JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 104/92

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	AMERICAN HOME ASSURANCE COMPANY	DEFENDANTS/ APPELLANTS
	CARIBBEAN HOME N.C.B. INSURANCE COMPANY LIMITED	
	N.E.M. INSURANCE COMPANY (JAMAICA) LIMITED	
	G. DESMOND MAIR (INSURANCE) COMPANY LIMITED	
	BRITISH CARIBBEAN INSURANCE COMPANY LIMITED	
	JAMAICA INTERNATIONAL INSURANCE COMPANY LIMITED	
	INSURANCE COMPANY OF THE WEST INDIES LIMITED	
	GENERAL ACCIDENT INSURANCE COMPANY (JAMAICA) LIMITED	
	AMERICAN INTERNATIONAL UNDERWRITERS (JAMAICA) LIMITED	
A N D	EDWARD SHOUCAIR T/A S.N. SHOUCAIR	PLAINTIFF/ RESPONDENT

Emil George, Q.C. & W.K. Chin See for Appellants

Dennis Goffe, Q.C. for Respondent

November 25, 26, 27, December 2, 1992 & January 25, 1993

CAREY P. (AG.)

This was an appeal against an order of Bingham J. made in Chambers on 29th October 1992 whereby he dismissed a summons by these appellants seeking, in effect, to stay arbitration proceedings while civil proceedings between the parties were in train and because the issues for determination were the same in both proceedings and, at all events, overlapped. Specifically the summons sought the following orders:

"1. Restraining the Plaintiff from pursuing Arbitration proceedings concurrently with these proceedings.

2. Prohibiting the Arbitrator from embarking or continuing with Arbitration Proceedings whilst the proceedings herein are being pursued by the Plaintiff."

We heard submissions between the 25th and 27th November and on 2nd December, announced that the appeal would be dismissed with costs to the respondent and that the order of the Court below would be affirmed. We promised then to put our reasons in writing and to hand these down at a later date. This we now do.

The action brought by the plaintiff, the present respondent, was for the following relief:

"(1) indemnity in the sum of ELEVEN MILLION ONE HUNDRED AND NINETY THOUSAND DOLLARS ($11,190,000.00) under Policy No. AH-F-5995196 dated 15th November, 1988 and entered into between the Plaintiff and the Defendants, in respect of loss and damage sustained by the Plaintiff on or about 7th November, 1989 as a result of a fire at 40 Port Royal Street, Kingston;.

(2) interest thereon;

(3) damages for breach of the said contract of insurance or alternatively for negligence in the settlement of the said claim;

(4) a declaration in respect of each Defendant that it has been guilty of unreasonable delay in the payment or settlement of the said claim."

His claim related to a fire which occurred on 7th November 1989 and sought to recover by way of indemnity under a policy of insurance, damages for the actual loss and as well, damages for the failure to settle his claim in a timely manner. The plaintiff filed his writ on 6th November 1990, a day before his action would have become time-barred by reason of such a clause in the policy (clause 19). After the writ was filed, the appellants

admitted liability. This occurred on 18th April 1991. Arbitration proceedings were commenced by the respondent in August 1991. The appellants thereafter sought by an originating summons to have those proceedings declared time-barred and also to have them stayed. This latter prayer must have been intended to dismiss those proceedings, for if, as it appears to me, they were held to be still-born, there really would be nothing to stay. That summons came on for hearing before Ellis J. who, by an order dated 12th March 1992, dismissed it. The plaintiff delivered his statement of claim on 29th July 1992 in which he abandoned the claim for indemnity. The appellants sought again to stay the arbitration proceedings by process which have given rise to the present appeal. For completion, I would add, that on 4th August 1992 when the arbitration hearings convened, the appellants objected to the continuation of those proceedings concurrently with the present action. On 10th August, the arbitrator expressed the view that it was for the Court to give directions and accordingly left the matter to the parties so that they might take such action as they might be advised. The summons which came on before Bingham J., was the result of that recommendation by the arbitrator.

Mr. George Q.C. pinned his flag to the mast of **Doleman & Sons v. Ossett Corporation** [1912] 3 K.B. 257 and argued that once a party to a dispute, the subject of an arbitration clause, has referred the matter to Court by filing a writ, it remains in the hands of the Court and cannot be ousted by an arbitrator. He said that was the situation so long as the issue to be determined by the Court was the same as the issue to be determined by the arbitrator. He relied on **Northern Health Authority v. Derek Crouch Ltd.** [1984] 2 All E.R. 175 - to urge that once there was an overlap of issues, then the proceedings in Court must take precedence. It was further argued that where arbitration proceedings preceded the filing of a writ the Court would look to see if there was an overlap of issues, and if there

was, the Court would call upon the party to elect. On the other hand, where the writ preceded the arbitration proceedings then, unless there was a stay of the civil proceedings or an agreement of the parties, the action must proceed. In the instant case, there was an overlap of issues because the claim for damages in the writ, required a determination of the amount of indemnity claimed. The sum representing the claim for indemnity was critical to a finding as to the correct amount of damages. The issues before the Court and the arbitrator were accordingly, identical.

It is as well, at this juncture, to set out the rival arguments raised by Mr. Goffe Q.C. before considering the differing positions adopted by these protagonists. Learned Queen's Counsel made the point, that the matters before the arbitrator and the Court were altogether different claims. He thought that while the arbitrator was concerned with the question of indemnity i.e. the sum representing the cost of items lost in the fire, what was at issue before the Court, was the question of general damages viz. the loss flowing from the failure of the appellants to settle the claim in a timely fashion. He stressed that although the Court was constrained to find the amount of damages, it need not find the amount of the indemnity: it was enough if it knew about it. He disagreed with Mr. George Q.C. as to the consequences of filing a writ where an arbitration clause existed. He maintained that in the instant case, neither party could invoke the arbitration clause in the policy until liability had been determined, because the matter in dispute or the matter of difference was not within the ambit of the clause. In that regard, he relied on Shah t/a Glassware Mart v. Hercules Insurance Co. Ltd. [1963] E.A. 134 at p. 124D and Kone Oy v. Optec NV & Anor. bound Transcript 1983 at p. 6.

