misconduct. It begins by stating that it is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire. It

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then states that the expression is of wide import and goes on to give examples. It states that misconduct occurs "if the award is inconsistent, or is uncertain or ambiguous, or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt." Several cases were referred to in the footnotes in support of this statement. It was submitted for the Respondent that the statement is incorrect and is not supported by the authorities cited. Learned counsel referred to each of the cases cited, in turn, to bear out this submission. None supported the statement that inconsistency or uncertainty in an award is misconduct. On the contrary, they supported the Respondent's contention that these are matters which must be shown on the face of awards. I shall deal later with mistakes of fact which are "admitted or at least clear beyond any reasonable doubt."

It was pointed out by learned counsel for the Claimants that the statement in Halsbury's Laws of England referred to above has stood as the law of England since 1907 as similar statements appear in the 1st, 2nd and 3rd editions of that work. I was also referred to the names of the distinguished contributors of the material relating to arbitration in the editions in which the statement appear. The statement in each edition is obviously based on the cases cited and, with the greatest possible respect to the distinguished contributors and the antiquity of the statement, I am bound to agree that those cases do not treat inconsistencies and uncertainties as misconduct. Russell on Arbitration does not treat them as examples of misconduct. Margulies Bros. Ltd. v Dafnis Thomaides & Co. (U.K.), Ltd. (1958) 1 All E.R. 777 is one of the cases cited in Halsbury's in respect of uncertainty in an award. In that case Diplock, J. had the choice of placing uncertainty in the award, which he found to be established, in the category of misconduct, being one of the grounds for remitting an award. Instead

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he placed it in the category that the award was bad on its face, another ground for remission, which is the category into which the Respondent contends it properly falls. It is, perhaps, of some interest to observe that in the second edition of Halsbury's Laws of England, Vol. 1, para. 1133 and the third edition, Vol. 2, para. 126, an award which "is on its face erroneous in matter of law" is included as an instance in which misconduct occurs. This category is, however, omitted from the 4th edition.

It was submitted for the Claimants that the reason why in the several cases referred to in Halsbury's Laws of England "misconduct" is not used in reference to the allegations is that an award is set aside pursuant to the power given to the Court in the statutes. These statutes, it was said, express what was the common law. If the Court decides to set an award aside in a case which does not concern improper procurement of the arbitration or the award, it must follow, it was argued, that the Court finds that the facts shown amount to misconduct. That will be so, it was said, whether the Court says so or not. Reference was made to the provisions of s. 12(2) of the (Jamaican) Arbitration Act (passed in 1900) which are, in terms, identical to those of s. 11(2) of the (U.K.) Arbitration Act of 1889. These provisions are as follows :

> " Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside. "

This submission of the Claimants is historically incorrect. It assumes that the only ground, apart from improper procurement, upon which an award can be set aside is misconduct of the arbitrator and that the power to do so is now exclusively statutory. The historical development of the power as seen in the cases shows that the submission is not correct. Parker, L.J. dealt with it in Meyer v Leanse (supra) when, at p. 380, he said:

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> " Accordingly, I pass to the first, and the more interesting, I think, of the points involved, namely, whether the county court judge under the section has a wider discretion than has the High Court in regard to the setting aside of an award such as this. As I have already said, this power to set aside first appeared in the Act of 1846 and in substantially the same form. At that time the position of the higher courts in regard to awards was, I think, this. The only statutory power to set aside was to be found in the Arbitration Act of 1698 in these terms: "And be it further enacted by the authority aforesaid that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity. " At the same time the court had always exercised its inherent jurisdiction at common law to set aside an award for misconduct. That inherent power was made statutory in the Arbitration Act of 1889, and in 1802, as the county court judge points out, in Kent v Elstob ((1802) 3 East 18), the Court asserted power to set aside awards for errors of law. "

As I understand this passage, in 1846, apart from the statutory power to set aside contained in the Act of 1698, the courts exercised an inherent jurisdiction to set aside an award on two separate grounds, viz. (a) misconduct; and (b) errors of law. That the ground of error of law is a separate and distinct ground for setting aside an award from that of misconduct is made clear in other cases. In Hodgkinson v Fernie (1857) 3 C.B. (N.S.) 189, at p. 202, Williams, J. said :

> " Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The Court has invariably met those applications by saying, "You have constituted your own tribunal; you are bound by its decision". The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. "

(The underlining is mine). Presumably, corruption or fraud there is what Parker, L.J. referred to as "misconduct". Willes, J., in the same case said, at p. 205 :

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> " It is quite clear, that, before the passing of the last Common Law Procedure Act, the court could not, as a general rule, interfere with the discretion of an arbitrator. An exception had been introduced in the case of a mistake of law apparent on the face of the award. "

In R v Northumberland Compensation Appeal Tribunal. Ex parte Shaw, (1951) 1 K.B. 711, Lord Goddard, C.J. in the Divisional Court, referred, at p. 716, to a passage in the judgment of Lord Greene, M.R. in Racecourse Betting Control Board v Secretary of State for Air (1944) Ch. 114 in which Lord Greene stated to be "unquestionably correct" the proposition that "the jurisdiction to set aside the award of an arbitrator for error of law appearing on the face is one that exists at common law independently of the Arbitration Acts". When the former case went on appeal (vide (1952) 1. K.B. 338), Denning, L.J. put the matter under discussion here very clearly when he said, at p. 351 :

> " If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see 9 and 10 Will. 3, c.15. At one time an award could not be upset on the ground of error of law by the arbitrator, because that could not be said to be misconduct or undue means ; but ultimately it was held in Kent v. Elstob that an award could be set aside for error of law on the face of it. This was regretted by Williams, J. in Hodgkinson v. Fernie, but is now well established. "

In Russell on Arbitration (18th edn.), the learned author, having referred to the statutory power to set aside an award, says, at p. 349:

> " The court has further an inherent power to set aside an award which is bad on its face :either as involving an apparent error in fact or law, or as not complying with the requirements of finality and certainty. "

That error of law or fact on the face of an award is a ground for setting the award aside, separate and distinct from the statutory ground of misconduct, and has been so recognized since the decision in Kent v Elstob (supra), is clear

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beyond doubt. There are numerous cases in the books in which applications have been made to set aside or remit awards on this ground. Indeed, the very motion in this case recognises it as a ground separate from the statutory ground of misconduct by stating that the grounds of the application "are that by reason of the matters hereinafter set out :

(a) The said award is upon its face erroneous uncertain and/or contradictory; and/or

(b) The said Arbitrator misconducted himself. "

The reason given by counsel for the Claimants why in the cases referred to in Halsbury's Laws of England "misconduct" is not used is, therefore, not a valid reason. The vast majority of those cases show that the relevant allegations were dealt with by the courts on the basis that they failed unless the alleged inconsistency or uncertainty appeared on the face of the award or incorporated documents.

There is authority to support the Claimants' contention that it is misconduct for an arbitrator to make a gross error which results in a substantial miscarriage of justice, which is one of the allegations made in this case. The authorities will have to be examined in order to decide whether this ground of misconduct is limited to gross errors admitted by the arbitrator, as the Respondent contends, or is unlimited in its application, as the Claimants contend, and can be proved otherwise than by affidavit of the arbitrator. This examination of the authorities will also embrace the submission by the Claimants that if a clear mistake which will result in injustice is shown by affidavit an award will be set aside on that ground. It was also submitted that it is misconduct to make a drastic mistake and show it on the face of the award but this is purely academic as such a case would properly fall under the ground of an award being bad on its face.

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In In re Hall and Hinds (1841) 2 M.&.G. 847, Hall admitted a balance due from him to Hinds. On investigation by arbitrators of accounts in writing to discover whether the amount due exceeded the admitted sum, the three arbitrators found a further sum due. Instead of adding the two sums together, by mistake, they deducted the smaller from the larger and, by another mistake, awarded that the difference should be paid by Hinds to Hall. Two of the arbitrators admitted their mistake on affidavit, on the basis of which application was made to set their award aside. Hall resisted the application, contending that the award being good on its face the court had no power to interfere. During the argument on the application, Tindal, C.J. asked the Solicitor General (Wilde), who appeared in support of the rule, whether it was impossible to have an agreement to send the case back to the arbitrators and was told that it was. By the end of his argument, however, the Solicitor General indicated that he had been consulting with Serjeant Channel, who appeared for Hall, and they hoped to come to an arrangement before Monday. No arrangement was come to and it was in those circumstances that Tindal, C.J., delivering the judgment of the court, held what had occurred to be misconduct on the part of the arbitrators "in the judicial sense of that term" and set aside the award. I have set out the background to the decision of the court in full so that the circumstances in which the decision came to be given, and comments on the decision in subsequent cases, can be fully appreciated.

