JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 83/2009

BEFORE: THE HON. MR JUSTICE PANTON, P
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN	SANS SOUCI LIMITED	APPELLANT
A N D	VRL SERVICES LIMITED	RESPONDENT

Vincent Nelson, QC, Stephen Shelton and Gavin Goffe, instructed by Myers, Fletcher and Gordon, for the appellant

Richard Mahfood, QC, Dr Lloyd Barnett and Weiden Daley, instructed by Hart, Muirhead, Fatta, for the respondent

13, 14 July, 25 September and 25 November 2009

PANTON, P.:

I have read in draft the reasons for judgment written by my learned brother Morrison JA. I agree with them, and have nothing to add.

MORRISON, J.A:

Introduction

1. This is an appeal from a judgment of Gloria Smith J, given on 19 June 2009. The appeal was heard on 13 and 14 July 2009 and on 25 September 2009 the court announced that the appeal would be

dismissed, with costs to the respondent to be agreed or taxed. These are my reasons for concurring with that decision.

2. By virtue of a management agreement dated 12 October 1993, the appellant ("SSL") was at all material times the owner and the respondent ("VRL") the manager of a hotel known as Sans Souci Grand Lido ("the hotel"). A dispute having arisen between the parties, by an award dated 16 July 2004, arbitrators appointed pursuant to the terms of an arbitration clause in the agreement made and published an award in favour of VRL for damages in the sum of US$6,034,793.00, plus interest and costs.

3. The arbitrators were Mr R.N.A. Henriques, QC and Mr John Wilman, both well known attorneys-at-law, who in turn appointed the Honourable Mr Justice Boyd Carey (retired) to act as umpire. The dispute between the parties arose out of the termination of the agreement by SSL by notice to VRL dated 4 March 2003 and the issues referred to the arbitrators were whether SSL had lawfully terminated the agreement and, if not, what amount was VRL entitled to recover from SSL as damages for wrongful termination of the agreement.

The court proceedings

4. Dissatisfied with the award of the arbitrators, SSL applied to the Supreme Court to set it aside on the usual grounds (misconduct and error of law on the face of the record) and, in a judgment given on 10 February 2006, Harris J (as she then was) dismissed the application, on the basis that

the arbitrators had considered fully and taken into account all relevant factors in coming to their award.

5. SSL appealed to this court against Harris J's decision (Supreme Court Civil Appeal No. 20/2006) and, in a judgment delivered on 12 December 2008, the appeal was allowed in part and the award was remitted to the arbitrators for reconsideration in the light of the court's ruling. The proceedings giving rise to this appeal are concerned with the true meaning and interpretation of the order remitting the award. Gloria Smith J upheld the arbitrators' interpretation of the extent to which their jurisdiction had been revived by the order, hence this appeal. It is in fact the fourth occasion on which this court has had to consider an aspect of the prolonged dispute between SSL and VRL arising out of the arbitral proceedings (the previous ones were in Supreme Court Civil Appeal No. 108/2004, judgment delivered 18 November 2005 and Supreme Court Civil Appeal No. 20/2006, judgments delivered 12 December 2008 and 2 July 2009). In all probability, it may not be the last.

6. SSL's liability to VRL for wrongful termination of the agreement, which was one of the two questions in issue before Harris J and in the appeal from her decision, is no longer a live issue, SSL having apparently accepted the ruling of the arbitrators, Harris J and this court in this regard. However, the issue of damages remains very much alive in the proceedings and on this appeal, as will shortly appear.

7. The current aspect of the dispute arises in this way. In the proceedings before Harris J and in this court, SSL contended, in addition to challenging the arbitrators' finding as to liability, that the award of damages should be set aside on two main grounds:

(i) That the arbitrators had misinterpreted the issue raised by SSL in paragraph 18 of its Points of Defence, that in future years VRL would incur unrecoverable expenses which should be deducted from any calculation of future loss, as being merely a claim to set off overpayments in past years against the damages to be awarded; and

(ii) the arbitrators had failed to take into account the possibility that under the agreement SSL was entitled to sell the hotel to a third party, and to terminate the agreement for that reason, provided that it gave VRL the opportunity to make an offer to purchase it and that the sale was made within six months of the offer to a purchaser who bought under more favourable terms.