Finally, especially in view of the time clause included in the policy, the only option left open to the plaintiff was to file a writ, for, if liability had not been admitted, the respondent

would be constrained to pursue his suit for all remedies at law. Once liability was admitted, however, and the only matter in dispute was the amount of indemnity, an award by the arbitrator became a condition precedent to suit by virtue of clause 18 of the policy. This came about as a result of the "Scott v. Avery" stipulation which formed a part of that clause. The present position is that the claim for indemnity pleaded in the writ has been abandoned in the respondent's statement of claim. In these circumstances, even if it could be said that there was an overlap of issues, the arbitrator nonetheless had jurisdiction to deal with his concerns. He referred to Northern Regional Health Authority v. Crouch (supra). He added that when the arbitrator makes an award, it binds all the parties - Arbitration Act section 13.

To succeed in this appeal before us, the appellants are obliged to show that Bingham J. exercised his discretion wrongly in the sense of applying some wrong principle in refusing injunctive relief to prevent arbitration proceedings from being embarked on or continued at the instance of the respondent. This Court is not exercising an independent or original jurisdiction but has a limited function. The principles are well set out in the speech of Lord Diplock in Hadmor Productions v. Hamilton [1982] 1 All E.R. 1042 at p. 1046 where he expressed himself in these terms:

> "... it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court

> would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own."

We have been furnished with notes of the ex tempore judgment of Bingham J. which I have found very useful and helpful. I propose to set out some relevant extracts:

> " ...
>
> 3. Although Writ included extent of loss/indemnity, the Statement of Claim excludes it. Effect is that since arbitrator without consent of parties, is confined to matters in arbitration clause - he could deal only with indemnity. The Defendants chose to withhold their consent for arbitrator to deal with questions independent of indemnity.
>
> 4. Piper's Affidavit - it is clearly not the case that the Court has to deal with indemnity. There is no overlap in relation to arbitration issue. The Statement of Claim which supersedes the Writ does not contain a claim for indemnity. Even if there was an

overlap the Northern Health case shows there is nothing wrong with the suit and arbitration running concurrently.

5. Overlap applies only where the issues are duplicated and the Plaintiff is in effect also seeking to repudiate arbitration clause (as in Heymans vs. Darwin) and the Defendants could accept the repudiation and seek to stop arbitration. That is not the case here.

6. The fact that both are being pursued arose from the Defendants' delay in admitting liability. Doleman case is not applicable here as an instance in which the suit ousts the arbitration.

7. The ground of complaint in Pipers Affidavit has no basis - the policy cond. 18 reflects the parties' choice of arbitration as a means of resolving any dispute (as to amount of loss) under the policy. The present action no longer has that as an issue."

It is necessary then, to see whether the learned judge misconceived any principle of law or to use the words of Lord Diplock "misunderstood the law" applicable to the facts and circumstances before him. Mr. Emil George Q.C. relied completely on a principle which he extracted from **Doleman & Sons v. Ossett Corporation** (supra) that once a writ was filed before arbitration proceedings were set in motion, the jurisdiction of the arbitrator was completely ousted. He based that contention first on a dictum of Fletcher Moulton at p. 271 where the Lord Justice stated as follows:

> " I am therefore of opinion that, so soon as an action is brought in respect of a difference to which an arbitration clause applies, there is a complete breach of that clause so far as that particular dispute is concerned, and that the only right which arises directly therefrom is a claim for damages for breach of contract. The defendant may, however, apply to stay the action under the provisions of s. 4 of the Arbitration Act, 1889, but if he neglects so to do, or if the Court refuses to stay the action, the Court has the sole and exclusive jurisdiction to decide the dispute."

Secondly, he relied also on the observations of Farwell L.J. in the same case at p. 274 where he said:

> "... The King's Courts do not compete with arbitrators, or permit their own proceedings to be interfered with in any way by them; when the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent. If this is not so, what would happen if the action and the arbitration go on together, and the plaintiff succeeds in his action, but the arbitrator makes his award on the same day in favour of the defendant? Is one to be set off against the other or which is to prevail? Or suppose that the arbitrator refrains from publishing his award in deference to a protest from the plaintiff who has succeeded in the action. Would such protest be a breach of the covenant to refer and entitle the defendant to his action for damages against the plaintiff? It appears to me impossible to allow more than one proceeding to continue without landing the Court and the parties in inextricable difficulties."

The facts in that case which I gratefully quote from the head-note at pp. 257 - 258 are as follows:

> " By a clause in a contract between the plaintiffs and the defendants, a municipal corporation, for the execution by the former of certain sewerage works, it was provided that, in case of any dispute, doubt, or difference arising or happening touching or concerning the works, or relating to quantities, qualities, description, or manner of work done, executed, or to be done and executed by the contractors, or in any wise whatever relating to the interests of the said corporation or of the contractors, such doubts, disputes, or differences should from time to time be referred to and settled and decided by the defendants' engineer, who should be competent to enter upon the subject-matter of such doubts, disputes, or differences with or without formal reference or notice to the parties to the said contract, or either of them, and who should judge, decide, order and determine thereon.
>
> The plaintiffs brought an action against the defendants for sums which they alleged to have become due to them from the defendants under the contract, and for damages for wrongful termination of the contract by the defendants. The defendants did not

> apply for a stay of proceedings in the action under s. 4 of the Arbitration Act, 1889. Subsequently to the commencement of the action, the defendants' engineer, under the before-mentioned clause, without giving notice to the parties, and without the knowledge or consent of the plaintiffs, made an award purporting to decide the matters which were the subject of the action, and the defendants pleaded his award in bar to the plaintiffs' claim in the action:—"

It was held that:

> " Where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract, and is pending, no application to stay the action having been made under s. 4 of the Arbitration Act, 1889, or such an application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequently to the commencement thereof, and without the consent of the plaintiff, is invalid, and will not afford a defence to the action."

It is, I think, important to note from this case that the matter of dispute must be the same in the arbitration proceedings as it is in the action. And as well it should be noted, that the defendant is at liberty to invoke the provisions of the Arbitration Act which allow for the action to be stayed. If this is so, then I do not accept that the mere filing of the action, renders the arbitration proceedings as at an end. This view is confirmed in Lloyd v. Wright [1983] 2 All E.R. 970 where Eveleigh L.J. at p. 972 referred to dicta of Fletcher Moulton L.J. in Doleman & Sons v. Ossett Corporation (supra) and said this:

> "... However, the court does not claim a monopoly in deciding disputes between parties. It does not, of its own initiative, seek to interfere when citizens have recourse to other tribunals. The court exercises its jurisdiction when appealed to. Until then, the court is not conscious of ignominy if an arbitrator decides a question with which the court is competent to deal. Furthermore, the

> court will not refuse to allow the subject matter of an action already begun to be referred to arbitration, if the parties so agree, as Fletcher Moulton L.J. makes clear in the above passage. The court, however, will not permit its assistance to be denied to a party who has invoked it except by that party's consent or by its own ruling. If the defendants in Doleman's case had been able to plead the award in bar, the principle thus stated would be breached. In my opinion, the judgments in Doleman's case show that the court was not seeking to assert a wider principle than this."