At the time when the decision in re Hall and Hinds was given, an award could only be set aside for mistake if it was apparent on the face of the award. The admitted mistake was not so apparent and Tindal, C.J. must have realised the difficulty why he enquired whether the parties would not consent to the award being sent back. To allow the award to stand would have

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caused grave injustice to Hinds. When Hall, dishonestly, would not consent, the court said that in the circumstances it must have some power to give a remedy and "it would really bring the administration of justice, in this particular instance, into scandal and contempt, if such remedy were wanting, or, if existing, it were not applied" (vide p. 852 of the report); the more so as Hinds would have no defence to an action on the award. The only category into which the circumstances could be placed was misconduct, the only other ground upon which, at that time, an award could be set aside. The basis upon which the case was put into this category must be noted. The Solicitor General, in supporting the rule, had cited authority for the contention that gross mistake, either apparent on the face of the award or to be made out by evidence, was one of the grounds for setting awards aside. He cited Anderson v Darcy, 18 Ves. jun. 447 and the statement of Lord Eldon in that case that "the rule as to mistake is, that where there is clear and distinct evidence of mistake, the nature of it, and that it was made out to the satisfaction of the arbitrators - as to which Lord Thurlow in Knox v Symmonds insisted upon having their affidavits - courts both of law and equity will interfere, the one by setting aside the award, the other by refusing to make it a rule of court." Tindal, C.J., on this background, was careful to indicate the limits of the precedent the court was setting. First, the court considered the mistake to be "a mere clerical mistake" by which the arbitrators had expressed "not the intention of their own minds, but one widely different". Secondly, the "mistake and act of carelessness" was held to be so gross as to amount to gross negligence which, it was said, "approximates to, and in many instances cannot be distinguished from, dolus malus, or misconduct." Thirdly, the court was careful to say "we think we do not extend the jurisdiction of the court beyond its proper

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limits, when we give relief in a case under these very peculiar circumstances" (the underlining is mine). This is the authority upon which the Claimants rely for the contention that gross error is misconduct. The limits which the court itself placed upon its decision clearly do not bear out the unlimited application of this ground of misconduct for which the Claimants contend.

In Phillips v Evans (1843) 12 M. & W. 309, a similar mistake was made as in In re Hall and Hinds (supra). An admitted debt by the defendant was overlooked by the arbitrator in his award, which resulted in the defendant's plea of set-off succeeding. The plaintiff applied to set aside the award. There was no affidavit from the arbitrator but an affidavit was filed on behalf of the plaintiff in which it was stated that the arbitrator had admitted the mistake. The application to set aside was resisted on the ground that the court will not set aside an award on the affidavit filed. It was conceded that "it might be otherwise" if the mistake had appeared in the award itself or from a letter or statement from the arbitrator himself. In support of the application it was submitted that the arbitrator was guilty of "that species of legal misconduct with which the court will interfere." Reliance was placed, for this submission, on In re Hall and Hinds which, it was said, "is an authority to show that where a gross mistake is made by an arbitrator, though not apparent on the face of the award, the court will sometimes set aside the award, as for misconduct of the arbitrator." Parke, B. observed, arguendo at p 311, that In re Hall and Hinds "is the first case in which gross negligence on the part of the arbitrators has been held a ground for setting aside an award." It was submitted, further, that as it appeared that the arbitrator had made some mistake, which had no reference to the exercise of his judgment upon any facts before him, the court will consider

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that he has been guilty of something which, in a judicial sense, amounts to misconduct. In his judgment, Parke, B. referred to the fact that in In re Hall and Hinds the error committed appeared from the affidavits of the arbitrators and continued, at p. 312:

> " I do not mean to say that the decision of the Court of Common Pleas in that case was not correct, as it was founded on facts which showed a clear mistake; but I feel extremely unwilling to enlarge that rule. Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not open a door to inquire into the merits, or we shall have to do so in almost every case. "

Alderson, B. said, at pp. 312, 313 :

> " If this case were precisely like the case in the Common Pleas, I do not say that I should not arrive at the same conclusion; but it is very different, for here there is only the affidavit of one of the parties that the arbitrator admitted he had made a mistake. Parties who submit their cases to references know that arbitrators are not infallible; they consent to take them with all their faults. In this case, from what has been stated, we may suspect that a mistake has been committed by the arbitrator, but we cannot be certain that that is the case, and therefore it is safer to abide by the general rule of not allowing awards to be set aside for mistakes. The door to inconvenience has been a little open by the case in the Common Pleas, but I am not disposed to open it further. "

Here is clear authority in support of the restricted application of the decision in In re Hall and Hinds and of the Respondent's contention that this specie of misconduct is limited to gross errors admitted by arbitrators.

In commenting on the judgments in Phillips v Evans (supra), learned counsel for the Claimants said that the rule which Parke, B. (at p. 312) was not going to enlarge was that where it is shown that there is a clear mistake the court will set the award aside. It was submitted that an application to set aside founded on facts which show a clear mistake will succeed and that this is so even though there is the principle of not allowing awards to be set aside for mistakes. It was submitted that the statement in

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successive editions of Halsbury's Laws of England that a mistake will not result in an award being set aside unless it is admitted by the arbitrator or is clear beyond reasonable doubt is supported by Phillips v Evans. I respectfully disagree with these submissions. In my opinion, the statement of Parke, B. about "clear mistake" and his willingness to enlarge the rule referred respectively to the nature of the evidence by which the mistake was established in In re Hall and Hinds and the particular grounds for the decision. I do not interpret what he said as establishing a principle that a clear mistake, however proved, will be allowed to rank as misconduct or will be a ground for setting aside an award. This would be inconsistent with what he said immediately after about refraining from an inquiry into the merits at the expense of doing injustice in particular cases. It must not be forgotten that the affidavit filed by the plaintiff stating that the arbitrator had admitted the mistake was uncontradicted. In a civil case this is usually sufficiently clear proof of a fact. Alderson, B's remarks in his judgment support the intention to limit the rule to cases where the arbitrator himself gave proof of the mistake.

Nine years earlier, in Ashton & ors. v Pointer (1834) 2 Dowl. 651, 652, Parke, B. said: "You can only move on the legal ground. You cannot move on the facts, unless so glaringly wrong as almost to amount to misconduct in the arbitrators." This statement was cited as supporting what the learned Baron said in Phillips v Evans (supra) about clear mistake. In my opinion, the views expressed by Parke, B. in this latter case are entirely inconsistent with his earlier statement. He could not have regarded his earlier statement as laying down any broad general principle that glaring mistakes, however proved, amount to misconduct. Facts "glaringly wrong" and "gross error" as in In re Hall and Hinds are probably synonymous and Parke, B. confirmed his views as to the limit of the decision in the In re Hall and Hinds

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case when in Hagger v Baker (1845) 14 M.& W. 9 at p. 10 he said: "We had occasion to consider the case In re Hall and Hinds in a recent case in this Court, Phillips v Evans, and we declined to carry it any further. "

In pursuing the argument that a clear mistake may be proved otherwise than by admission of the arbitrator, learned counsel referred to In re Robson and anor, and Railston (1931) 1 B.& Ad.722 in which an admitted sum was left out of account by arbitrators in their award. This mistake was not disputed. The award was held bad. The report of the case is silent as to the source of the proof of the mistake and it was submitted for the Claimants that it does not appear that this error was one proved by affidavit of the arbitrators. This case was, however, referred to in Mills v Master etc. of Society of Bowyers (1856) 3 K. & J.66 at p. 73 and there it is stated that the arbitrators had admitted their mistake by affidavit.

Hutchinson v Shepperton & ors. (1849) 13 Q.B. 955, was another case of omission by an arbitrator to award an admitted sum. The award was set aside. The case was another relied on by the Claimants for the contention that if affidavits show a clear mistake which will result in injustice the award will be set aside. In his judgment, Lord Denman, C.J. (at p. 958) referred to the "strong expressions" by Parke, B. in Phillips v Evans "which seem to indicate that no mistake of an arbitrator can ever be a sufficient ground for setting aside an award". He then continued:

> " Though fully sensible of the propriety of observing the greatest caution with regard to this subject, to avoid inquiries which would unravel by-gone transactions and keep alive the litigation which the parties had hoped to terminate by reference, we cannot think the rule universal and subject to no exception. It is at most one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless. "

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With all due respect, it does not seem to me that what the Lord Chief Justice said about Parke, B's. expressions is a fair summary or interpretation of what the learned Baron said in Phillips v Evans. However that may be, Lord Denman's judgment did not, in my opinion, lay down any principle of general application regarding mistakes amounting to misconduct. It cannot be said that this case extends the limit any farther than the earlier cases did. It was another case in which the application was supported by the arbitrator's affidavit, which set out the circumstances in which the mistake was made. When the error was brought to the defendants' attention they refused their consent to the award being amended. The reasons for the court's decision followed closely that in In re Hall and Hinds, which the court said, at p. 959, "is a clear precedent for our taking this course". The reasons were given by Lord Denman in these terms at pp. 958, 959 :

> " If awards are allowed to be questioned under any circumstances, it may be difficult to draw a line: but a line must be drawn somewhere; and this case will certainly not be found to fall within it, wherever drawn. If the Court might with propriety have refused that application in the first instance, yet, the rule having been granted on affidavits clearly setting forth without contradiction a case of gross injustice, which the Court has power to remedy, we ought not to sanction that injustice. "

It was submitted that neither in Phillips v Evans nor in Hutchinson v Shepperton did the court say that the mistake can only be proved by the affidavit of the arbitrator. It was said that what they said is that the matter must be satisfactorily brought before the court. The courts in the two cases may not have said expressly that the mistake must be proved by the arbitrator's affidavit; but it was clearly implicit in the decision in the earlier case and the latter must be read and understood on its own special facts, where the mistake was proved by the arbitrator's affidavit which was uncontradicted, and it was, therefore, unnecessary for the court to say anything about the proof of the mistake.

