IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E207 OF 1985

IN THE MATTER of an Application by Mutual Housing Services Limited for an Order to set aside an award dated the 27th day of August, 1985, pursuant to Section 12(2) of the Arbitration Act of 1900.

A N D

IN THE MATTER of an Arbitration between Marley and Plant Limited and Mutual Housing Services Limited under the Arbitration Act, 1900.

SUIT NO. E216 of 1985

IN THE MATTER of an Arbitration between Marley and Plant Limited and Mutual Housing Services Ltd.

A N D

IN THE MATTER of Section 13 of the Arbitration Act.

SUIT NO. E253 of 1985

IN THE MATTER of an Arbitration by Marley and Plant Limited for an Order to strike out the Originating Notice of Motion filed on the 16th day of September, 1985 bearing Suit No. E207 of 1985, pursuant to the Judicature (Civil Procedure Code) Act.

A N D

IN THE MATTER of an Arbitration between Marley and Plant Limited and Mutual Housing Services Ltd. under the Arbitration Act, 1900.

Carl Rattray Q.C. and John L. Thompson for Mutual Housing Services Ltd.

Miss Hilary Phillips and Miss Christine Tomlin for Marley and Plant Ltd.

HEARD: NOVEMBER 7, 8 DECEMBER 12, 13, 1985, JANUARY 9, 10, 1986
NOVEMBER 24, 1986.

WOLFE J.

The Applicant, Mutual Housing Services Limited, seeks an Order in Suit No. E207/85 to set aside an award made on the 27th day of August 1985 in the matter of an Arbitration between Marley and Plant Limited and the Applicant herein.

The Applicant in Suit No. E216/85 to wit Marley and Plant Limited prays the court for leave to enforce the said award made on the 27th day of August 1985 in the same manner as a Judgment or an Order to the same effect and further for leave to enlarge the time for making the award.

Suit No. E253 of 1985 is an application by Marley and Plant Limited to strike out the Originating Notice of Motion filed by Mutual Housing Services in Suit No. E207 of 1985.

By and with the consent of the parties all three applications were heard together.

I propose herein to deal first with the application by Marley and Plant Limited in Suit No. E253 of 1985 to strike out the Originating Notice of Motion in Suit No. E207 of 1985.

The Originating Notice of Motion in Suit No. E207 of 1985 seeks an order to set aside the award of the sole Arbitrator dated the 27th day of August 1985 arising out of the reference of an Arbitration between Marley and Plant Limited and Mutual Housing Services Limited the said reference bearing the date 14th February 1985. The order is sought pursuant to section 12(2) of the Arbitration Act and the court's inherent powers.

The grounds upon which the order is sought are set out hereunder:

1. That the terms of reference are as stated in the Award set out in Agreement dated the 14th February, 1985,

and the Award is dated the 27th August, 1985. That the provisions of Section 4 (c) of the Arbitration Act require the Arbitrator to make his Award within three months after entering upon the reference. That the Arbitration proceedings commenced on the 11th day of April, 1985. That the time of for making the Award was not enlarged either by agreement of the parties or order of the Arbitrator or a n Order of the Court or Judge under the provisions of Section 10 of the Arbitration Act. That at the time of making the Award the Arbitrator was, therefore, functus officio and the Award is, in the circumstances, null and void and of no effect.

2. That there is error on the face of the Award in that in respect of Claims 4, 5, 6, 7, 9, 12, and in respect of all the applicant's Counterclaims, in that the Arbitrator has stated in his Award that "I make no Award". That the Arbitrator in respect of these Claims and Counterclaims has, therefore, found neither in favour of one side nor the other as to the merits of the Claim, and, therefore, failed to address his mind to the issues raised in these Claims and the Counterclaims.

3. That the determination of the issues involved a determination of various questions of law raised by the parties before the Arbitrator and which have not been addressed in the Award and the Award is, therefore, not capable of being understood by the parties and this constitutes misconduct on the part of the Arbitrator.