8. The reasons for the decision of this court dismissing the appeal from Harris J's order are to be found in the judgment of Harrison P, with which both McCalla JA and Dukharan JA (Ag) (as they both then were) agreed. It is, characteristically, a thorough and careful judgment running into 83 paragraphs over 48 printed pages. At paragraph 15, having set out the

factual background, Harrison P identified the issues to be determined on the appeal as follows:

> "(1) On a proper construction of clause 14 (iv) of the Agreement, did [SSL] have the power to terminate the contract in the circumstances; and
>
> (2) If not, what are the damages due to [VRL] in respect of its losses, due to the breach of contract committed by [SSL]."

9. In the 23 paragraphs following (ending at paragraph 39), Harrison P then dealt, in considerable detail, with the first issue (liability), concluding, in agreement with both the arbitrators and Harris J, that SSL did not have the right to terminate the agreement in the circumstances of the case and that Harris J had accordingly correctly refused to set aside the award on this issue.

10. The remainder of the judgment, from paragraph 40 to the end, deals with the second issue (damages). In paragraphs 42 - 44, Harrison P set out SSL's primary contention in this way:

> "42. The appellant had argued before the Arbitrators that the respondent was not entitled to recover the loss of the Management fee claimed. However, if there was any loss, it was the loss of profit that the respondent would have earned for each of the future years, that is, the Management fee, less expenses which the respondent would have incurred, which were not re-imbursable by the appellant, under the Agreement. The appellant, in paragraph 18 of its points of defence, said:
>
> > '18. In relation to the Damages claimed in Appendix 1 the Respondent denies that

Claimant is entitled to any of the sums claimed or any sums at all and will deal with each item in Appendix 1 separately notwithstanding:

A. **LOSS OF MANAGEMENT FEES**

> (I) The Respondent denies that the claimant is entitled to recover the loss of the Management fees claimed, as this does not represent the loss if any which the Claimant suffered. The Claimant was required to expend substantial sums in managing the hotel, all of which sums were not properly recoverable from the Respondent under and pursuant to the Management Agreement. In the circumstances if the Claimant will suffer any loss which is denied, then the same would only be for the profit it would have made, which would be Management Fees less the unrecoverable expenses it would have incurred in managing the hotel particulars of which for the period January 2002 to March 2003 are set out hereunder and prorated for the twelve (12) month period.'

The appellant thereafter enumerated the "unrecoverable expenses," to be borne by the respondent, in its view. Emphasizing the point, the appellant, in paragraph 18A(iii) stated:

> '(iii) The Respondent [appellant] will contend that even if the Management fees alleged were in fact the management fees which would be lost for the respective years, which is denied, there should be deducted from each years alleged management fees the comparable total of the unrecoverable expenses in each year.'

43. Each party relied on the evidence of its expert witness in calculating the loss incurred by

> the respondent for the years 2004 to 2014 as a consequence of the termination of the agreement. The respondent relied on the calculations of David Kay, vice-president, corporate finance of the Super Clubs group of companies, a Fellow of the Institute of Chartered Accountants, and agreed to by Kathleen Moss. The appellant relied on the evidence of one Mrs. Marlene Sutherland.
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> 44. The appellant also argued before this Court and before Harris, J that the Arbitrators misconstrued the appellant's point of defence in paragraph 18, by regarding it, as a claim to set off management fees overpaid in previous years from any damages found to be due and owing during the years 2004 to 2014."

11. And then, in paragraphs 45 - 48, Harrison P recorded the response of the arbitrators to this contention (that, "if there were management fees due, then it is entitled to set-off sums which should have been deducted over the years, but were claimed as management fees"), as well as Harris J's conclusion on it (that there was no error of law on the face of the record). There then followed a discussion of the principles applicable to the calculation of damages for breach of contract ("The general rule is that the party not in breach would be entitled to net damages" - para. 49), and the appropriate method of allowing for contingencies ("The Arbitrators properly recognized that in assessing such losses in the future, allowances must be made for contingencies and that that is effected by way of a discount" - para. 56).