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In Mills v Master etc. of Society of Bowyers (supra), on a motion to set aside or remit the award, objection was taken to the reading of any affidavits to impeach the award. Affidavits had been filed on both sides. Vice-Chancellor Sir W. Page Wood, in ruling on the objection, referred to Fuller v Fenwick (3 C.B. 705) and Hutchinson v Shepperton (supra) and said that the cases seem to show that affidavits were allowed to be read on such applications, and that he could not exclude them (vide p. 70).

It was submitted for the Claimants that it is clear from this case that affidavit evidence is admissible in the type of case now under consideration. The report of the case, however, shows (at p. 68) that the first ground of objection to the award was that the umpire had improperly held communications with some of the agents of the company. This is clearly an allegation of misconduct which enables a court to look beyond the award. In addition, immediately after the ruling had been made on the objection, counsel for Mills, the applicant, stated (at p. 70) that the "award is impeached not on account of any mistake of law or fact, but because the arbitrators have not followed the order of the Court." The Vice-Chancellor's judgment removed any doubts as to the use to which the affidavits in the case could be put. He said, at p. 73 :

> " I do not find any case in which the Court has gone behind the award, except where there has been an admitted mistake on the part of the arbitrators; and when I say admitted mistake, if I am not in error, all the authorities cited this morning are to this effect, that it must be a mistake admitted by the arbitrators themselves. I have not yet found an authority in which the parties litigant have been allowed to go into the proceedings of arbitrators in any other respect; except it be the misconduct of the arbitrators in dealing with the matters submitted to their reference. "

It was said for the Claimants that this passage is obiter dictum because it was unnecessary to go into the question whether the

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mistake could have been proved by other affidavits as there was an affidavit by the arbitrator. It does not seem to me that what the learned Vice-Chancellor said was obiter dictum. He had already disposed of the objection to the award that there was communication between the umpire and some of the agents of the Bowyers' Company and was then dealing with what he said was the main part of the case "which is with regard to the alleged error on the part of the arbitrators." What he said in the passage quoted was apparently in answer to a contention put forward on behalf of the applicant because the passage is introduced by the words : "I do not find among the authorities any case in which an award has been so dealt with, either before or since the statute - whether the provision I have referred to was contained in the submission or not." And the pains which the Vice-Chancellor took to say, later in his judgment, that the arbitrators' affidavits were the only ones he took into account seems to suggest that there were other affidavits which he was invited to look at in support of the ground with which he was then dealing. In the result the award was remitted for reconsideration because of admitted error by the arbitrators.

The Claimants placed great reliance on Flynn v Robertson (1869) L.R. 4 C.P. 324. Application was made by motion in that case to remit the award of the master who, in making his award in favour of the defendant, forgot a payment made to the defendant by the plainfiff. Both parties admitted the mistake and the master stated, not by affidavit, how the mistake arose. In re Hall and Hinds was relied on on the basis that the master's statement was equivalent to an affidavit by an arbitrator. The award was remitted. Bovill, C.J., after citing words of Tindal, C.J. in In re Hall and Hinds and a passage from the judgment of Lord Denman in Hutchinson v Shepperton, said in his judgment, at p. 326 :

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> " It seems to me that judgment (Lord Denman's) lays down the correct rule, and that the Court has a discretion to send back an award to the arbitrator where the mistake is clear, and especially if it is admitted by the arbitrator as it is here; indeed, in such a case the Court are bound to do so. "

This passage is relied on for the proposition that once a mistake is clear, however established, there is power to set aside or remit. Insofar as this can be inferred from what was said, it was an obiter dictum and, in my opinion, is not supported by the case which it is said laid down the rule. The supporting judgments were more guarded, for preservation of the general rule. Montague Smith, J. said, at p. 327 :

> " I do not wish to shake the general rule that courts will not review the judgment of an arbitrator either in fact or law: but I think this rule should be made absolute, not on the ground that the master's judgment was erroneous, but because there was a mistake in the conduct of the reference on his part which has prevented his giving expression to his judgment on the matter, and led to an error which is clearly proved, and is admitted by both parties. "

It should be noted that the error was regarded as clearly proved because the master showed how it arose. It should also be observed that the judgment was "not on the ground that the master's judgment was erroneous." Bovill, C.J. said, arguendo, at p. 324: "I understand the arbitrator has made a mistake in drawing up his award, not that he has come to a wrong judgment on the case." Brett, J., the third member of the Court, obviously agreed to remit the award on the basis of admitted mistake. He also was of the view that it could be said that the master had not really adjudicated on the facts, not having applied his mind to them, so this brought the case within the decision in Hutchinson v Shepperton (vide p. 327).

In my opinion, the authorities establish beyond doubt that the ground of misconduct for gross error on the part of an arbitrator which arose from the decision in In re Hall and Hinds

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is limited in scope to errors admitted by the arbitrator. Reference was made to the principle that previous decisions of the courts in these cases are to guide a court in the exercise of its discretion and are not to be taken as restricting its jurisdiction. The decision in In re Hall and Hinds, however, set a precedent and one can only see the limits of the precedent by looking at the decision itself and the way in which it has been applied in subsequent cases. This ground for setting aside or remitting an award has come to be recognized and treated as a separate ground from misconduct. It is regarded in the cases as an exception to the rule that an award will not be set aside for mistake or error unless the mistake or error appears on the face of the award or incorporated documents. It is so treated in Russell on Arbitration (see p. 370 of the 18th edn.). In Attorney General of Manitoba v Kelly & ors. (1922) 1 A.C. 268, Lord Parmoor, delivering the considered opinion of the Board of the Privy Council, said, at p. 281 :

> " In a submission, in which the parties have agreed that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the court to review his decision. "

This passage exemplifies the way in which the rule laid down in In re Hall and Hinds is regarded in the cases.

I do not think that the reason for limiting the rule as the cases have done is far to see. The over-riding principle applied throughout the cases is that the finality of awards of arbitrators must be preserved. Care is, therefore, taken to prevent the re-opening of issues already decided on the ground of mistake, where to do so will revive the controversy between

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the parties. Where it is alleged that a mistake appears on the face of an award the issue which arises on the allegation is whether or not there is a mistake which so appears. It does not involve a re-examination of what transpired at the arbitration proceedings. It does not revive the controversy which the arbitrator heard. In the case of mistakes admitted by arbitrators, the mistake, though not apparent on the face of the award, is shown and established without controversy. During the argument in Phillips v Evans (supra), when reference was made to In re Hall and Hinds, Rolfe, B. said at p. 312:

> " There it was done because, without controversy, a mistake had been committed ..... "

Alderson, B. following, said :

> " If we were to enter into the question of merits on affidavits, in nine cases out of ten it would be argued there was some mistake. "

If an alleged mistake is not apparent on the face of the award or incorporated documents, and is not admitted by the arbitrator, the question whether there is mistake or not, if contested will "open the door to inquire into the merits" (see Parke, B. in Phillips v Evans (supra) at p. 312). This would destroy the principle of finality in awards.

I do not understand the authorities as establishing as a separate ground for impugning an award, a clear mistake not shown on the face of an award and not admitted by the arbitrator but proved by extraneous evidence. References to "clear mistake" in the authorities were usually in the context of the application of the rule in In re Hall and Hinds and, in my opinion, have no wider limits than that rule. The submission before me based on those cases is caught by what was said in the Attorney-General of Manitoba case, (supra) (at p. 281) that courts will not inquire whether the conclusions of an arbitrator are right or wrong unless an error appears on the face of the award or

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incorporated documents or the arbitrator himself admits a mistake.

The Claimants contended that it is misconduct for an arbitrator to disregard admissions made before him and to disregard uncontradicted evidence, as it is alleged the arbitrator did in this case. As authority for this contention Societe Franco-Tunisienne D'Armement-Tunis v Government of Ceylon (1959) 1 W.L.R. 787 was cited. There was, in that case, a motion to set aside or remit an award on the ground of excess of jurisdiction and of technical misconduct, i.e. one of the parties had no opportunity of making submissions on a new development in the case, which the umpire did not communicate to them. It was held by the Court of Appeal :

(1) that the umpire had exceeded his jurisdiction in awarding a sum not claimed ;

(2) that he had not exceeded his jurisdiction in disregarding an admission of liability by one of the parties ;

(3) that he had, however, misconducted himself in a technical sense - the proceedings were unsatisfactory and contrary to natural justice.