In his judgment, he adverted to a decision of Kerr J. in Tradax International SA v. Cerrahogullari TAS, The M Eregli [1981] 3 All E.R. 344 at p. 351 in which that judge had to consider Doleman's case. In reference thereto, Kerr J. said:

> " 'All that the case decided, I think, as correctly stated in the first paragraph of the headnote, is that, when the court is seised of a dispute in an action, an arbitrator cannot (in effect) oust the jurisdiction of the court by purporting to make a final award in a concurrent arbitration, and that any award so made cannot be a defence to the action before the court!"

Dunn L.J. who was of a like mind that arbitration proceedings do not cease to exist because the jurisdiction of the court has been invoked, observed as follows:

> " In the instant case, the arbitration was already in existence when the writ was issued. I ask: why, on principle, should the arbitration and the action not proceed side by side? To maintain the action is not a contempt of court (see per Vaughan Williams LJ, whose dissent did not cover this point in Doleman's case [1912] 3 K.B. 257 at 262), and the court has ample powers to restrain further proceedings in the arbitration by an injunction, or to refuse a stay of the action if the appropriate applications are made to it. In those circumstances, there can be no question of a race between the arbitration and the court proceedings. The court retains control throughout, if it is asked to do so. In the absence of any such application and in the

> absence of any intervention by the court. I can see no reason why the arbitration should not continue, and so long as the arbitration continues the parties to the reference are bound to comply with the requirements of the arbitrator (see s 12(1) of the Arbitration Act 1950)."

At p. 975 the learned Lord Justice also doubted the validity of a statement by Fletcher Moulton L.J. in **Doleman's** case where he spoke of an arbitrator becoming functus officio because the Court became seised of the dispute, in these words:

> "... With great respect to Fletcher Moulton L.J., he must have been using that expression in a different sense to that in which it is used now. The expression 'functus officio' in relation to arbitrators is used nowadays to describe the position of an arbitrator once he has made his award. Until then he has the power and the duty to deal with any application which is made to him in the arbitration, notwithstanding the existence of a concurrent action."

In **Northern Health Authority v. Derek Crouch Ltd.** (supra) where action preceded any reference to an arbitrator, the Court of Appeal held (and I quote from the headnote at p. 176) that:

> "... There was no rule of law that an arbitrator must decide all matters in dispute between the parties and nor was there any inherent objection to an action and an arbitration proceeding side by side. Accordingly, if any overlap of issues occurred the arbitrator, who would be in the best position to decide whether that was so, would be entitled to refuse to decide any issues which overlapped with the High Court proceedings."

Sir John Donaldson M.R. in the same case outlined the questions which an arbitrator should ask himself where there was an overlap of issues. He said at p. 191:

> "... The primary duty of an arbitrator is to decide all issues referred to him. However, an arbitrator is subject to the supervision of the court and it is well settled that the court has jurisdiction to restrain an arbitrator from deciding issues which are being litigated before the court. If, therefore, an arbitrator has reason to believe that he is being asked to

> decide issues which the court concurrently has under consideration, he should ask himself whether the court, if asked, would be likely to enjoin him from proceeding. If the answer is Yes, he should indicate his view and give the parties an opportunity of applying to the court for a mandatory injunction requiring him to proceed. If the answer is No, he should indicate his view and give the parties an opportunity of applying to the court for a prohibitory injunction restraining him from proceeding. This is analogous to the duty of an arbitrator when his jurisdiction is challenged. This does not mean that, whatever his view, the arbitration will grind to a halt. The arbitrator may be able to proceed with matters which create no risk of conflict or, if this is impossible and he thinks that the court would wish the arbitration to proceed, he can do so and only refrain from issuing his award until the wishes of the court are known."

These cases lead me to the view that Mr. George's submissionsattractive though they may be, are misconceived. There is no rule of law that the filing of a Court **action** ousts the arbitrator's jurisdiction to determine matters referred to him as governed by the arbitration clause. He cannot, of course, deal with matters on which the Court is required to adjudicate. Save for that caveat, both proceedings can proceed concurrently. Where there is an overlap, the arbitrator must therefore confine himself to those matters referred to him or to put it another way, he can refuse to decide those issues which the Court has been asked to determine. Mr. George Q.C. in his submission, did not dissent to the view that in the case of an overlap, the Court could call upon the party to elect. He read a deal of significance into the order of taking proceedings viz, the filing of the writ or a reference to arbitration. But, with respect, none of the cases since Doleman as I have shown, have placed any significance whatever in the order of, or sequence in which one or other of the proceedings is initiated.

The real question which now arises is whether there was any overlap of issues between the arbitration proceedings and the action as filed. When the action was filed, the claim related both to indemnity and a claim for damages. The arbitration clause related only to disputes about the quantum of indemnity and therefore reference to an arbitrator could only be made, where that state of events existed. It was the existence of a dispute as to quantum which was capable of triggering the arbitration clause. Kone Oy v. Optec NC & Anor. (supra) is authority for saying that where an arbitration clause allows reference to an arbitrator to be made when a dispute as to quantum exists, it cannot be invoked where the dispute concerns liability. Slade L.J. had this to say at p. 6:

> " The decisions in the Metropolitan Commissioners of Sewers case (1853) Law Journal (New Series) 234 and the Jureidini case well illustrate that where a dispute between two contracting parties relates to liability rather than quantum, the dispute may not be covered by a clause which simply provides for disputes as to amount to be referred to arbitration. In both those cases the relevant dispute did demonstrably relate to liability rather than quantum. In the former, the primary issue was whether the claimant had suffered any damage at all by the exercise of the powers of the relevant statute, so as to give rise to liability. In the latter, the primary issue was whether the claim was a fraudulent one. In both these cases, questions of amount of damage would not have arisen until these primary issues had been decided."