4. That the points of law raised and argued before the Arbitrator were as follows:

   a) Claims 1, 2 and 3 raised the question as to whether in law the claimant was entitled to extensions of time under Clause 23 of the Contract, the extent of such extensions, if any, whether Claims had been made in accordance with the provisions of Clause 23 of the Contract during the currency of the Contract, and whether Claims had been made under Clause 24 of the Contract by reason of delays entitling the claimant to an extension of time which would have entitled the claimant to a monetary award.

   b) That in respect of Claim No. 10, the question of law arising was whether under Clause 31 of the Contract which deals with Fluctuation of Labour, this Claim could be established without the

production by the claimant as required by Clause 31 (iii) of the Contract of "detailed time sheets for all work people engaged upon or in connection with the works". The Contractor failed to produce the time sheets as required by this Clause of the Contract either during the currency of the Contract or to the Arbitrator.

c) That in respect of Claim 11, the legal questions which were argued were as follows:

(i) Does Clause 31 of the Contract permit a payment to the claimant in respect of a fluctuation on the price of all materials during the currency of the Contract?

(ii) If the answer is in the negative, does it permit a fluctuation in respect of the items listed as the schedule of basic rates of materials (Schedule 5 of the Contract)?

(iii) If materials are not in the schedule of basic rates of materials is the claimant entitled to fluctuation in the prices of these materials not on the list during the currency of the Contract?

d) That in respect of Claim No. 13, the legal questions raised were as follows:

(i) In the absence of a Fluctuation Clause for Equipment in the Contract, is the claimant entitled to make a claim for Fluctuation of Equipment?

(ii) Does clause 31 of the Contract permit such a claim?

(iii) Could such a claim be accommodated either under Clause 11 (6) or Clause 24 of the Contract?

e) That in respect of Claim No. 14, the legal question raised was:

Is the claimant entitled to remove material and equipment from the site during the currency of the Contract and to be paid for such removal and its return bearing in mind the provisions of Clause 14 of the Contract and maintain a claim for the cost of removal and return of this material and equipment?

f) That in respect of Claim No. 16, the legal question was:

Bearing in mind the closure of the site by the Contractor on the 29th of March, 1984, is the owner entitled to liquidated damages under Clause 22 of the Contract?

5. That these questions of law were fully addressed and in the final written submissions to the Arbitrator and that professional legal advice was available to the Arbitrator in respect of the drawing up of the Award. That there is error on the face of the Award and misconduct in that the Arbitrator has made a determination, such determination is contrary to the law on the particular issues, since a proper determination would require a finding against the claimant. The Arbitrator, therefore , either:

a) did not consider the legal issues or

b) came to a wrong conclusion in respect of these legal issues.

In any event, in the circumstances, the Arbitrator should have given his Award in the form of a case stated on the points of law, and the Arbitrator misconducted himself in not so doing, or alternatively, in not addressing the points of law in his Award, as required by the terms of reference.

6. That the Arbitrator misconducted himself, in that, he awarded interest at the rate of fifteen percent (15%) on his Award, to be paid from the 28th April, 1984 until the 27th August, 1985, and that he is not entitled in law to award interest in these proceedings."

The Application to strike out is made on the following grounds:

1. That the application to set aside the award discloses no reasonable basis for the action taken.

2. That it is scandalous, frivolous, vexatious and without merit.

3. That it may prejudice, embarrass or delay the interests of justice and

4. That it is otherwise an abuse of the process of the Court.

It cannot be doubted that a court is empowered to strike out a pleading in certain prescribed circumstances.

Those circumstances are lucidly set out in Halsbury's Laws of England 3rd Edition Volume 30 pages 36 - 39 paragraphs 75 - 78.

Paragraph 75 - Striking out unnecessary or scandalous matter.