It was contended that this case is authority that where an admission is going to be disregarded by an arbitrator, he should make clear his intention to the parties. In my view, the case is no authority for such a proposition. There is no statement in the case capable of supporting it. Disregard of admissions arose in In re Hall and Hinds, Phillips v Evans and Hutchinson v Shepperton (all supra). In the latter two cases it was not regarded as misconduct and though in the first named it was so regarded it was, and had to be, proved by the admission of the arbitrator. On the authorities, disregarding uncontradicted evidence is clearly not misconduct as would allow extraneous evidence to be introduced to attack an award.

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As, what I will call, a sweeping up submission, it was contended for the Claimants that it is misconduct for an arbitrator to act contrary to the express or implied terms of his appointment. Alternatively, it is misconduct to mishandle the arbitration in such a way as is likely to amount to a substantial miscarriage of justice. Arising from these alternative contentions, it was submitted that because it is an express or implied term of any arbitration agreement that the arbitrator will award finally on every matter submitted to him, it is misconduct not to award finally on every matter. For a similar reason it was submitted that it is misconduct if an award is uncertain or inconsistent. It was submitted, further, that it must be implied in every arbitration agreement that the arbitrator will act fairly and carefully between the parties. It follows from this, it was said, that it is misconduct not to award an admitted claim, to act with gross negligence, to make a clear mistake, to fail to act on admissions made by one party, to fail to act on uncontradicted evidence and to be uncertain and unfair in his award. For a similar reason, error of law or mistake in findings of fact on the face of an award were said to be species of misconduct, as these are simply examples of a failure to comply with the requirements for a valid award, which, in accordance with "the modern definition of misconduct", amounts to misconduct. From terms to be implied in an arbitration agreement as to procedure, it was submitted that the disregard of uncontradicted evidence would be a departure from the normal rules for the administration of justice and in the case under consideration may amount to misconduct on this ground.

It will be seen that these submissions cover the whole gamut of matters which the authorities have held must be shown on the face of an award or incorporated documents before the award can be impugned by them. If these contentions and submissions are right, in spite of the authorities, and all these matters may properly be classified as misconduct then evidence extraneous

to the award may be admitted to prove them. This is the whole purpose of the exercise of seeking to have them so classified.

Two cases were cited in support of the alternative contentions from which the submissions flowed. For the first contention, reliance was placed on London Export Corporation Ltd. v Jubilee Coffee Roasting Co. Ltd. (1958) 1 All. E.R. 494. In that case there was a motion to set aside an award of a board of appeal, who heard an appeal from the award of an umpire, on the ground that the presence of the umpire at the deliberations of the board was an irregularity in procedure amounting to misconduct. Diplock, J, held that it was a necessary implication from rules regulating the procedure on appeal that the umpire was to have no influence on the board of appeal in reaching their decision and that the board had no right to allow him to attend their deliberations after the conclusion of the hearing. His presence there was held to be a breach of an implied term of the arbitration agreement and the award was, as a result, set aside.

It must be noted that the main contention in the case was that the proper procedure had not been followed in the arbitration and that this entitled the applicants to have the award set aside. It is in this context that Diplock, J. made the pronouncements on which the Claimants rely. The learned judge dealt (at p. 497) with the tasks of the court when asked to set aside an award on this ground. He said that the first task is to construe the arbitration agreement in order to ascertain to what procedure the parties have agreed. Where the award has been made by the arbitrator in breach of the agreed procedure, the applicant is entitled to have it set aside "not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have not agreed to be bound by an award made by the procedure in fact adopted." When the arbitration

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agreement has been construed and no breach of the agreed procedure found there may nevertheless arise a second and quite separate question: that is, whether, as a matter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced and ought, therefore, to be set aside. Diplock, J. then dealt with express and implied terms. He said, at p. 498 :

> " If my analysis is correct, it follows that where the court in a case such as this is engaged in its first task of construing the arbitration agreement it must first look to see if there is an express term authorising the particular procedure impugned. If there is such an express term, it will not set aside the award except on grounds of public policy, which may include violation of the rules of natural justice in the strict sense in which I have sought to use it above. Arbitration agreements seldom contain, however, a complete code of procedures, and where there is no express written term relating to the point of procedure impugned the court has to ascertain the term to be implied, which it does from the language the parties have used in their written agreement, the provisions of the Arbitration Act, 1950, the surrounding circumstances ..... and any custom or trade practice which must be taken to be incorporated in their agreement. "

At p. 499, Diplock, J. said :

> " Where an arbitration agreement is silent as to the procedure, what attitude should the court adopt in seeking to imply terms ? Obviously it does not imply terms which tend or appear to tend to an unjust award; but the court, particularly in commercial arbitrations, does not now, as perhaps once courts did, start on the assumption that the parties, except as otherwise expressly agreed, intended to adopt in its full rigour the procedure which, on long experience, helped by natural conservatism, has commended itself as most appropriate to the courts of law themselves. Rather should the courts start with the presumption that, in confiding their disputes, not to the courts of law, but to an arbitral tribunal of their own choice, the parties intended to confer on that tribunal a discretion as to the procedure it should adopt to arrive at a just decision; and the court will not lightly assume a limitation on that discretion, unless the mode of exercising it tends, or appears to tend, to an unjust result. "

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I have set out the pronouncements of Diplock, J., and the context in which they were made, out of respect for the argument and contentions of learned counsel for the Claimants, who, I must assume, put them forward in all seriousness. But it will be seen that nothing said by Diplock, J. has any relevance to the allegations and issues in the case under consideration. The question of procedure, with which the London Export Corporation Ltd. case (supra) was primarily concerned, does not arise in this case. All the allegations here arise out of the assessment of evidence and submissions which were before the arbitrator for his consideration and decision and out of the findings he ultimately made. There is, therefore, no merit in the contentions based upon the London Export Corporation Ltd. case and the passages in Russell on Arbitration (18th edn.) cited in support, which also were concerned with questions of procedure.

For the alternative contention, that it is misconduct to mishandle the arbitration, the case relied on was Williams v Wallis & Cox (1914) 2 K.B. 478. There was an appeal in that case from the refusal of a county court judge to set aside an award on the ground of misconduct by an arbitrator, who allegedly rejected evidence on a material issue tendered by the appellant. The appeal was allowed, the court holding that the rejection of material evidence, if established, amounts to misconduct entitling the person against whom the award is made to have it set aside. The judgment of Lush, J., was to this effect and was confined solely to this issue. It is on a statement by Atkin, J. that the Claimants rely. In his judgment, speaking of the meaning of misconduct, Atkin, J. said, at p. 485 :

> " The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice, and one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue. "

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If the statement about mishandling was intended to be a statement of principle of general application it would be impossible to define its limits. It would certainly make most of the previous and subsequent decisions wrong in which the courts refused to open consideration of the merits of an award though the allegations showed injustice. Such a case was the Gillespie Bros. case (supra) in which Atkin, J., by then Atkin, L.J., was a member of the Court of Appeal. It is apparent from what he said in this case that he did not regard his statement in the earlier case in 1914 as having the wide general application for which the Claimants now contend. Atkin, L.J. said, at p. 524 :

> " I have come to the conclusion with considerable reluctance that there are no grounds for differing from the conclusion which has just been expressed by the Master of the Rolls. I come to that conclusion with reluctance because it is one of the numerous class of cases where this Court has limited jurisdiction and can only deal with matters within a limited scope; and as a result has very often put upon it the distasteful task of enforcing decisions which appear to be wrong. "

In the Oleificio Zucchi case (supra) it was submitted to McNair, J. that the finding of Atkin, L.J. in the Gillespie Bros. case was inconsistent with the view expressed by that learned judge in the passage, cited above, in the Williams v Wallis & Cox case. McNair, J. said, at p. 520, that he could not see any inconsistency "but if there be any such inconsistency (he preferred) to act on the later judgment of the learned Lord Justice in the Court of Appeal." In my view, the term "mishandling of the arbitration" must be understood in the context of the example given, refusal to hear evidence, and cannot be used as authority for re-opening consideration of the merits of an award on allegations regarding the way in which the arbitrator considered and dealt with the evidence that was before him. This contention of the Claimants is also without merit.

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In the result, I upheld the Respondent's objection to the Claimants being allowed to refer to affidavits and other documents extraneous to the award and incorporated documents. I held that insofar as the allegations in support of the grounds of the motion alleged error or mistake, gross error, contradictions, omission to make an award on claims established, inconsistency, the award of claims abandoned and omission to award claims established, these are not properly grounds of misconduct and that the Claimants are confined to the award and incorporated documents in order to establish the allegations. I held further, that insofar as there are allegations of disregarding admissions, submissions and uncontradicted evidence, these also are matters which, on the authorities, may only be shown on the face of the award and incorporated documents. These have to do with the assessment of evidence, upon which the decision of the arbitrator is final. As I read the authorities, there has been a steadfast and consistent refusal by the Courts to allow the merits of an award to be opened where this would lead to controversy upon the matters which the arbitrator had under consideration. This is to preserve the virtues of arbitration proceedings, such as they are i.e. the finality of awards. To allow the Claimants to look beyond the face of the award in these circumstances would have breached the principles upholding its finality.