He relied on Jureidini v. National British and Irish Millers Insurance Co. Ltd. [1915] A.C. 499 and Commissioners of Sewars case [1853] L.J. (M.S.) 234. The situation stands thus - there is a reference to an arbitrator which could only be possible when a dispute between the parties with respect to quantum of indemnity exists. That situation only came into being when the appellants admitted liability. Mr. Goffe Q.C. is therefore correct when he says that the arbitrator has before him what can

properly be brought before him, i.e. the determination of the quantum of the indemnity. The Court also has before it, what is not before the arbitrator viz, the determination of damages arising from the delay in settling what has been described in argument, as consequential damages. The claims or the issues to be determined are quite different: the enquiries to be made are different. It is correct to state that the basis of the Court's determination will depend on a prior determination of the arbitrator. But clause 17 of the conditions of the policy which was inserted unilaterally by the appellants, stipulated, so far as material, as follows:

> "... And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

This stipulation binds both parties. In the result, as it appears to me, the arbitrator is competent to deal with the question of quantum of indemnity and to make an award. The arbitrator's award having first been obtained, binds the parties and becomes admissible as the basis for the assessment of damages by the Court.

The conclusion is inevitable that Bingham J. correctly exercised his discretion. The issues which the arbitrator and the Court are called upon to determine are altogether different. There is no overlap. The award of the arbitrator is necessary for the action as provided by clause 18 (the Scott & Avery clause) inserted by the appellants. It would, it seems to me, to be wholly inequitable to restrain the arbitrator from proceeding to carry out his terms of reference under an arbitration clause, unilaterally imposed by the appellants, by process initiated at the instance of the very appellants themselves.

It was for these reasons that I agreed with others of my brothers that the appeal should be dismissed with costs.

FORTE, J.A.

I have read in draft the judgment of Carey P, (Ag.) and having regard to his detailed account of the history leading up to the subject-matter of this appeal, I will confine such references, to matters which are relevant to my reasons for concurring in the decision to dismiss this appeal.

It is common to both sides that there was a fire to the respondent's property, during the existence of a contract of insurance between the parties. The contract provides for indemnity to be paid by the appellants to the respondent for loss incurred as a result of the fire. A claim was made by the insured on the applicants and thereafter correspondence passed between the parties but, the fire having occurred on the 7th November 1989, no admission as to liability was made by the appellants one year after, and in the event, not until the 18th April 1991, and certainly so, in writing on the 19th April, 1991.

This appeal comes to this Court from an order made by Bingham J, dismissing a summons by the appellants seeking the following orders:

> 1. Restraining the plaintiff from pursuing Arbitration proceedings concurrently with these proceedings.
>
> 2. Prohibiting the Arbitrator from embarking or continuing with Arbitration Proceedings whilst the proceedings herein are being pursued by the plaintiff.

In order to understand the context of the application made in the summons, a reference to the relevant sections of the contract of insurance, and specific events in the procedural history of the case, is necessary.

There are two provisions of the contract which have achieved prominence in the final determination of the issues in the appeal. It provides in Condition 18 that where any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the

decision of an arbitrator, and it thereafter stipulates as follows:

> "... And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

The other provision is to be found in Condition 19 which reads:

> "In no case whatever shall the insurers be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

On the 6th November, 1990 i.e. near twelve months after the respondent had incurred the loss or damage, in order to safeguard his rights under the contract, which would have been evaporated by virtue of Condition 19 (supra), no admission of liability having then been made, he filed a writ against the appellants in the Supreme Court claiming in the Indorsement as follows:

> "(1) indemnity in the sum of ELEVEN MILLION ONE HUNDRED AND NINETY THOUSAND DOLLARS ($11,190,000.00) under Policy No. AH-F 5995196 dated 18th November, 1988 and entered into between the Plaintiff and the Defendants, in respect of loss and damage sustained by the plaintiff on or about 7th November, 1989 as a result of a fire at 40 Port Royal Street Kingston;
>
> (2) interest thereon;
>
> (3) damages for breach of the said contract of insurance or alternatively for negligence in the settlement of the said claim;
>
> (4) a declaration in respect of each Defendant that it has been guilty of unreasonable delay in the payment or settlement of the said claim."

The appellants, however, wrote to the respondent's attorneys on the 19th April, 1991 admitting liability but at that time the differences between the parties as to the amount of the loss was still subsisting. The respondent thereafter on the 26th August, 1991 invoking the provisions of Condition 18 referred the matter to Arbitration by serving upon the appellants a "Notice of Request to concur in appointing single Arbitrator." On the 2nd April, 1992, he filed his Points of Claim with the Arbitrator, and on the 4th May, 1992 served the writ (which had been filed on the 6th November, 1990) upon the appellants' Attorneys under cover of a letter which inter alia stated.

> "There is no intention to duplicate the arbitration proceedings and we do not intend to pursue claims which are justiciable in the arbitration."

In furtherance thereof, the respondent filed his statement of claim in the Action on the 29th July, 1992 and therein made no claim for indemnity for the loss incurred, inspite of such claim being included in the writ. Significantly, on the 7th May, 1992 the appellants filed their "Points of Defence" in respect of the claim in the Arbitration, but nevertheless filed a defence to the action on the 28th September, 1992, and thereafter made the application the subject of this appeal.

Before us the appellants contended that the respondent having filed a writ before making his submission to arbitration, has abandoned his right under the arbitration clause to go to arbitration, and as they (the appellants) have not applied to stay the action, or subsequently agreed to go to arbitration he must proceed with the action. This is so, they submit, because in cases where the subject matter of the action and the arbitration is the same, and the plaintiff first invokes the aid of the Court, the jurisdiction of the Court cannot be ousted. In cases where the writ is filed subsequently to the submission to arbitration,

then if the subject matter is the same, the plaintiff will be put to election. In the alternative, the appellants also contend that the issues before the arbitrator and that before the Court overlap and in those circumstances also, where the writ is first in time, the arbitration cannot be allowed to trespass on the jurisdiction of the Court.