> "The Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action. The power to make the order is discretionary and should be exercised only in plain and obvious cases; but it is the duty of the judge to make an order in a fit case since a party is entitled ex debito justitiae to have the case against him presented in an intelligible manner. If the objectionable parts cannot be severed from the rest, the whole pleading may be struck out. (emphasis mine)

Paragraph 76 - Striking out Pleading showing no cause of action or defence.

> "The Court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer. In judging of the sufficiency of a pleading for this purpose, the Court will assume all the allegations therein to be true and that they are admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists, the Court will strike it out ..... The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases, and where a question of general importance or serious question of law would arise on the pleadings the court will not strike out the pleadings unless it is clear and obvious that the action will not lie." (emphasis mine).

Paragraph 77 - Staying of frivolous and vexatious actions.

> "If a pleading discloses no reasonable cause of action or answer or if the action or defence is shown by the pleadings to be frivolous or vexatious the court or judge may order the action to be stayed or dismissed or judgement to be entered accordingly as may be just. An action may be regarded as frivolous and vexatious and therefore proper to be stayed under the foregoing power on the ground that the Court is not a forum conveniens, and that the Plaintiff having a perfectly good remedy in some other Court, cannot be allowed to continue his claim without prejudice to the defendant".

7.

Paragraph 78 Inherent Jurisdiction of Court to strike out pleadings or stay action.

> "The Court or a judge may in virtue of the inherent jurisdiction of the Court strike out any pleading or stay any action which is shown to be an abuse of the process of the Court".

If further authority is needed in support of the paragraphs cited above them reference may be made to Order 18 r19 of the Rules of the Supreme Court 1967 and to Section 191 Title 18 of the Civil Procedure Code.

In Nagle v Feilden /1966/ 1 A.E.R. p.689 at 697. Salmon L.J. said:

> "It is well settled that a statement of claim should not be struck out and the Plaintiff driven from the judgment seat unless the case is unarguable."

Fifty one years prior to Nagle's case Fletcher Moulton L.J. expressed a similiar view in Dyson v Attorney General /1911/ 1 K.B. at p. 419 when he said:

> "It has been said that the Court would not permit a plaintiff to be 'driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad."

Following the dicta of Salmon L.J. and Fletcher Moulton L.J. the question therefore arises has the Plaintiff in the instant case an arguable case. The applicant seeks to set aside the award on the basis that:

(a) the award is bad on the face of it.

(b) Misconduct on the part of the Arbitrator.

(c) the Arbitrator was functus officio at the time of making the Order.

It is unarguable that these are grounds upon which a Court may set aside the award of an Arbitrator. See Section 12(2)

of the Arbitration Act and Re An Arbitration between Montgomery, Jones and Co. And Liebenthal and Co. Vol. LXXVIII The Law Times May 28, 1898.

If the allegations as set out in the pleadings of the Applicant are sustainable then it is my view that the Applicant has an arguable case and bearing in mind the dictum of Salmon L.J. in Nagle v. Fielden supra I hold the motion to strike out ought to be denied. The application to strike out is therefore refused.

Re Suit No. E.207/85

For an Order to set aside the Award of An Arbitrator.

Ground 1 of the motion to set aside the award contends that at the time of the making of the award the Arbitrator's period of office had expired and had not been extended by the Arbitrator himself or by an order of the Court.

Section 4(c) of the Arbitration Act states as follows:

> "The arbitrators shall make their award in writing within three months after entering upon the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators by writing signed by them, may from time to time enlarge the time for making the award."

The terms of reference herein was dated the 14th February 1985. The Arbitration Proceedings were commenced on the 11th April 1985 and the arbitrator actually began hearing evidence on the 2nd May 1985. The award was handed down on the 27th August 1985. Miss Phillips for the Respondent concedes that whether the Arbitrator entered upon the reference on the 11th April 1985 or the 2nd May 1985.the award would have been handed down outside the permitted period of three months as provided for by the Arbitration Act. However she submitted that Court has power by virtue of Section 10 of

the Act to enlarge the time for the making of the award. Mr. Rattary Q.C., for the applicant, concurred with this submission. As a matter of completeness the provisions of section 10 are set out herein:

> "The time for making an award may from time to time be enlarged by Order of the Court or a judge, whether the time for making the award has expired or not."