The result of my ruling was that the Claimants were unable to argue paras. (iv) and (viii) of the particulars in support of the grounds of the motion. Paragraphs (vi) and (vii) were argued and I now proceed to deal with them in turn.

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As amended during the hearing, para. (vi) of the grounds of the motion, shortly put, alleges error of law on the face of the award, alternatively that the award is uncertain, arising from the award of £103,095 made in para. 3B. This award was made in respect of the claim made in paras. 22 and 23 of the points of claim and was identified as claim DWC 59. The award was made the subject of certain of the questions in the Special Case. The sum awarded was to be paid by the Respondent to the Claimants if ques. 1(b), 2(a) and 3(b) were answered in the affirmative and ques. 2(b) in the negative. As I stated when dealing with the Special Case, it was conceded that ques. 3(b) should be answered in the affirmative and as a result ques. 1 and 2 were not required to be answered.

The Claimants made several alternative claims in their pleadings. The first, made in para. 11 of the points of claim, was a general claim to be paid upon the basis of a quantum meruit for the entire work actually carried out by them under the contract. The case upon which they based this general claim was (as stated in para. 11) principally that during the currency of the contract the nature and character of the Works and the methods employed by them to construct the Works as envisaged by the contract was so radically changed that the Works as executed and completed were wholly different from those contemplated by the contract and by the parties. The principal matters and events upon which the Claimants relied in support of the claim in para. 11 were summarized in para. 12 of the points of claim and the total sum claimed, as stated in para. 13, was £7,787,839. Credit was given for £4,601,951 paid on account, making the net sum claimed £3,014,305, exclusive of interest.

In para. 14 of the points of claim, on the grounds stated in para. 12 and as an alternative to the claim in paras. 11 to 13, a claim was made for payment upon a quantum meruit

in respect of certain stated sections of the Works, called the major parts of the Works. This was referred to as the "partial quantum meruit" claim during the argument and in para. 15 the net sum claimed was £2,951,827. In para. 16 and subsequent paragraphs of the points of claim there followed a number of further alternative claims, mainly claims under the contract, in respect of stated sections of the Works. The claims in paras. 20 and 21 et seq. were, by para. 19, expressly made in the alternative to the claims in paras. 11 to 18 inclusive, unless there was express indication to the contrary.

The claim in paras. 22 and 23, claim DWC 59, was a claim under the contract and was in respect of work done on section C of the Works, namely, the channel between the Riverton railway bridge and the Spanish Town Road bridge. The sum claimed was £168,772 and the details showing how this sum was arrived at are stated in annex VII to the points of claim. Annex VII shows various sums claimed, totalling £168,772, under nine headings. Head A is a claim for excavation. The total sum claimed was £129,184 less payments totalling £111,820 with a net claim under that head of £17,364. Head C is a claim for dewatering and the sum claimed was £101,917.

In appendix I annexed to his award, the arbitrator set out certain miscellaneous findings of fact. In para. 4 he found as follows :

> " The Claimants did not establish their claim for remuneration in respect of the entirety or the greater part of the works on the basis of quantum meruit; but did establish their claim for remuneration on the basis of quantum meruit in respect of the Spanish Town Road Bridge claim DWC 35 (Annex X to the Points of Claim) and in respect of that excavation and dewatering which is the subject of the excavation and dewatering claims in DWC 59 (Annex VII to the Points of Claim)".

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The specific alternative claim in respect of the Spanish Town Road bridge and roadworks, claim DWC 35, was made in paras. 27 and 28 of the points of claim. The claim is framed in para. 27 differed from the claim in para. 22, i.e. claim DWC 59. Whereas the latter was a claim under the contract only (but, as shown above, was alternative to the general and the partial quantum meruit claims), the former, in addition to claiming under the contract, had a separate alternative claim based upon a quantum meruit, though it was also alternative to the partial quantum meruit claim. In annex X to the points of claim, details of the sum claimed in respect of claim DWC 35 are given. This shows a total sum claimed for direct cost of the work, for labour, material and equipment. To this sum is added; 34.2924% thereof for overheads, giving a total job cost; 7½% of the total job cost for Home Office overheads; and a further 7½% for profit. These details constituted the quantum meruit claim. The finding in para. 4 of appendix I in respect of claim DWC 35 can, therefore, be said to be a finding based on the claim itself. Insofar as the finding in respect of claim DWC 59 is concerned, it amounts to a finding that the partial quantum meruit claim succeeded to that extent.

The arbitrator made an award of £86,850 in respect of the DWC 35 claim (see para. 3B of his award). The amount claimed was £90,857. This award, like that for claim DWC 59, was made the subject of ques. 1(b), 2(a) and 2(b) as well as ques. 3(a) of the Special Case. Both awards (for claims DWC 35 and DWC 59) were also made subject to ques. 9 of the Special Case. This question asked whether upon the basis of the facts found by the arbitrator and stated in appendix G and upon a proper construction of the contract (and cl. 84 thereof in particular) the Claimants are entitled to recover a sum in respect of profit "in

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those claims in which a profit element forms a part of the claim". As already indicated, it was conceded that the answer to this question must be in the affirmative. In para. 5 of his award, the arbitrator stated four sums awarded by him in previous paragraphs, including the sums awarded for claims DWC 35 and DWC 59, and stated that if the answer to ques. 9 is in the negative the sums awarded and specified in the paragraph are to be reduced by the respective sums specified in para. 5. The effect of what is stated in this paragraph is that the specified sums awarded included, in each case, an amount for profit, which should be deducted if it was held that the Claimants were not entitled to recover a sum for profit in respect of the claims for which the sums specified in ques. 9 were awarded. The amount stated in para. 5 of the award to be deducted from the award made in respect of claim DWC 35 is £14,785 while the amount to be deducted from the award for claim DWC 59 is £329.

In the argument on this ground, learned counsel for the Claimants referred to the details of the claim made for DWC 35 in annex X and to the sums stated in respect of this claim in para. 5 of the award (i.e. the sum awarded and the sum to be deducted) and demonstrated to my satisfaction that, consistent with his finding in appendix I that the Claimants had established their claim for remuneration on the basis of quantum meruit in respect of the Spanish Town Road bridge claim DWC 35, the arbitrator had valued the works for this claim on the basis of a quantum meruit and had allowed for profit of 7½% in arriving at the amount of his award - £86,850. The percentage allowed for profit is the percentage which was claimed by the Claimants in annex X and it was submitted for the Claimants that this is a finding by the arbitrator that 7½% is a fair profit to award on a quantum meruit claim for the Sandy Gully project.

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In respect of the general and partial quantum meruit claims as well as claims DWC 35 and DWC 59, the Respondent set up the defence of lack of notice relying on cl. 96 of the contract. The contention, as stated in the relevant paragraphs of the points of defence, was that the Claimants failed to give written notice of the respective claims within the period stated in cl. 96 and by reason thereof the claims were absolutely waived. In their points of reply the Claimants relied on several alternative contentions why their claims were not barred by cl. 96. The opposing contentions gave rise to the first three questions in the Special Case. As I stated when dealing with the Special Case, in view of the arbitrator's findings in appendix A in respect of notice, it was conceded that question 3 should be answered favourably to the Claimants and that ques. 1 and 2, therefore, did not arise for answers.

The contentions of the Claimants in support of the allegations of para. (vi) of the grounds of the motion of error on the face of the award, or uncertainty, in the award of £103,095 for claim DWC 59, are:

(i) that the arbitrator has made no award of any sum on the basis of quantum meruit in respect of the excavation and dewatering heads of the claim, in spite of his finding that the Claimants established their claim for remuneration on this basis in respect of those two heads of claim ;

(ii) alternatively, that he has made an award said to be on the basis of quantum meruit which contains no sum in respect of profit, alternatively, a sum grossly inconsistent with that in another part of his award on a similar basis.

Learned counsel for the Claimants developed an argument in support of the first contention based upon the fact that in para. 3B of his award the sum awarded for claim DWC 59 was not made the subject of ques. 1(a) of the Special Case. That question is: whether upon a proper construction of the contract the

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provisions of cl. 96 apply to claims by the Claimants that they were entitled to be renumerated on the basis of a quantum meruit and that they were entitled to damages for breach of contract. It was submitted that if the sum awarded for claim DWC 59 was intended to be, or to include, an award on the basis of a quantum meruit, the award or the relevant part of it should have been made subject to ques. 1(a). Instead, the submission continued, the whole of the award was made subject to questions of law which were appropriate if the arbitrator was not awarding on the basis of quantum meruit. It must follow, it was said, that the award of £103,095 does not contain an award in respect of excavation and dewatering on the basis of a quantum meruit. This, it was submitted, is a clear error, in view of the findings in para. 4 of appendix I.