12. Harrison P then re-stated SSL's contention with regard to the impact of the "unrecoverable expenses" on the claim for management fees and concluded that the arbitrators, by treating it as a claim to a set-off, had misapprehended the point actually being made by SSL (paras. 69 - 70):

> "69. Whether or not expenses incurred by the respondent, were in fact "unrecoverable", as claimed by the appellant, in its points of defence or re-imbursable as contended by the respondents should have been determined by the Arbitrators. The Arbitrators were required to demonstrate in their award, that they accepted that the expenses were "unrecoverable" or alternatively, payable by the appellant. At its lowest, the Arbitrators should have demonstrated that they considered the issue of the "unrecoverable expenses" as contended for by the appellant. The respondent seemed to have recognized this omission by Arbitrators in a virtual concession in their "Supplemental Skeleton Argument". The respondent at paragraph 6, submitted:
>
> > '6. There is no categorization of 'unrecoverable expenses' in the Management Agreement. It was therefore for the Arbitrators to decide as a matter of fact whether –
> >
> > (1) these expenses were reasonably required to meet the contractual objective;
> > (2) these expenses were being incurred to the advantage of the Appellant; and
> >
> > (3) the probability is that the Appellant would in the circumstances continue to agree them;

and if not that they should be excluded'.

70. The point of the "unrecoverable expenses" having been raised by the appellant, assuming that such expenses were so found not to be reimbursable, they should have been excluded from the sum used to determine the annual management fees earned. Thereafter, using that reduced annual management fee, the assessment of the damages for the years 2004 to 2014 would be effected with the appropriate discounting."

13. And finally, in conclusion on this point, Harrison P said this (at paras. 78 - 82):

"78. In the instant case, the Arbitrators treated the appellant's paragraph 18 of its points of defence as a set-off, claiming a repayment of management fees overpaid in the past and therefore not subject for consideration in the reference before them. Instead, they should have considered it as a list of expenses incurred by the respondent, which the appellant was contending was "not reimbursable", and therefore should not be included in the average annual management fees ascertainable from the period January 2002 to March 2003, and to be used to assess the damages for loss of future earnings for the period 2004 to 2014, being considered by them. No implication therefore arose in the instant case, as it did in ***Middlemiss v Hartlepool*** (supra). The Arbitrators, in the instant case by not considering the proper implication of clause 18 of the appellant's points of defence, were in error.

79. Where an arbitrator has omitted to decide something which he ought to have decided, the award may be remitted

> to him for such a decision to be made. (See ***King et al v. McKenna Ltd et al*** [1991] 1 Q.B. 480). The power of remittal is contained in section 11 of the Act. It reads:
>
> > "11. - (1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."
>
> In section 2 of the Act, 'Court' means the Supreme Court and 'Judge' means a Judge of that Court.
>
> 80. The powers of the Court of Appeal are contained in section 18 of the Act. It reads:
>
> > "18. The Court of Appeal shall have all the powers conferred by this Act on the Court or a Judge thereof under the provisions relating to references under order of the Court."
>
> 81. In the circumstances, this matter ought to be remitted to the Arbitrators for a reconsideration of the issue as to damages, with particular reference to the 'unrecoverable expenses' claimed.
>
> 82. For the above reasons, it is my view that the appeal against the order of Mrs. Harris J, refusing to set aside the award ought to be dismissed, in part. The appeal against the award of damages ought to be allowed and remitted to the Arbitrators to determine the issue of damages only."

14. As regards SSL's second basis for contending that the arbitrators' award should be set aside (the possibility of sale to a third party - see para. 7(ii) above), Harris J had made the observation in her judgment (at page 39) that "There is no evidence that sale of the hotel was imminent.

Consequently, the arbitrators would not be required to consider its sale." None of the grounds of appeal from her judgment challenged this finding and in his judgment in this court Harrison P accordingly contented himself (at para. 74) with the comment that "...a possible contingency, namely sale of the hotel within the relevant period did not arise."

15. It is against this background that the order of the Court of Appeal (with the meaning of which this appeal is solely concerned) was made in the following terms:

> "1. The appeal against the order of Mrs Harris J refusing to set aside the award is dismissed, in part.
>
> 2. The appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only.
>
> 3. Half the costs of this appeal and of the costs below are to be paid by the respondent, such costs to be agreed or taxed."