In order to determine the validity of these submissions a brief look at the legal principles governing these matters is necessary. The parties to a contract could always agree to refer their differences arising thereon to an arbitrator, or some other private body. Nevertheless, the Courts would never refuse to adjudicate on matters brought before it whether or not there was such an arbitration clause in the contract. If the matter, albeit the same subject matter in which the contract calls for arbitration, was sued for in the Courts, the defendant may have had an action in breach of contract against the plaintiff, but could never set up the clause as a defence to the action. The plaintiff was therefore never precluded by the existence of the arbitration clause from appealing to a Court of law to enforce his rights under a contract, because such a clause did not oust the jurisdiction of the Court as the Court had the jurisdiction to pronounce finally and conclusively on the rights of the parties. (See **Doleman & Sons v. Ossett Corporation** [1912] 3 K.B. 257). To remedy the situation, in England, the legislature through the Common Law Procedure Act introduced the machinery which is now provided by section 4 of the Arbitration Act 1889 (England). In Jamaica this was done through the provisions of section 5 of the Arbitration Act which reads:

> "5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may

> "at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings apply to the Court to stay the proceedings, and if the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

In the case of **Doleman & Sons v. Ossett Corporation** (supra) at page 268 Fletcher Moulton LJ explains the effect of the English statute which is pari materia with our own provision, his explanation being in agreement with my own. He said:

> "It (the Court) has under these provisions power to refuse its aid to a person who appeals to it in breach of an agreement to decide the matter by arbitration. But the statute very properly requires that the necessary application so to do should be made by the defendant immediately on appearance and before taking any step in the action. If the defendant allows the action to proceed for a while, he cannot subsequently withdraw it from the Courts. If the Court thus refuses its assistance to the plaintiff, he is driven to have recourse to arbitration as his sole means of obtaining redress, and thus the original agreement to submit the matter to arbitration is indirectly enforced."

If the plaintiff seeks the assistance of the Court in the face of an arbitration clause, then if the Court refuses to stay the action on the application of the defendant or if the defendant does not apply for the stay, then the Courts will be seised of the dispute, and will be the overriding authority by which the dispute will be finally determined. In the words of Fletcher Moulton LJ in the **Doleman** case -

> "... There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted.
> Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the Court would be to say that, in all cases in which s. 4 of the Arbitration Act, 1889, applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, oust the jurisdiction of the Courts to decide the question they have in hand. In each case where the Court has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunal which should be the first to give a decision in the matter."

It is on the strength of these well defined principles that the appellants have advanced their case. They contend that the respondent having filed a writ in breach of the arbitration clause has chosen to place the matter before the Court and they (the appellants) having not applied for a stay of the proceedings, the Court being the overriding authority must proceed to adjudicate upon the matter. This submission is of course dependent on the success of their contention that the subject matter before the arbitrator is the same as that before the Court or that at any rate, the issues before both bodies, overlap. That the principles adumbrated in the **Doleman** case (supra) would apply in circumstances where the issues overlap was established in the case of **Northern Regional Health Authority v. Derek Crouch Construction Co Ltd** [1984] 2 All E.R. 175. A reference to the headnote will be sufficient to indicate the responsibility of an Arbitrator when the question of overlapping of issues arises and a fortiori that where such circumstances exist, it is the Court that ought to decide in what tribunal those issues should be determined. It reads:

> "Held (1) (Per Dunn and Browne-Wilkinson LJJ) There was no rule of law that an arbitrator must decide all matters in dispute between the parties and nor was there any inherent objection to an action and an arbitration proceeding side by side. Accordingly, if any overlap of issues occurred the arbitrator, who would be in the best position to decide whether that was so, would be entitled to refuse to decide any issues which overlapped with the High Court proceedings. Alternatively (per Sir John Donaldson MR), although an arbitrator was under a primary duty to decide all matters referred to him, he was entitled to indicate whether he was being asked to decide issues which were concurrently before the court thereby giving the parties an opportunity to apply to the court to exercise its supervisory jurisdiction over arbitrators by giving directions whether to proceed with the arbitration."

The history of these proceedings indicate that it is upon the suggestion of the arbitrator that the present proceedings were brought, as the appellants also contended before him, that the issues overlap. Do they? The dispute before the arbitrator relates to a difference as to the quantum of the damages for which the respondent should be indemnified. Though the writ of summons, made such a claim, the statement of claim makes no such claim, but is confined to a claim in damages caused by the appellants delay in settling the claim. After alleging that it was an implied condition of the contract that the defendants would exercise due diligence and reasonable expedition in dealing with claims, and that the defendants breached that condition well knowing that the plaintiff's stock was furnished with foreign currency and that the Jamaican Dollar was steadily declining, the respondent claimed the following damages in the statement of claim:

> **PARTICULARS OF LOSS AND DAMAGE DUE TO THE DECLINE IN THE VALUE OF THE JAMAICAN DOLLAR SINCE THE DATE OF THE LOSS**
>
> "(a) Loss due to failure to make a payment on account in the amount of $5M in April 1990 less credit for a payment of $2.5M in June 1991 $ 6,025,425

"(b) Loss due to failure to pay the sum of $6.9M in June 1990 in settlement of the balance of the amount of $11.9M - the value of the stock $16,087,993

$22,113,418"

The two claims are clearly different. The appellants however contend that a determination of the damages claimed in the action necessitates a finding as to the amount of loss, and in those circumstances, the Court will be asked to determine the same matter which the arbitrator is called upon to decide. In my view, on the face of it, this contention has merit, as the value of the loss must be ascertained as a basis for determining what damages have occurred as a result of the delay, and the resultant devaluation of that amount of currency during the relevant period.

That however is not an end of the matter. The appellants in an attempt to convince us of the validity of their submissions, contend that in those circumstances the Court now being seised of the matter, should not surrender its superior jurisdiction to the arbitrator or engage in a race with the arbitrator as to a determination of the quantum of the indemnity for which the appellants may be liable.

Bingham J, in the Court below, however exercised his discretion in favour of the respondent, by refusing the injunction sought to prevent the arbitrator from proceeding. Before determining whether this decision is correct, it is appropriate as a reminder, to state that this Court can overturn the exercise of his discretion not to stay the arbitration proceedings only if it is demonstrated that he misdirected himself or reached a wholly wrong conclusion.

The question which now arises, is whether the respondent at the time he filed his writ, was in fact in breach of condition 18 of the policy and as a result, could be said to have abandoned his right to submit to arbitration.

It is common ground that at the date of the writ, the appellants had not admitted liability. It is also agreed on both sides, that a non-admission of liability amounted to a denial of liability. These accepted facts have therefore to be viewed against the background of Conditions 18 and 19 of the contract, both of which have been referred to heretofore. Condition 18 relates to disputes which arise as to the limited issue of the amount of loss for which the respondent is entitled to be indemnified. On the date the writ was filed, there was also a dispute as to the appellants' liability under the contract. This leads to the important point for determination, and that is, where, as here, the appellants' companies under the policy of indemnity, dispute liability as well as the amount of the loss, whether the submission to the arbitrator for determining the amount of loss, is a condition precedent to the filing of an action.