Counsel for the respondent invites court to say, that notwithstanding the arbitrator did not expressly extend the time for making the award the parties by their conduct are estopped from contending that the time was not enlarged by the arbitrator.

Dealing with the question of the power of the Court to enlarge time the learned Author of Russell on Arbitration 18th Edition at page 287 states:

> "The power can be exercised although the award has in fact already been made after the period fixed for making it has expired. The effect of an order of enlargement is that the extended time is to be treated as if it had been originally given in the arbitration agreement. Consequently, the award and all else done in the arbitration during such extended time is rendered valid and effective."

In Browne v. Collyer 20 L.J. Q.B. 426.

> "Pursuant to the power given by an order of reference Nisi Prius, an arbitrator enlarged the time for making his award. The case proceeded, and the parties attended before the arbitrator after the time specified in the enlargement had expired. Neither party was aware that the arbitrator had omitted to keep the time enlarged. The award was made in favour of the plaintiff. Two terms further elapsed since the award was made in favour of the plaintiff. Two terms further elapsed since the award was made, the plaintiff proceeded to tax his costs, on which occasion the defendant discovered the want of enlargement and objected that the award was bad. The court on application of the plaintiff, enlarged the time for making the award."

Wightman J. at p427 said:

> "On referring to the section in the act of Parliament, 3 & 4 Will - 4 C42 S39, it seems to me that the terms are quite large enough to enable me to enlarge the time. It has been held that although the time has elapsed the court may notwithstanding grant an enlargement. It is true that the cases deciding this are cases in which no award had been made before the application to the court, and the objection here is that the arbitrator has made his award after the expiration of time given to him by the submission. .....It seems to me that I have power to enlarge the time and for this purpose it is inmaterial to consider whether the present award be a nullity or not."

It must be noted that the statute under consideration by Wightman J. is in pari materia to Section 10 of the Arbitration Act. I am prepared to follow the dictum of Wightman J. The power to enlarge time is entirely discretionary and will not be exercised unless the court thinks fit in each particular case. Where there has been unexcusable delay in applying for an enlargement the court will, as a rule, refuse the application. In this regard the case of Oakland Metal Co.Ltd. v Benaim (D) & Co. Ltd. [1953] 2 Q.B. 261 is instructive. The Plaintiffs sought a declaration that an award was a nullity on the grounds (inter alia) that one arbitrator did not possess the agreed qualifications and that his award was out of time by about fourteen days. However the court extended the time for making the award under Section 13 (2) saying:

> "Under the Section the court has a very wide discretion to enlarge the time after it has expired. It seems to me that this is a proper case in which to do so, subject to this, that the court hesitates to do so if the application is made at a late date. In the circumstances of this case, however it seems to me that it was perfectly reasonable for the defendants, rather than to take out an application at once for enlargement of time, to wait and apply to the trial judge. If there had been an application to the Master in the first instance to enlarge time I imagine that he would have referred it to the trial judge."

Section 13 (2) of the Arbitration Act of 1950 is similiar in terms to Section 10 of the Arbitration Act of Jamaica. In the instant case the award was made on the 27th August 1985 and the application to enlarge time was filed on the 31st October 1985. The delay herein, in my view, ought not to be labelled as considerable.

In Kaiser Bauxite Co. v National Workers' Union 9 J.L.R. 283. Fox J, as he then was, exercised his discretion and eenlarged the time for the making of an award in circumstances where there had been a delay of some eight months in making the application. He did so on the basis of the dictum of McCardie J. in Selley v Whitebread & Co. (1917) 1 K.B. at p. 748

> "I think that the court should approach an award with a desire to support rather than to destroy it."