The remitted arbitration proceedings

16. The matter thus having been remitted to the arbitrators, SSL made an application before them for permission to adduce fresh evidence concerning the sale of the hotel (which had been completed on 10 September 2005) and the state of the tourism industry, from the date of termination of the agreement to the date of the remitted proceedings.

17. In a written and obviously carefully considered ruling dated 20 February 2009, the arbitrators refused the application, concluding that the

matter had been remitted to them by this court for further consideration of the issue of unrecoverable expenses only, and not in respect of the wider issue of damages in general:

> "It is therefore clear on analysis of the Judgment as a whole the decision of the Court is that the Arbitrators were in error in not considering the unrecoverable expenses and that error can be corrected by remitting the award for reconsideration.
>
> It is therefore our considered opinion that the Order of the Court of Appeal revived the jurisdiction of the Arbitrators to correct the error by reconsidering the issue of the 'unrecoverable expenses'.
>
> The Order of the Court of Appeal has not set aside the award of damages in its entirety so as to revive the jurisdiction of the Arbitrators to hear the fresh evidence on the other aspects of the award of damages [on] which the Court has made no decision.
>
> The application to adduce fresh evidence is therefore dismissed."

Fresh proceedings

18. This ruling prompted SSL to move the court again and, by an Amended Fixed Date Claim Form filed on 12 March 2009, SSL sought the following orders:

> "1. The Award dated 20th February 2009 is set aside.
>
> 2. Further, or in the alternative, a declaration that the effect of the Order of the Court of Appeal is to revive the Arbitrator's

> jurisdiction to consider the issue of damages in general.
>
> 3. Further, an order restraining the Arbitrators from making any further award pending the determination of this claim.
>
> 4. Costs to the Claimant to be taxed if not agreed."

19. Gloria Smith J dismissed the application on the ground that the order of the Court of Appeal did not have the effect of reviving the arbitrators' jurisdiction on the question of damages in general, but was limited to a direction to the arbitrators to consider the issue of unrecoverable expenses. This is how the learned judge puts it:

> "On reading the order, and when taken in context with the reasons in the judgment of Harrison P (retired) (specifically paragraphs 81 and 82 on page 48 of the judgment), the matter was remitted to the Arbitrators for a consideration of the issue as to damages **with particular reference to 'unrecoverable expenses'**.[Emphasis mine]. The words of the order in my view are precise and unambiguous and I would have to disagree with the submissions of Mr. Nelson, Q.C on behalf of the Claimant that this remission was to consider the issue of damages in general. The submissions of the Defendant are to be preferred that the remission to the Arbitrators is to be on one point only that is with particular reference to 'unrecoverable damages' and it does not mean that one starts anew. Further I am of the view that if the Claimant wanted to adduce fresh evidence in regards to the actual sale of the hotel and the state of the hotel industry then the Claimant should have made formal application to the Court of Appeal during that hearing for a

> special order of remission which involved meeting very stringent requirements as outlined in the ***Vimiera* (No. 3)** [sic]."

The appeal

20. From this judgment, SSL appealed to this court on eight grounds, as follows:

> "(i) Having found as a fact that the Court's Order was clear and unambiguous, the learned Judge erred by failing to have regard to the principle that it is not permissible to refer to the reasons for decision to interpret a clear and unambiguous Court Order.
>
> (ii) The learned Judge disregarded the principle that it is the Order of the Court, and not the reasons for the decision, that the arbitrators are to put into effect.
>
> (iii) The learned Judge below wrongly applied authorities relevant to the construction of statutes and written instruments only when construing the Court of Appeal's order whilst disregarding and/or failing to apply relevant and applicable authorities on the construction of Court Orders.
>
> (iv) The Learned Judge below erred in failing to find that the jurisdiction of the arbitrators on a remission by the Court is to be determined from construing the clear and unambiguous words of the Court Order.
>
> (v) The learned judge erred in not holding that upon a proper construction of the Order the Arbitrators' jurisdiction was revived in respect of damages in general.

(vi) The learned judge wrongly held that the reasons for decisions given by the Court of Appeal indicated that the Arbitrators' jurisdiction was revived as regards 'unrecoverable expenses' whereas on a proper reading of the reasons for decision it is clear that the expression 'this matter ought to be remitted for reconsideration as to the issue of damages, with particular reference to 'unrecoverable expenses', was a remission to consider the issue of damages generally with unrecoverable expenses being an important part of the consideration of the Arbitrators in the context of the remission.