In determining the very question in the case of **Shah Glassware Mart v. Hercules Insurance Company Limited** [1963] E.A. 114; the East African Court of Appeal held:

> "... the respondent's refusal to admit liability amounted in the circumstances to a denial of liability and accordingly the obtaining of an arbitrator's award as to the amount of loss was not a condition precedent to the action; ..."

This was a case in which the provisions of the arbitration clause were in exact terms as is in the case before us. In coming to its decision that Court (per Sir R. Sinclair P.) applied the decisions in the cases of **Jureidini v. National British and Irish Millers' Insurance Co., Ltd.** [1914-15] All E.R. 328 and **Heyman and Another v. Darwins, Ltd** [1942] 1 All E.R. 337. In the **Jureidini** case, there was a policy of insurance which indemnified the insured for loss or damage done to certain property. The clause in relation to arbitration was in exact terms as the policy, the subject

It is common ground that at the date of the writ, the appellants had not admitted liability. It is also agreed on both sides, that a non-admission of liability amounted to a denial of liability. These accepted facts have therefore to be viewed against the background of Conditions 18 and 19 of the contract, both of which have been referred to heretofore. Condition 18 relates to disputes which arise as to the limited issue of the amount of loss for which the respondent is entitled to be indemnified. On the date the writ was filed, there was also a dispute as to the appellants' liability under the contract. This leads to the important point for determination, and that is, where, as here, the appellants' companies under the policy of indemnity, dispute liability as well as the amount of the loss, whether the submission to the arbitrator for determining the amount of loss, is a condition precedent to the filing of an action.

In determining the very question in the case of **Shah Glassware Mart v. Hercules Insurance Company Limited** [1963] E.A. 114; the East African Court of Appeal held:

> "... the respondent's refusal to admit liability amounted in the circumstances to a denial of liability and accordingly the obtaining of an arbitrator's award as to the amount of loss was not a condition precedent to the action; ..."

This was a case in which the provisions of the arbitration clause were in exact terms as is in the case before us. In coming to its decision that Court (per Sir R. Sinclair P.) applied the decisions in the cases of **Jureidini v. National British and Irish Millers' Insurance Co., Ltd.** [1914-15] All E.R. 328 and **Heyman and Another v. Darwins, Ltd** [1942] 1 All E.R. 337. In the **Jureidini** case, there was a policy of insurance which indemnified the insured for loss or damage done to certain property. The clause in relation to arbitration was in exact terms as the policy, the subject

matter of this appeal. In addition however, the policy had a condition which made any fraudulent claim result in the forfeiture of any benefits under the policy. As a result of damage to certain insured property, the insured made a claim on the insurers who refused to honour it on the basis that the loss was caused by the felonious acts of the insured whom they charged with arson, and alleged that the claim was fraudulent. The insured brought an action on the policy, and the insurers contended that the condition as to arbitration had to be fulfilled before an action could be brought. It was held that the allegation that the claim was fraudulent resulted in a repudiation which went to the substance of the whole contract, and therefore the insurers were not entitled to insist on a subordinate term of the contract being enforced. The insured's action was therefore competent although the dispute had not been referred to arbitration.

The speeches in the case were subsequently analysed in the case of **Heyman v. Darwins Ltd** (supra) by Viscount Simon, L.C. who concluded that the majority of the House decided the case on the basis that no difference had arisen as regards matters which could come for decision under the arbitration clause and that that clause therefore had no application. He explained it thus:

> "Viscount Haldane, L.C., who had during the argument, referred to the above observation of Lord Shaw in the Hohannesberg case [1909] S.C. (H.L.) 53 2 Digest 335a says at p. 505:
>
> 'Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up the repudiation can be entitled to insist on a subordinate term of the contract still being enforced.'
>
> At page 507, Lord Dunedin, pointed out that the arbitration clause only applied to differences as to amount of loss, and therefore not to a

> "claim which the respondents rejected altogether, whatever the loss might be. Lord Atkinson at p. 507, rested his judgment on this last point alone. Lord Parker concurred without distinguishing reasons. Lord Parmoor, at p. 508, says expressly that no difference had arisen as regards matters which could come for decision under the arbitration clause and that consequently the clause had no application. It is on this second ground that I think the majority of the House should be regarded as having decided the appeal."

Sir R. Sinclair P, in the **Shah** case (supra) having himself analysed the speeches in the **Jureidini** and **Heyman** cases (supra) came to the following conclusion, which is relevant to the issues in the present case, and with which I am entirely in agreement. He stated:

> "I think that these authoritative expositons of the judgments in **Jureidini's** case show clearly that nothing turned upon whether in fact there was a dispute or difference as to the amount of the loss because the total repudiation of liability was all pervading and prevented any approach to the stage at which a difference over amount could be a live issue. I think that in the light of what has been said by the eminent authorities quoted above the words used by Lord Dunedin -
>
> 'that clause necessarily refers to an existing difference, not a historical difference',
>
> are to be construed in the sense, not that there had been a dispute as to amount which had been resolved before action (which does not in fact appear to have been the case, as the dispute lasted at least until trial) but in the sense that such dispute had been superseded by the total denial of liability."

In my view, as long as there is a dispute as to liability, there cannot be said to be an existing difference as to the quantum of damages. This view also coincides with that expressed by Slade J,

in **Kone Oy v. Optec NV and another** decided in the English Court of Appeal (Civil Division) available in 1983 C.A. Bound Transcript 171 at page 8. He stated as follows:

> "The decisions in the Metropolitan Commissioners of Sewers case (1853) Law Journal (New Series) 234 and the **Jureidini** case well illustrate that where a dispute between two contracting parties relates to liability rather than quantum, the dispute may not be covered by a clause which simply provides for disputes as to amount to be referred to arbitration. In both those cases the relevant dispute did demonstrably relate to liability rather than quantum. In the former, the primary issue was whether the claimant had suffered any damage at all by the exercise of the powers of the relevant statute, so as to give rise to liability. In the latter, the primary issue was whether the claim was a fraudulent one. In both these cases, questions of amount of damage would not have arisen until these primary issues had been decided."

In the instant case, at the time of the filing of the action, there was a dispute as to liability and therefore the question of the quantum of the loss or damage, had not yet become a live issue. Consequently, there were no circumstances existing upon which Condition 18 of the contract could be invoked, that condition being limited to the amount of loss or damage suffered by the respondent. There was therefore no reason why the writ should not have been filed given the requirements of Condition 19 which required a suit to be filed within 12 months.