Counsel for the Respondent argued in the alternative that the parties were estopped by conduct from contending that the arbitration had not enlarged the time for making the award. In support of this submission she cited and relied upon a passage from Halsbury's Laws of England 3rd Edition Volume 2 at p. 42.

> "The parties to an arbitration agreement may by their conduct be precluded from objecting to the award on the ground that it was made out of time, although they have given no express consent to the time for making the award being eenlarged."

In further support of the submission The King (In aid of Mytton) v Hill et al 146 E.R. 1085 was relied upon.

> "The defendants, in an extent in aid, have withdrawn their plea, and suffered judgment to be entered up, upon an agreement to submit to arbitration the question of the amount of what was due to the prosecutor provided the award be made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendants having delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendant's solicitor afterwards wrote a letter, requiring that the

> arbitrator would take into consideration matters not before him during the reference, which was refused, as the reference was considered to be closed: It was held by the court, that under those circumstances the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority, for that the conduct of the defendants, and the solicitor's letter, was equivalent to a consent to extend the time, and therefore they refused to set aside the judgment, and the proceedings thereon, and the award, and allow the defendants to plead to the extent."

It is patently clear that the decision in Hill's case was based upon the peculiar facts of that case which in the opinion of the court operated as consent to the extension of the time in which to make the award. I am inclined to the view of Mr. Rattray Q.C. for the Applicant, that for there to be estoppel by conduct the conduct relied on must be deliberate and not by mistake. The party, in my considered opinion, must have acted in such a manner that it can be readily inferred from his acts that he was consenting to the time being enlarged. From the history received from both Counsel who appeared before the arbitrator it is quite clear that they were so intent on facilitating the completion of the matter that they both overlooked the fact that the arbitrator had failed to enlarge the time. I have no doubt that had it been brought to their attention they would readily have agreed to time being enlarged. However I am not satisfied that the doctrine of estoppel by conduct is applicable in these circumstances. Nevertheless in the exercise of my discretion under section 10 of the Act I am of the view that this would be fit case in which to order that the time for the making of the award be enlarged. I therefore order that the time for making the award be enlarged to the 27th August, 1985.

The other grounds on which it is sought to set aside the award may conveniently be dealt with under the heading of misconduct on the part of the arbitrator. The

The applicant contends that:

(a) in respect of claims 4, 5, 6, 7, 9, 12 and in respect of all the applicant's counter claims the arbitrator stated "I make no award." In so doing the arbitrator failed to make a finding in favour of either party and therefore failed to address his mind to the issues raised in the claims, enumerated above, as well as the counterclaims. This constituted not only an error on the face of the award but also misconduct on the part of the arbitrator.

(b) questions of law were raised and argued before the arbitrator which he failed to determine or in the alternative if he determined them those determinations were contrary to law and that this constituted a error on the face of the award as well as misconduct.

(c) the award should have been given in the form of a case stated, failure to do which amounted to misconduct.

(d) the arbitrator misconducted himself in that he awarded interest at the rate of fifteen percent (15%) on his award when he was not empowered so to do.

Section 12 (2) of the Arbitration Act enacts that:

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

For purposes of the act, the question is raised, what is misconduct?

In London Export Corporation Ltd. v Jubilee Coffee Roasting Co. Ltd. [1958] 1 W.L.R. 661 at p. 665. Jenkins L.J. opined

"Misconduct is, of course, used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort."

In dealing with the effect of irregularity upon the award McNair J in Rotheray (E) & Sons Ltd. v. Carlo Bedarida Co. [1961] 1 Lloyd's Rep. 220 at p. 224 said:

"The more difficult question, however, is whether the extent of that irregularity is such as to justify

> "interference by this court either by way of setting aside the award or remitting the award. The determination of that issue..... depends upon whether the court is satisfied that there may have been - not must have been - or that this irregularity may have caused - not must have caused - a substantial miscarriage of justice that would be sufficient to justify the setting aside or remitting of the award, unless those resisting the setting aside or remission could show that no other award could properly have been made than that which was in fact made, notwithstanding the irregularity."