(vii) The learned Judge below erred in finding that the Claimant needed to make an application to the Court of Appeal for a 'special order' which would give the Arbitrators jurisdiction to consider, after remission, fresh evidence on issues that were already under reference to the arbitrators.

(viii) The learned Judge below failed to have regard to the fact that where an Arbitral Award as to damages is set aside entirely, the arbitrators are required to start afresh to assess damages."

21. VRL for its part also filed a counter-notice of appeal, contending that Gloria Smith J's judgment should be upheld, primarily on the basis that on the remission of an award to arbitrators, their powers and duties cannot exceed those which are necessary to give effect to the order of the court. The arbitrators therefore lacked jurisdiction to permit the introduction of the fresh evidence which SSL was seeking to adduce, having regard to the specific scope of the remission construed in the light

of the judgment and the submissions before the Court of Appeal. The introduction of such evidence would have required a separate order of remission and in the circumstances SSL was estopped by conduct and election from seeking to introduce such evidence. Finally, VRL contended that in any event SSL was bound, on the issues of the sale of the hotel and the state of the tourism industry, by the principles of res judicata and issue estoppel, these matters having previously been adjudicated on by both Harris J and the Court of Appeal.

22. Grounds (i), (ii), (iii) and (iv) were argued together by Mr Nelson QC for the appellant. He submitted that Gloria Smith J had erred in failing to have regard to the principle that it is not permissible to refer to the reasons for a decision to interpret a clear and unambiguous order of a court, in this case the Court of Appeal. The duty of the arbitrators upon a remission pursuant to section 11 of the Arbitration Act is to put into effect the judgment or order of the court (as embodied in the certificate of the result of the appeal issued by the Registrar on 4 January 2009, pursuant to rule 2.18 of the Court of Appeal Rules). In this regard, it is the terms of the judgment or order itself that are to be given effect, and not the court's reasons for the decision: once the judgment or order is clear as to its terms, it is not permissible to look at the reasons, the pleadings or the history of the litigation to construe the judgment contrary to its clear meaning.

23. In the instant case, Mr Nelson submitted, the order of this court ("...the matter is remitted to the Arbitrators to determine the issue of damages only") was unqualified and thereby invited a reconsideration of the question of damages generally, as to which the specific issue of the treatment of the unrecoverable expenses was but a part. That this is the position at common law (equally applicable to arbitration proceedings), it was submitted, clearly appears from the decisions in ***Lake v Lake*** [1955] 3 WLR 145, ***Gordon v Gonda*** [1955] 2 All ER 762, ***In re Bank of Hindustan, China and Japan, Alison's case*** (1873) LR 9 Ch 1, 24 and ***Repatriation Commission v Lionel Nation*** [1955] FCA 1277.

24. But in any event, Mr Nelson submitted further, even if it were permissible to have resort to the Court of Appeal's reasons for decision in this case, it is clear, from a reading of paras. 81 and 82, taken together, that the court intended that the arbitrators should re-consider the issue of damages generally.

25. As for the cases of ***Interbulk Ltd v Aiden Shipping Co. Ltd (The "Vimeira" (No. 1)*** [1985] 2 Lloyd's Rep. 410 and ***Glencore International A.G. v Beogradska Plovidba (The "Avala")*** [1996] 2 Lloyd's Rep 311, both of which were referred to and relied on by the arbitrators in their ruling, as well as by VRL in its skeleton argument in this appeal, Mr Nelson submitted that they were both clearly distinguishable, on the basis that in both cases the issue that it was sought to raise in the remitted hearing was one that

had not been before the arbitrators in the original hearing. In those circumstances, it had therefore been permissible for the court to look at extrinsic material to determine the issue. They therefore stood in contrast to the instant case, in which the possibility of a sale of the hotel had always been an issue in the arbitration.