In bringing the action, having regard to Condition 19, the respondent was doing no more than protecting his rights under the policy and at any rate, since liability had been denied, the question of any differences as to quantum was not an existing issue, and consequently the respondent could not have submitted to arbitration at that stage. There was therefore no breach of the condition of the arbitration clause in the policy. It follows

also, that at the time of the filing of the writ, any application to stay the proceedings in accordance with section 5 of the Act, would necessarily have met with failure, as liability had not been admitted, and the only recourse the respondent would have had was in the Court, the issue of the amount of loss or damage being the only issue which was justiciable by arbitration. Significantly, the respondent, soon after the admission of liability obviously cognizant of the fact that Condition 18 would thereupon become operative, abandoned in the action his claim in relation to the quantum of loss or damage for which he should be indemnified and in accordance with that clause submitted that question to arbitration. In my view, this was the correct procedure to follow.

Mr. Goffe in his arguments before us, has stated that the respondent's intention is to proceed with the arbitration with a view to having the quantum of the loss ascertained, and thereafter to proceed with the action for damages. In my view, having regard to the condition stipulated in Condition 18 i.e. that an award by an arbitrator is a condition precedent to any right of action - the action cannot be proceeded with, until the arbitrator's award has been obtained.

For the reasons set out, I agree with my brothers, that the order by Bingham J, cannot be disturbed, and that this appeal should be dismissed with costs to the respondent.

GORDON, J.A.

This is an appeal from an order made by Bingham J, on 29th October 1992 dismissing in chambers a summons brought by the appellants against the respondent. In the summons the appellants had sought an order -

(1) restraining the plaintiff from pursuing arbitration proceedings concurrently with proceedings pending in suit No. C.L. S 233 of 1990 and

(2) prohibiting the arbitrator from embarking or continuing arbitration proceedings whilst the proceedings in suit No. C.L. S 233 of 1990 are being pursued by the plaintiff.

In this appeal the appellants urged that the decision of Bingham J, should be set aside and the orders sought in the summons be made in favour of the appellants.

Before addressing the submissions of counsel, it is convenient and desirable to state briefly the facts on which these proceedings are based.

1. By a policy of insurance entered into between the respondent and the appellants, the respondent insured his building, furniture, fixtures and stock-in-trade against loss or damage by various perils including fire.

2. On 7th November 1989 while the policy was in force the insured property was destroyed by fire.

3. The respondent in due course made a claim against the insurers, under the terms of the policy, for compensation for his loss. This claim was resisted by the insurers (the appellants).

4. On 6th November 1990 the last day of the limitation period contained in the contract of insurance, the respondent filed a writ claiming damages for his loss against the appellants, the insurers.

5. The appellants admitted liability on 18th April, 1991 and arbitration was commenced on 26th August, 1991.

6. By originating summons M 10 of 1992 filed on 28th January 1992, the appellants (insurers) sought, inter alia, a Declaration that the arbitration proceedings were out of time: a Declaration that the appellants were not liable to pay the respondent any further sums other than the $2.6m paid in July 1992 and an order staying the arbitration proceedings.

7. This summons was dismissed by Ellis J, on 12th March, 1992.

8. The writ of summons was served on the appellants under cover of a letter dated 4th May 1992 from the plaintiff which stated:

> "There is no intention to duplicate the arbitration proceedings and we do not intend to pursue claims which are justiciable in the arbitration."

9. Statement of Claim was filed on July 29, 1992 no claim was made for indemnity which was the subject of the arbitration proceedings.

10. On 10th August, 1992 the parties met with the arbitrator; the appellants stated their objection to the arbitration and the suit proceeding concurrently, and the arbitrator ruled it was for the Court to decide.

11. Appellants' list of documents in arbitration filed on Respondent on 28th September, 1992.

12. Defence to suit filed 28th September, 1992.

13. Summons for stay filed 9th October, 1992.

14. Summons dismissed by Bingham J, on 29th October 1992.

15. For completeness it is necessary to reproduce relevant portions of Conditions 18 and 19 of the policy of insurance.

Condition 18 reads:

> "If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, ...

> "And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

Condition 19:

> "In no case whatever shall the insurers be liable for any loss or damage after the expiration of twelve months from the happenning of the loss or damage unless the claim is the subject of pending action or arbitration."

The appellants contended that they had instituted proceedings which sought to prohibit the prosecution of concurrent claims before the Arbitrator and before the Court. Mr. George submitted that the writ was filed before arbitration proceedings commenced and that both should not proceed concurrently because the issues are identical and in any event will, and must, overlap. Furthermore the plaintiffs' decision to exclude from the statement of claim the claim for indemnity cannot affect the principle that an action when filed makes the arbitration clause dealing with the same subject matter inoperable unless the defendant seeks a stay which the defendant has not sought.

The appellants relied on Doleman & Sons vs. Ossett Corporation [1912] 3 K.B. 257. The report in this case commences with this statement:

> "Where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract, and is pending, no application to stay the action having been made under s. 4 of the Arbitration Act, 1889, or such an application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequently to the commencement thereof, and without the consent of the plaintiff, is invalid, and will not afford a defence to the action."

In Doleman's case while the writ was pending, the arbitrator without the consent of the plaintiff made an award and the Court of Appeal held that the award was of no effect and not binding on the Court. The thrust of the appellants' argument before us was that the issues before the arbitrator and the Court were identical and the court will not permit the arbitrator to decide matters which the court must decide.

The filing of the writ by the plaintiff, it was submitted, was an abandonment of the right to proceed to arbitration contained in Condition 18 of the agreement, and without the consent of the appellants, which consent was not forthcoming, the plantiff cannot invoke the arbitration clause, but is constrained to pursue the remedies claimed in the writ.

Mr. Goffe submitted that there was no over-lapping in the claims before the tribunals. The claim before the arbitrator was for indemnity in accordance with the provisions of Condition 18 of the contract. That before the Court in the writ was for damages and the arbitrator had no jurisdiction to entertain the claim for damages. Likewise the Court could not entertain the claim for indemnity because (a) it was not pleaded in the statement of claim; it was abandoned after the respondents admitted liability and (b) the claim for indemnity being properly before the arbitrator, his decision will be binding on the Court by virtue of section 13 of the Arbitration Act. Continuing Mr. Goffe submitted that the arbitration clause in the case was confined to the amount of loss only. Until liability was admitted neither party could invoke the arbitration clause. When the writ was filed, he stressed, he could not go to arbitration, it was many months after he filed the writ that the appellants admitted liability.