In so far as the Defence to the claim is concerned the issues raised there in do not give rise to any independent claims by the Applicant. The issues raised are in my view mere answers to the claim of the respondent herein and therefore are subsumed in the awards made on the claims. Let me illustrate this point by way of an example,

Claim No. 4

Core Testing

> "This claim deals with the cost of making core tests to concrete floors, walls and roofs as instructed by the owner in keeping with the request of the cUrban Development Corporation including the cost of making good the works disturbed in facilitating such tests. The claim amounts to $4,500.00.

Defence

Core Testing

> "The core tests made by the contractor to concrete floors, walls and roofs were on the instructions of the Architect as required under the contract and such tests failed the specifications. Under the terms of the contract, therefore, the Contractor is not entitled to be paid in respect of this claims."

In respect of claim No. 4 the Arbitrator made "No award". Reading the claim and the defence thereto together it is unequivocally clear that the Arbitrator accepted the

contention of the owner and rejected the claim of the contractor, hence he made no award on the claim. The same is true of claims 5, 6, 7, 9 and 12 in which the arbitrator made no award. In the light of the foregoing I reject the contention urged by the Applicant that no award indicated that the arbitrator failed to determine the legal issues raised in respect of those claims as well as the alternative argument that "if the arbitrator did make a determination such determination is contrary to law on the particular issues, since a proper determination would require a finding against the claimant." "It is my considered opinion that "No award" is a finding against the claimant and implied therein is a finding in favour of the respondent.

I shall now proceed to consider the counter claim. It shall be necessary for a proper understanding of the reasoning which is to follow to set out the details of each counter claim and the defence thereto.

Counter Claim No. 1.

Liquidated Damages

> The completion date for the works as stated in the contract between the parties and extended by a grant of extension of time by the Architect was December 31, 1983. By virtue of the failure of the contractor properly to perform the contract, the works have not been completed and will not be completed until 29th March, 1985 or soon thereafter. The owner, therefore, counter claims liquidated damages against the contractor as provided in Clause 22 of the Contract.

PARTICULARS

Liquidated Damages totalling $2,808,000.00 shown below, have been calculated based on the period January 1, 1984 to March 31, 1985, January 1984 to March 1985 = 65 weeks.

Liquidated Damages = 216 units at $200 p.w. for 65 weeks = $2,808,000.00.

N.B. The original completion date was December 19, 1983 but because the Architect had granted two weeks extension of time to the contractor damages actually commenced on January 1, 1984.

The Appendix to the contract states that the liquidated and ascertained damages under Clause 22 amounts to $200.00 per house per week.

Defence to Counter Claim No. 1

The contractor denies that the owner is entitled to liquidated damages as claimed or at all and states:

(a) The Contractor's signature to the contract in its present terms and and conditions with specifications applying thereto, was procured by misrepresentation of the owner, in that the contractor tendered for the works and won the tender based on the Joint Industrial Council's form of contract and specifications using what has been designated the Marley and Plant System of Mass housing construction (hereinafter called "M&P System").

Upon enactment of the formalities of signing the owner represented and warranted that the document presented for signing that is, the present contract, was the same as that on which tender was based and won including by especial reference the M & P system. This was not so which resulted in Marley & Plant having to make adaptations.

b) Later during construction of the works a stranger to the contract, namely, the Urban Development Corporation, was interposed to the effect that the Corporation produced additional specifications resulting in variations and delays.

c) Variations, numerous and massive in scope and value were required by the Architects throughout performance of the works and certain such variations occurring particularly during the initial stages of the contract, had the effect of dislocating the Contractor's works programme and phased scheduling.

d) The intransigence of the Architects in agreeing that the extension of time ought to have been granted and based on the facts supporting such extension of time, the quantum of time by which such extension should be given.

e) Clause 22 of the conditions of contract, stipulates that:

> "The Architect certifies in writing that in his opinion the same (i.e. the works) ought reasonably so to have been completed.....
> ....."

where the completion date has elapsed and extension has not been fixed. This was not enacted and if done was not done in accordance with Clause 22. And in any event based on the facts and circumstances which existed in December, 1983 as well as the subsequent conduct and agreement of the parties such certification would be ambivalent and worthless.