On behalf of the Respondent, it was submitted that the Claimants cannot properly rely upon the questions of law in the Special Case to ask the Court to say that there is error on the face of the award as contended. It was said that it is the facts on the face of the award which are to be reviewed in this connection and no help is obtained in looking at the arbitrator's questions. I can see no objection to the line of argument which has been put forward based on ques. 1(a). It is really the award in para. 3B which is being impugned. This paragraph expressly makes the awards in the paragraph subject to specific questions stated in the first paragraph of the award. All that the Claimants are saying is that the omission to make one of the awards subject to another of the questions in the first paragraph has certain consequences insofar as the validity of that award is concerned.

Learned counsel for the Respondent pointed to the fact, as stated in the recitals of the award, that it was the

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parties who asked that the award should be made in the form of a Special Case and in para. 1 of the award the arbitrator states that the questions of law stated by him for the opinion of the Court "are generally in the form in which the parties asked (him) to express them." It was said that at the time the questions were being settled as a guide to the arbitrator, ques. 1(a) would have had no reference to the claim DWC 59 since that claim was put forward under the contract and not as a quantum meruit claim. Even so, it was pointed out, although the claim DWC 35 was expressly put forward on a quantum meruit basis the award for that claim was not related to ques. 1(a). Indeed, it was said, the question was not related to any award at all. It was submitted that in view of the finding that the quantum meruit claims had not been established, except in the two areas in claims DWC 35 and 59, and the arbitrator having found that notice under cl. 96 was given, ques. 1(a) became irrelevant and was asked only because the parties, unaware of what the arbitrator's findings of fact would have been, requested that it be put and the question "just got left in". It was submitted that it cannot be inferred, from the fact that ques. 1(a) was not related to claim DWC 59, that the arbitrator arrived at his assessment of the claim on a basis other than quantum meruit in respect of the excavation and dewatering heads of that claim.

In reply, it was submitted for the Claimants that one must start with the presumption that the arbitrator did not make a mistake and it cannot, therefore, be presumed that he left ques. 1(a) in by an oversight. Furthermore, the arbitrator did not know when making his award that the Respondent would make the concession which has been made in respect of ques. 3. In those circumstances, it was submitted, the arbitrator was obliged to ask not only ques. 3 but ques. 1(a) as well as this latter question had to be determined before ques. 3 became relevant to the claims on quantum

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meruit and for damages. For those reasons, it was said, it is impossible to find that at the time the award was made ques. 1(a) was irrelevant and left in by mistake.

I was referred to a statement in Russell on Arbitration (18th edn.) at p. 272, and the authorities cited in support of it, that : "It has often been said that the courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favour of its being a final, certain, and sufficient termination of the matters in dispute". It was agreed that this is an accurate statement of the principle of law applicable when an award is impugned as this one is. Applying it to this first contention of the Claimants, I am afraid that I am not persuaded that the failure to make the award for the DWC 59 claim the subject of ques. 1(a), by itself, necessarily leads to the conclusion that the arbitrator did not calculate and allow the claims for excavation and dewatering on the basis of a quantum meruit. It was demonstrated that the award made for the DWC 35 claim was on the basis of quantum meruit, yet this was not made the subject of ques. 1(a). The Claimants agree that the question was relevant to the DWC 35 claim but say that an error on the face of the award is not explained away by pointing to another. This may be so, but the burden is on them to show a clear error and, in my opinion, the omission in respect of the DWC 35 claim, which was admittedly awarded on the basis of quantum meruit, weakens the force of the contention that the omission in respect of the DWC 59 claim shows that the award made in respect of that claim did not include an award on that basis. There is also some merit in the Respondent's submission that the arbitrator may have considered the question irrelevant because of his almost total rejection of the general and partial quantum meruit claims, overlooking the relatively minor respects in which the claims on this basis had

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succeeded. As an extension of this submission, and perhaps the most compelling reason why this contention of the Claimants cannot succeed, it seems to me that the arbitrator cannot properly be said to be wrong in not making the DWC 59 claim subject to ques. 1(a), though this may be said of the DWC 35 claim. The reason is that the arbitrator, as it seems to me, was quite entitled to regard ques. 1(a) as applying only to claims expressly made on the basis of a quantum meruit. This appears to be the literal meaning of the question. The DWC 35 claim was such a claim but the DWC 59 claim was not.

The second contention on this ground concerns the profit element in the awards made for claims DWC 35 and DWC 59 and shown in para. 5 of the award. As already stated, the total claim made in DWC 35 on the basis of a quantum meruit was £90,857 and the award on that basis is £86,850, with a profit element of £14,785. In the DWC 59 claim, the total sum claimed under the contract for excavation was £129,184 and £101,917 for dewatering. A total for both heads of the claim of £231,101. An allowance of £111,820 for payments received was made against the claim for excavation, reducing that claim to £17,364. It was shown, however, that the payments were inclusive of payments for dewatering as well as excavation, so the allowance should, properly, have been made against the total for both heads of the claim. If this were done, the total net claim under both heads would have been £119,281. As already seen, the total sum awarded on this claim is £103,095 and the profit element to be deducted from this award if ques. 9 were to be answered in the negative is £329.

In para. 4 of his findings in appendix G, annexed to his award, the arbitrator found "that the calculation of the value of work carried out upon a quantum meruit should include an element in respect of profit, and that the value of the work has not been

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properly paid for if no element for profit is included". It has been shown that in respect of claim DWC 35 he allowed 7½% profit in his award, the same percentage claimed. It was contended for the Claimants that, to be consistent, the same percentage should be allowed in respect of the award for excavation and dewatering in claim DWC 59. For the Respondent it was submitted that the fact that 7½% profit may have been allowed for the DWC 35 claim does not, in law, establish a principle that the arbitrator must award the same percentage on all quantum meruit claims. It was said that because quantum meruit is what is a reasonable value for work done, different parts of the work could attract different allowances in respect of profit "dependent upon how intricate the work is and a lot of imponderables." I do not agree. I cannot see what the intricacy of the work has to do with the profit percentage. I accept the contention that the arbitrator should be expected to make the same percentage allowance for profit on the DWC 59 claim as he did on the DWC 35. This has nothing to do with legal principles. It has to do with consistency, as there appears to be no rational basis upon which a different percentage can be justified.

In order to drive home the point being made on this second contention, learned counsel for the Claimants conducted an arithematical demonstration. He assumed, against the Claimants, that the arbitrator awarded in full the other heads of claim (besides the excavation and dewatering) in the DWC 59 claim. These would total £49,491. If this sum is taken from the sum of £103,095 awarded, a balance of £53,604 remains, representing the minimum award which the arbitrator could have made for the excavation and dewatering. When this balance is added to the payment made on account, £111,820, a total of £165,424 results, which represents the total value of the excavation and dewatering work. If a profit of 7½% is allowed, the profit element in that

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figure would be in the region of £11,000 (on counsel's calculations - not mine). This figure of £11,000 is to be compared with £329 stated in para. 5 of the award. From this it was submitted that it is clear on the face of the award that the arbitrator could not have included a reasonable element of profit for excavation and dewatering and that if any profit at all was included it was derisory. It was pointed out that the less the arbitrator awarded against the other claims in DWC 59 the more it becomes clear that the excavation and dewatering were not valued on the basis of a quantum meruit which, it was submitted, is a complete denial of the basis upon which the arbitrator said that he was going to award for excavation and dewatering.

The whole basis of this second contention of the Claimants is, of course, the ninth question asked in the Special Case. The terms of this question and its effect upon the contents of para. 5 of the award have already been stated. It was submitted for the Respondent that the words "in those claims in which a profit element forms a part of the claim", which appear in ques. 9, refer to those claims in which a profit element forms an identifiable part of the claim. As the DWC 35 claim is such a claim, it was said, the profit element of £14,785 in it is isolated in para. 5 of the award. It was contended that as the DWC 59 claim had no profit element isolated as part of it, it was not properly the subject of ques. 9 and that the arbitrator was, therefore, not required to isolate in para. 5 the profit element of his assessment of the excavation and dewatering claims. Learned counsel for the Claimants accepted the submission that ques. 9 was intended to refer to claims in which a profit element was isolated but pointed out that in the general and partial quantum meruit claims (in annexes III and IV to the points of claim) an element of profit is an identifiable part of each claim, so

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ques. 9 applies to them. It followed from this, it was argued, that if the arbitrator had made within his award of £103,095 an award on the basis of a quantum meruit which included, as he said it should, an element of profit, he would have shown it in para. 5 and he has not done so. So one is driven to the conclusion, it was submitted, that the arbitrator has not made an award on the basis of a quantum meruit or, if he has done so, he has not included any profit element in it.

Learned counsel for the Respondent sought to refer to details of the DWC 59 claim in correspondence between the Claimants and the Consulting Engineers on the ground that the DWC 59 claim was incorporated by reference in the award. Learned counsel for the Claimants did not object to my looking at the correspondence but submitted that the documents were not properly incorporated in the award and should not be taken into account in my judgment if I decided that they were not so incorporated. Reference was made to these documents to show that the amount isolated as profit in para. 5 of the award in respect of this claim was the profit element in the heads of claim other than the claims for excavation and dewatering. This was for the purpose of supporting the argument that the arbitrator was concerned in para. 5 only with claims in which a profit element was identified and not with what profit went into his award in relation to his quantum meruit assessment for excavation and dewatering. After due consideration, I am satisfied, and hold, that the documents are not incorporated in the award and I, therefore, do not rely on them for the purposes of my decision.