I found the presentations of counsel helpful, particularly those of Mr. Goffe which I accept as correct. The appellants up to the time the writ was filed had not admitted liability and the

plaintiff had to protect his common law right of action which had been constrained by Condition 19 of the contract. This was a contract of adhesion: the insured had little or no choice. To get the coverage he required, he had to accept the contract prepared by the insurers. This contract whittled his common law right of action down from 6 years to 12 months. It was a situation of "take it or leave it." On the last day of the limitation period fixed by the contract the insurers had not admitted liability so the plaintiff was obliged to act in his own interest.

The case of **Bhimji Anand Shah trading as Shah Glassware Mart v. Hercules Insurance Company Limited** [1963] East African Reports 114 relied on by the respondents is supportive of the Respondent's submission. The contract in this case contained a provision similar to that in the instant case. This provision is called a **Scott v. Avery** clause [1843-60] All E.R. Rep. 1.] In **Shah's** case the Court of Appeal at Nairobi held:

> "(1) the respondent's refusal to admit liability amounted in the circumstances to a denial of liability and accordingly the obtaining of an arbitrator's award as to the amount of loss was not a condition precedent to the action."

I am not persuaded that **Doleman's** case is of any assistance to the appellants.

I cannot perceive any overlapping of claims. The arbitrator is required to determine the amount of loss - the indemnity. This amount when determined is enforceable under the provisions of section 13 of the Arbitration Act. The arbitrator can only act if there has been an admission of liability by the insurers. Failure of the insurers to admit liability would oblige the insured to have recourse to his right of action to have liability determined by the Court and to have consequential damages assessed,

if claimed. Liability having however been admitted, albeit belatedly, the jurisdiction of the court is replaced by that of the arbitrator who now has the responsibility under the contract to determine the amount of the loss. The Court has jurisdiction under the **Scott v. Avery** clause to determine the amount of loss when it is coupled with a determination of liability or if the parties consent.

In this case, the insured claimed in the writ consequential damages occasioned by exchange loss due to failure by the insurers to pay the claims promptly. In this regard, devaluation of the Jamaican currency was a factor. This claim could not be entertained by the arbitrator. There was therefore in my view no overlapping of claims. On an overview of the submissions under this head I would quote with approval this finding of the Court of Appeal in **Northern Regional Health Authority v. Derek Crouch Construction Co Ltd** [1984] 2 All E.R. at p. 175:

> "There was no rule of law that an arbitrator must decide all matters in dispute between the parties and nor was there any inherent objection to an action and an arbitration proceeding side by side. Accordingly, if any overlap of issues occurred the arbitrator, who would be in the best position to decide whether that was so, would be entitled to refuse to decide any issues which overlapped with the High Court proceedings."

With that, I couple the dicta of Evelsigh, L.J. in **Lloyd and others v. Wright Dawson v. Wright** [1983] 2 All E.R. 971 at p. 972:

> "The principle that the court will not allow its jurisdiction to be ousted is at the root of the appellant's argument. However, the court does not claim a monopoly in deciding disputes between parties. It does not, of its own initiative, seek to interfere when citizens have recourse to other tribunals. The court exercises its jurisdiction when appealed to. Until then, the court is not conscious of ignominy if an arbitrator decides a question with which the court is competent to deal. Furthermore, the court will not refuse to allow the subject matter of an action

> "already begun to be referred to arbitration, if the parties so agree, ... The court, however, will not permit its assistance to be denied to a party who has invoked it except by that party's consent or by its own ruling. ..."

It was the contention of the appellant that the arbitration proceedings should be stayed and the plaintiff would consequently be obliged to proceed with the action. The appellant therefore in effect prayed the court in Equity for injunctive relief. It is desirable that the conduct of the appellants be examined to determine if they accord in principle with what Equity requires in terms of behaviour of one who seeks equitable relief.

The appellants in their contract limited the right of action to one year instead of six years provided at common law. This placed the respondents at a disadvantage. The appellants then delayed their investigation obliging the respondent to file action to protect their rights. They admitted liability and subsequently, after arbitration proceedings had been commenced, they sought by an originating summons before Ellis J, to have those proceedings aborted on the ground that they were out of time.

Ellis J, on 12th March 1992 dismissed the summons. From his decision, there was no appeal. I think it desirable to refer to some of the learned judge's findings of fact which are unchallenged and with which I entirely agree:

> "(a) The fact that in spite of the one-year limitation, the insurers 'purportedly' investigated the claim for over one year and three months before accepting liability.
> ...
> (b) The fact that the insurers continually led the insured 'down the garden path' by requesting information and documents, the relevance of which was never explained.
> ...

"(c) The fact that the insurers did not send their building experts to survey the building until some six months after the fire.

(d) The fact that six months after the fire they had not studied the documents which were submitted to them in support of the claim, for they asked for documents, e.g. schedule of fixtures, cash balances, which were already on their file.

(e) The protracted negotiations between the insurers and the Insured and the requirement for voluminous documentary proof of loss evinced a clear denial of liability.

(f) The denial of liability removed the necessity to have an arbitration award as a condition precedent to the filing of Suit by the Insured Shoucair."

Ellis J, was absolutely correct in his conclusions.

Having failed in this endeavour the appellants by this appeal seek to thwart the respondent's effort to have justice done to his cause. These acts by the appellants certainly indicate that they are not fit and proper persons to bare their hands in the presence of justice. Bingham J, like Ellis J, was right in dismissing the summons of the appellants. It has not been shown that his discretion was improperly exercised.

Even if I were persuaded to consider favourably, without more, the supplications of the appellants I would be constrained to give effect to the spirit and intent of the Arbitration Act section 15 of which requires:

"S. 15. In any cause or matter (other than a criminal proceeding by the Crown) -

...

(b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury; or

> "(c) if the question in dispute consists wholly or in part of matters of account,
>
> the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before the Registrar or a Special Referee."

The submissions show that the evidence in this case falls fully within the parameters of section 15 (b) and (c) and to grant the relief claimed would be a futile exercise. I will not be persuaded to do anything in vain.

For these reasons I agreed that the appeal be dismissed with costs to the respondent to be taxed if not agreed.