Further, the Contractor repeats and adopts paragraphs 1 and 2 of the Reply to Defence as though the same were set out herein.

Paragraphs 1 and 2 of the Reply to Defence are set out below.

1. "That the need for extension of time has been patently borne out and also recognized by the owner by, inter alia, the terms of the contract, the facts affecting its performance, the nature and extent of variations issued by the Architects which resulted in greatly increasing the scope of the works, the decision of the Architects to grant only two weeks extension thereof, the terms and conditions of the assignment of performance of the uncompleted portion of the works (See Deed of Assignment between the owner, the Contractor and Construction Developers Associates Limited dated 21st May, 1984 enclosed in the Bundle of Document submitted herewith,) (hereinafter called "Deed") pursuant to Clause 17

of the conditions of the Contract and, in keeping with the said conditions of Contract, subsequent extension of the time agreed for completion under the Deed.

The circumstances for liquidated damages could not have arisen since the Contractor performed as required under the contract for which performance approximately 90% of the original Contract price has been certified and paid in the knowledge of the same remaining to be executed. Further by the terms of the Deed the owner (employer) fixed the period for completion of the works as 10th day of October, 1984 with paid preliminaries for that period, which, as aforesaid, has been further extended. In addition, the owner and the Contractor agreed with the Assignee as set forth by the Deed that:

> "As of the date hereof the Employer shall desist from claiming or calculating liquidated damages against the Assignor (that is, the Contractor) and shall have or seek no recourse against the Assignor for anything done or not done about that portion of the works which shall have been assigned to the Assignee."

Also the Contract between the owner and the Contractor subsists, a portion of its performance having been assigned under its own provisions (see Clause 17 as referred to above) and both owner and Contractor having agreed with the Assignee under the Deed that:

> "The Notice of Determination hereinbefore mentioned is deemed and agreed by all the parties thereto as having been withdrawn and rendered of no effect."

The Claim for liquidated damages is, therefore, not only invalid on the facts but is in breach of the parties agreement

The counter claim and the Reply and Defence raised, in my view, the following issues of law.

1. The question of whether or not the owner was entitled to liquidated damages due to the non performance of the contract by the contractors.
2. Whether or not the owners were guilty of misrepresentation.
3. Whether the owner was estopped by Clause 17 of the Deed of assignment from recoverning liquidated damages.

The terms of reference required the arbitrator not only to make monetary awards but to determine issues set out in the claims and counter claims and to hand down such findings as he may deem fit based on the evidence placed before him. The question therefore arises does "no award" properly meet the terms of reference. Miss Phillips contends that the arbitrator was not required to give reasons for his award. Clearly a distinction must be made between determining an issue and giving reasons. The gravamen of the Applicant's complaint is not that the arbitrator failed to give reasons for his award but that in making "No award" he failed to determine the issues which arose between the parties. As I understand the owner's position he was aying that even if the contractor was entitled to an award he the owner was entitled to an award for the non performance of the contract which he would be entitled to set off against any award made to the contractor. To contend, as counsel for the contractor contended, that the award on each of the claim automatically disposes of the counter-claims is untenable. The counter-claims raised issues in which an award could have been made in favour of the owner without such an award being inconsistent with any award made on the claims.