As I have already indicated, the finding in appendix I, annexed to the award, that the Claimants established their claim for remuneration on the basis of a quantum meruit in respect of the excavation and dewatering parts of the DWC 59 claim, amounts to

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a finding that the partial quantum meruit claim succeeded to that extent. This partial quantum meruit claim (and the general claim as well) was made up in the same way that the quantum meruit claim in the DWC 35 claim was made up, that is to say, showing separate claims for costs of labour, material, equipment, job overheads and Home Office overheads and a separate claim for profit. Question 9 in the Special Case is, in terms, made dependent upon the facts found and stated in appendix G. In that appendix, as already stated, the arbitrator found that "the calculation of the value of work carried out upon a quantum meruit should include an element in respect of profit, and that the value of the work has not been properly paid for if no element for profit is included". When, therefore, in para. 5 of his award, the arbitrator was isolating the profit element in the awards he had made, because of ques. 9, it should have been clear to him that any profit allowed by him in respect of the claims for excavation and dewatering should be isolated for deduction in the event stated in the paragraph. Since he has not done so, the basis upon which he made the award for those claims is open to question.

It was submitted for the Respondent that it has to be presumed that the arbitrator has made an award in respect of all matters before him (see the passage from Russell on Arbitration cited above). From this, it was contended that once it is clear that the figure of £103,095 must contain an element over and above the totality of the other claims in DWC 59, apart from excavation and dewatering, the extra figure, based on the findings of the arbitrator, can only possibly relate to an assessment of the excavation and dewatering claims on the basis of a quantum meruit. If all that was being considered was the award of £103,095 in para. 3B of the award this contention could not be faulted. It would then have to be presumed that the award in respect of excavation and dewatering had

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been calculated on the proper basis. When, however, as is clear from the figure of £329, especially when compared with the amount isolated for profit in respect of the DWC 35 claim, the arbitrator fails to isolate a profit element in para. 5 in respect of the DWC 59 claim which shows that a reasonable profit was included for the excavation and dewatering parts of the claim, the presumption cannot reasonably be made; unless one goes further and assumes that the arbitrator misunderstood or misinterpreted ques. 9 or oversighted the fact that he had calculated those parts of the claim on the basis of a quantum meruit, thus explaining the failure to isolate a profit element which included a reasonable profit in respect of the award on the basis of a quantum meruit. In my opinion, the words "in those claims in which a profit element forms a part of the claim" appearing in ques. 9 so clearly included the quantum meruit claims that I would not be justified in making either of these assumptions. It could be argued with equal force, and was so argued, that the explanation for the failure to isolate a reasonable profit element is that the arbitrator, by an oversight, did not award the excavation and dewatering parts of the claim on a quantum meruit basis, as he had found, but under the contract as claimed in the DWC 59 claim.

In all the circumstances, I hold that the arbitrator's failure to state a reasonable profit element in para. 5 of his award in respect of the DWC 59 claim makes it uncertain whether the award for the excavation and dewatering parts of the claim were calculated on a quantum meruit basis as they should have been, or under the contract and, if the former, whether a reasonable sum for profit was included in the award. This, in my judgment, makes the award of £103,095, in para. 3B of the award, uncertain.

Paragraph (vii) was the other ground of the motion which was argued. It alleged that the arbitrator erred in law in his award of interest: / .....

"(a) in failing to award interest from the date the relevant work was completed or the date the Claimant ought to have been paid therefor, and/or

(b) in not awarding interest on those portions of his award which relate to the Claimants' entitlement to be paid on the basis of a quantum meruit either from the date the relevant work was completed or from the date on which the Claimants ought to have been paid therefor."

In para. 6 of his award, dependent on the answers to ques. 11 and 12 of the Special Case, the arbitrator awarded interest "upon the sum awarded by (him)" for the period from April 1, 1968, to the date of the award at varying rates of interest for each year during the period. The rates varied from 6¼% to 11 1/8%.

The submission on behalf of the Claimants was that though the arbitrator exercises a discretion in awarding interest yet that discretion must be exercised upon a proper legal basis. It was submitted that there is a proper legal basis for the exercise of the discretion in deciding the period for which interest should run. Subject to a number of qualifications, it was said, the principle is that the period should begin with the date when the cause of action arose. Arising from these submissions it was contended that where more than one cause of action succeeds there should be different periods for interest related to the date on which each cause of action arose. The gist of the complaint is that the arbitrator has allowed one period for all the claims which succeeded and if he had exercised his discretion properly he would have shown different periods for the different claims with the award of interest related to those periods. It was said that the discretion should have been exercised on the principles laid down in Jefford v Gee (1970) 1 All E.R. 1202.

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The answer on behalf of the Respondent was that the arbitrator is given a wide and unfettered discretion by the statute and his discretion should not be interfered with unless it is clear that it was exercised upon wrong principles. Reference was made to Hodges v Harland and Wolff, Ltd. (1965) 1 All E.R. 1086 in which, at p. 1087, Lord Denning, M.R. said: "Indeed, when a judge exercises his discretion and takes all the relevant considerations into account, it is well settled that the burden is on anyone coming to this court to show that he was wrong". It was submitted that it is impossible to review the arbitrator's exercise of his discretion without having before the court the matters which he had to consider. It, therefore, cannot be shown on the face of the award, it was submitted, that the arbitrator applied wrong principles or wrongfully exercised his discretion.

In my opinion, the Respondent's submissions are undoubtedly right. To begin with, the allegations in this paragraph of the grounds of the motion are that the arbitrator failed to award interest from the date the relevant work was completed or the date the Claimants ought to have been paid therefor, but these dates do not appear on the face of the award. Similarly as regards the dates in respect of the quantum meruit awards. As regards the quantum meruit claims, it was contended that the principles laid down in Jefford v Gee (ante) in respect of weekly wages should be applied; so that the cause of action in respect of these claims would arise on a day to day basis. I do not agree. In the case of weekly wages, the payment becomes due at the end of each week. In the case of the work for which payment was allowed on a quantum meruit basis, payment did not become due day to day. It cannot, therefore, be said, applying the principle stated in Jefford v Gee (ante), that the Respondent wrongfully had the use of the Claimant's money for this work from day to day. The work was carried out under the contract

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and the question of payment for it on the basis of a quantum meruit could only arise when a claim for payment on that basis was made. There is nothing on the face of the award to show when the claims were made, though I was referred to dates in appendix A, annexed to the award, when some of the work began and when some was in progress.

The only point of substance on which the Claimants can rely is the fact that one period was allowed for all the claims that succeeded in circumstances where the dates for the individual claims must have differed. But even in Jefford v Gee (ante) it was recognised that the circumstances of a case may warrant a judge using "rough and ready" methods in calculating the interest he is allowing. In setting out the principles for loss of wages the judgment in that case states, at p. 1208: "More rough and ready, the total loss could be taken from accident to trial: and interest allowed only on half of it, or for half the time, or at half the rate". This passage exemplifies the width of the discretion that a judge or an arbitrator has under the statute. The Law Reform (Miscellaneous Provisions) Act. s. 3, provides (in the same terms as its counterpart in England), inter alia, that the court may order interest "at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment". It will be seen that there is no obligation to award interest for the whole of the period between the date the cause of action arose and the date of judgment, as is contended for the Claimants.

In the recitals to his award, the arbitrator stated that counsel for the parties agreed that he should include a global figure in his award which should have effect if the Special Case was not set down for hearing in due time. That figure is stated in para. 7 of his award. It is clear from the use of the words: "I award that in addition to the sum awarded" and "interest upon the sum

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awarded by me" in para. 6 that the arbitrator contemplated the payment of interest either on the global figure or on the total of the several awards made by him. In view of this and of the numerous claims with which he had to deal and, no doubt, a variety of dates when the claims became payable, he cannot be said to be wrong if he fixed a mean date as the commencing date of the period and then made allowances up or down in the rates of interest to compensate. This would be permissible within the principles stated in Jefford v Gee (ante). No complaint has been made about the rates of interest, which appear to be on the generous side. In any event, there may have been, nay, must have been, numerous factors which were before the arbitrator, but which are unknown to me, which he could properly take into account in fixing the rates of interest and the periods for which they should be paid. In those circumstances, as contended for the Respondent, it is impossible for me to say that the exercise of his discretion was not upon a proper legal basis.

During the argument complaint was made of the fact that the arbitrator did not show separate awards of interest for the claims under the contract and the quantum meruit claims. It was submitted that the award is defective in not showing different periods for the different bases of the award in view of ques. 11 and 12 of the Special Case. It is sufficient to say that this point was not taken in the motion. For the reasons I have endeavoured to give, I hold that the Claimants have not established the allegation that the arbitrator erred in his award of interest.