I take the view that the arbitrator in keeping with paragraph C of the Terms of Reference ought to have made specific findings in respect of the claim for liquidated damages. I am inclined to this view because the claim raised fundamental issues on the question of performance. What really does "No award" mean in relation to this claim. Does it mean that the contract has been performed in keeping with the terms of the contract. Does it mean that by virtue of Clause 17 of the Deed the owner was estopped from recovering liquidated damages or is that the arbitrator concluded that the allegation of misrepresentation had been established. These questions posed involved issues of law and fact which necessitated the arbitrator making specific findings. The owner were entitled to know the basis on which the "No award" was made. My reasoning is applicable to counter-claims 2 - 7 all of which are claims arising out of the performance or non-performance of the contractor.

Failure to have dealt with the issues in accordance with paragraph C of the Terms of Reference is an irregularity. The parties who were responsible for drafting the Terms of Reference must have had reasons for framing and including paragraph C in the Terms of Reference. The obvious reason, if one were to hazard a guess, was that the parties were not only seeking monetary awards but wished to have the issues between them decided and ruled upon by the arbitrator. An arbitrator is under a duty to strictly observe and comply with the Terms of Reference.

I am satisfied that "No award" on the counter-claims cannot be said to be a strict observance and compliance with the Terms of Reference.

The final complaint of the Applicant is that the arbitrator misconducted himself, in that, he awarded

interest at the rate of fifteen percent (15%) on his award, to be paid from the 28th April, 1984 until the 27th August, 1985 and that he is not entitled in law to award interest in these proceedings.

Mr. Rattary Q.C. submitted that if the arbitrator had no power to award interest and did so he would be guilty of misconduct, and the award would also be bad on the face of it. He contended that the legal position in the United Kingdom must be distinguished from that in Jamaica.

Resolution of the issue as to whether or not the arbitrator is empowered to award interest depends upon whether the Provisions of Interest (Allowances by Jury) Act enacted in 1908 remains in force after the enactment of the Law Reform (Miscellaneous Provisions) Act. The identical question arose for consideration in the unreported case of Suit No. M60/74. Raymond International (Jamaica Ltd. et al v. The Government of Jamaica - May 1975. Smith C.J. in a lucid and well reasoned judgment concluded that an arbitrator was empowered to make an award of interest. Without retracing the paths along which the Learned Chief Justice travelled I wish to adopt his reasoning and conclusion in the case referred to supra and I hold that the arbitrator was empowered to make an award of interest in the instant case. The power to award interest is the same as that which the Court has under the Provisions of the Act of 1955, unless the power was taken away by the terms of the contract. It has not been contended before me that the contract has so done. Further I hold that the arbitrator in awarding 15% interest has not exceeded his jurisdiction.

The question now arises whether or not the award should be remitted to the arbitrator or set aside. The

Learned Author of Russell on Arbitration ibid p.354 had this to say in respect of the exercise of the court"s discretion to remit or set aside.

> "Indeed, setting aside would appear to be the correct remedy in every case where justice demands it, for example where the arbitrator might not approach the question with a fresh mind."

We were the matter to be remitted to the arbitrator for him to state his findings in respect of the issues is he likely to make a finding which is inconsistent with his "No award". Is he likely to be objective? In Rotheray (E) & Sons Ltd. v. Carlo Bedarido & Co. supra at p. 225 McNair J. said:

> "The remaining question is whether this award should be wholly set aside or should be remitted to the arbitrators. As regards that, I feel it would be very difficult indeed for / the arbitrator in question / having once committed himself to the view to which he has committed himself in the award which is sought to be set aside, with the best will in the world, to approach the question with an entirely free mind. I think it is much more likely that justice would be done between the parties if this award were set aside."

The Learned judge was dealing with a situation in which one of two arbitrators failed to read some of the documents in the case which were in foreign language which he did not understand. The decision seemed to have been based on the fact that the arbitrator committed himself to a view without properly considering all the issues. Did the arbitrator in the instant case arrive at his decision after a consideration of all the issues? Is he likely to approach the question with a fresh mind. Like McNain J. I hold to the view that interest of justice between the parties would be best served by setting aside the award.

Costs of the Application to the Applicant to be taxed if not agreed.

Stay of execution granted for six weeks.