The motion having succeeded on para.(vi) of the grounds, I must now decide whether the award should be set aside in part or remitted to the arbitrator. The Claimants contended that if the motion succeeded on para. (vi) the circumstances warranted my exercising my discretion in favour of setting aside the award while the Respondent contended that, in that event, the matter should be remitted.

It was submitted for the Claimants that the following principles on the question of the exercise of the Court's discretion are to be deduced from the cases: If the error on the face of the award is a simple mistake which requires to be corrected, there is no reason to suppose that the arbitrator may have closed his mind and it does not appear as if he might have associated himself with one side or the other, the award should be remitted to him. But if the error amounts to a serious irregularity or slip or if it appears as if the arbitrator may have closed his mind, or if, given his bona fides, despite himself he might have a disposition to make it appear that the objection to the award was useless and productive of no good, the award should be set aside. Reference was made inter alia, to: Re Tidswell (1863) 32 Beav. 213, 217; Fratelli Schiavo di Gennaro v Richard J. Hall, Ltd. (1953) 2 Lloyd's Rep. 169, 172 and E. Rotheray & Sons. Ltd. v Carlo Bedarida & Co. (1961) 1 Lloyd's Rep. 220, 225.

On the part of the Respondent, it was submitted that it should be borne in mind that the power to remit was introduced by statute to cure fatal defects in an award which were not of such a nature as to make it expedient to set aside the award, which would render nugatory all the expenses incurred in the reference. It was submitted that the cases do not support the principle that if there is error in the award amounting to a serious slip or irregularity the award must be set aside and that the proper

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approach in considering how the Court's discretion should be exercised is to start with the principle that if it is at all avoidable the parties should not be put to the expense of starting de novo, provided justice can be done on remission.

The grounds upon which it was contended that the award should be set aside rather than remitted are as follows: Firstly, it was contended that the arbitrator committed a serious irregularity in respect of the award for the DWC 59 claim, that he has committed himself to a view regarding the valuation of the work and it must be extremely difficult for him to approach the matter with an entirely fresh mind. The Respondent disputes this contention and says that the fact that the arbitrator may have erred in not assessing the award on a quantum meruit basis does not give rise to any inference that on a remission he would be prejudiced. Secondly, it was contended that in a supplementary award, which he made at the Claimants' request, there is an indication that the arbitrator had closed his mind against the Claimants. Thirdly, it was said that the arbitrator had expressed his opinion to be rid of the matter once and for all and that after such a long time his view may become crystallised, which would make it difficult for him to approach the matter with an open mind. These two contentions were also resisted by the Respondent and I shall deal with them before dealing with the first contention.

I find that there is no merit in the second contention. In his award, the arbitrator upheld the contention of the Respondent that he had no jurisdiction in respect of certain claims, five in all, which he identified in appendix X to his award. For that reason he made no award in respect of them. The Claimants indicated to the arbitrator that they wished to apply to the Court for a declaration that he in fact had jurisdiction over those items and asked him to state the sums he would have awarded

if he had jurisdiction, in the event that the Court granted the declaration. The arbitrator found (and this is the supplementary award) that the Claimants were not entitled to succeed on the five claims and that nothing was payable to them in respect of those claims. The complaint is that some of the claims in question had alternative claims on which the arbitrator had made awards in his original award so, instead of saying that nothing was payable, he should have said that the Claimants were entitled to succeed to the extent of the sums awarded on the respective alternative claims. It was said that the fact that he did not say that but "said bluntly that the claims failed" is indicative that he had not really thought about the matter or he would have made his award more accurately; it also shows, it was said, that the cast of his mind was now firmly against the Claimants. It was conceded that if the supplementary award was made in the way the Claimants thought it should have been made the result might well have been the same. But the complaint, it was said, "is as to the manner in which he has expressed himself", which "indicates that he didn't really think about it and hostility to the Claimants". His manner was said to be brusque. I do not think the terms of the supplementary award justify the allegations made against the arbitrator. Having already awarded on the alternative claims, there was no necessity for mentioning them in stating his findings on the original claims. Had he awarded as the Claimants said he should have done, if he wanted to be polite, he would have had to state the sums excepted in terms which would avoid duplicating the awards already made. Having found that the claims failed, the arbitrator merely stated succinctly the consequence of that finding. I see nothing offensive or sinister in the way he expressed himself.

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As regards the third contention, there was affidavit evidence before me, filed by the Claimants, that during the course of the arbitration the arbitrator expressed his determination to be rid of the matter once and for all if possible once his award was issued. Further that he had said during the proceedings that what he was anxious to obtain is that "this thing leaves me for good and all." The Respondent filed an affidavit by its leading counsel during the arbitration proceedings in answer to the Claimants' affidavit. I quote para. 7 of that affidavit in full: "In the final stages of the lengthy hearing of the Arbitration, and during discussions with the parties as to the draft outline award which the parties were endeavouring to agree, the Arbitrator expressed an anxiety not to slip on the Special Case stated and an anxiety that the matter should leave him for good and all. Counsel for the Claimants agreed, on one such occasion, that it was the wish of all concerned that the matter should be final when it left the Arbitrator's hands. The Arbitrator made it clear, however, that he appreciated that whatever he said was subject to the possibility of a reference back to him. I regarded those expressions of anxiety on the part of the Arbitrator as clearly understandable in the circumstances of such a lengthy hearing and I formed no impression therefrom of any determination by the Arbitrator to be rid of the matter once and for all or of any likelihood or possibility of the Arbitrator approaching with a closed mind any part of the award which might be remitted to him". This statement by counsel, which of course I accept, shows the context in which the remarks attributed to the arbitrator were made and, in my view, completely answers the Claimants' contention.

Dealing now with the first contention, for the Respondent it was submitted that the highest that the Claimants

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can put their case on para. (vi) of the grounds of the motion is that the inferences to be drawn from the award lead to the conclusion that the arbitrator may have inadvertently assessed the excavation and dewatering claims in the DWC 59 claim on a contractual instead of a quantum meruit basis. If this is so, it was said, it cannot be said that the arbitrator is committed to an assessment other than that which he intended, viz. on the basis of a quantum meruit. His disposition would, therefore, be to correct the assessment inadvertently made on the wrong basis. In reply, it was submitted for the Claimants that where an arbitrator has made a glaringly inconsistent award the parties cannot be expected to trust in his judgment again. It was said that it is not necessary for the Claimants to suggest that the arbitrator will act with bad faith if the matter is remitted to him. The danger, it was said, that he might have the disposition "to make it appear that the objections to the award were useless, and that the sending it back was productive of no good" (see Re Tidswell) may arise notwithstanding his basic honesty and good faith.

I agree with the contention that the highest that the Claimants' case can be put is that the arbitrator assessed the relevant claims on a contractual rather than a quantum meruit basis. If that is what he did, it could only be a matter of inadvertence in view of his clear finding that the claims for remuneration on the latter basis were established. To suggest that he would do otherwise than correct his error if the matter is remitted to him is to impugn his integrity, which was not done directly during the proceedings before me. There is no question here of his judgment being trusted. This is not a case like Re Tidswell or the Rotheray & Sons. Ltd. case (supra) where on remission the arbitrator would have to consider afresh evidence on which he had already formed a concluded judgment. One can well understand the difficulty which an arbitrator would have in those / .....

circumstances in coming to a fresh conclusion without being influenced by what he had decided before. In this case, at its highest, it is a mere matter of calculating the award on the proper basis. I do not, therefore, think the circumstances warrant the allegation that the arbitrator has committed himself to a view regarding the valuation of the work and that it would be difficult for him to approach the matter with an entirely fresh mind. It would, clearly, be dishonest for him to say that the award of £103,095 includes an assessment of the excavation and dewatering claims on a quantum meruit basis, when it does not, merely to prove himself right and make it appear that the objection to his award was useless. This is not to be imputed to the arbitrator without justification.

In my judgment, the nature of the uncertainty which I have held that the award discloses does not justify a setting aside of the award. The arbitrator has heard the evidence and has had all the facts and figures relating to the claim in question placed before him. I cannot see that it will be a matter of any difficulty for any error in the award, if such exists, to be corrected and the award made certain. I, therefore, propose to remit the matter. In arriving at this decision, I have not overlooked the evidence, allegations and submissions regarding the age, health and life expectancy of the arbitrator. The matter has to go back to him anyhow, in spite of his age and health, for the question of costs to be decided and an award made. It does not seem to me that remitting the award to him will add greatly to the time he will be obliged to spend in hearing the parties and deciding the issue as to costs.

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The order I make is that the award made by the arbitrator in para. 3B of his award in respect of the claim identified as DWC 59 be remitted to him for reconsideration of the excavation and dewatering heads of the claim, based on the evidence which was before him, and for such re-assessment and/or amendment and/or clarification as is necessary in the light of the figures respecting this claim which are stated in para. 5 of the award. It is ordered that the parties be heard on the remission, if they so desire, and that the sum awarded in respect of the excavation and dewatering heads of the claim on the basis of a quantum meruit be shown separately from the sums awarded in respect of the other heads of the claim. It is also ordered that such other consequential amendments, if any, be made to the award in respect of this claim as may arise from this order.