26. With regard to grounds (vii) and (viii), Mr Nelson challenged Gloria Smith J's conclusion that, if SSL wished to adduce fresh evidence as regards the sale of the hotel and market conditions in the tourism industry, it would have needed a special order from the Court of Appeal to permit this. This conclusion was, he submitted, based on a misunderstanding of a passage in the judgment of Ackner LJ in ***The "Vimeira"(No.1)*** (supra), which had to do with a situation in which a party tried to raise a new issue not raised before upon a remission from the court. In the different circumstances of the instant case, so the argument ran, the judge should have found that the arbitrators' original powers as regards the issue of damages having been revived, they had all the powers necessary to a proper assessment of damages, as also the duty to hear such further evidence as the parties might wish to adduce on the remitted issue. The arbitrators were therefore obliged to hear evidence as to the sale of the hotel and the state of the tourism industry, both important considerations in the original arbitration proceedings. On the potential significance of such evidence, Mr Nelson relied on the recent decision of the House of

Lords in ***Golden Strait Corporation v Nippon Yusen Kubishika Kaisha*** [2007] 3 All ER 1 (***"The Golden Victory"***).

27. Mr Mahfood QC for the respondent submitted that the "fundamental error" on the appellant's part was to treat the function of arbitrators in re-considering a matter remitted to them by the court pursuant to section 11(1) of the Arbitration Act as though what was being sought was the judicial enforcement of a judgment or order of a court. A court seeking to enforce a judgment need not concern itself with the reasons for an order, but arbitrators, who are required to correct an error, have a right and indeed a duty to look at the court's reasons for remitting an award. The arbitrators in the instant case were required to re-consider the matter in the light of the Court of Appeal's specific mandate, which was to correct their error in the treatment of the unrecoverable expenses, the impugned award having been affirmed by the court in every other respect. This case, Mr Mahfood contended, is a case about the power of arbitrators and not about the enforcement of judgments or orders of the court, with the result that ***Lake v Lake*** (supra) and that line of cases are irrelevant.

28. Mr Mahfood also pointed out that, although under the terms of the agreement VRL was given a right of first refusal to purchase the hotel in the event of SSL deciding to sell, because there was no evidence that SSL proposed to sell the hotel, the case had been approached on the basis

that the normal term of the agreement would not expire until 2014 and that VRL's entitlement was therefore to loss of management fees for that period. What SSL was now attempting to do by way of fresh evidence, Mr Mahfood therefore submitted, was to re-open the entire matter. In this regard, he referred us to ***Fidelitas Shipping Company Ltd v V/O Exportchlee*** [1965] 1 Lloyd's List LR 223, 230, to make the point made by Denning LJ (as he then was) in that case that "There must be an end to litigation some time".

29. Mr Mahfood further submitted that, when an award is remitted to an arbitrator by order of the court, his powers and duties cannot exceed those which are necessary to give effect to the order of the court for remittal (***Michael Carter v Harold Simpson Associates (Architects Ltd*** [2005] LRC 182, 188, per Lord Hoffman). He very helpfully handed up to the court a copy of a recent article by Mr John Tarrant, an Australian academic lawyer, entitled "Construing undertakings and court orders" (2008) 82 ALJ 82. (This article came to attention, we were told by Mr Mahfood, as a result of the industry of his junior, Mr Weiden Daley.) Reliance was also placed by Mr Mahfood on both ***The "Vimeira"(No.1)*** and ***The "Avala"***.

The issues

30. The issues that arise for determination on this appeal are whether Gloria Smith J was correct in her conclusions that (i) as the arbitrators had

found, remission of the matter to the arbitrators by this court was for the limited purpose of a reconsideration of the issue of the unrecoverable expenses only (and not the issue of damages in general), and (ii) that, if the appellant wished to adduce fresh evidence as regards the actual sale of the hotel and the state of the tourism industry, it ought to have made a formal application to this court for a special order of remission.

The first issue - the scope of the order remitting the award

31. The court's power to remit an award to an arbitrator is to be found in section 11(1) of the Arbitration Act, which provides that "the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire". The "Court or a Judge" for these purposes includes the Court of Appeal (section 18).

32. The effect of remission is stated in ***Halsbury's*** (Laws of England, 4th edn reissue, vol. 2, para. 696) as follows:

> "**696.** The effect of remission is to revive the jurisdiction of the arbitrator with regard to the matters remitted.
>
> The whole or only a part of an award may be remitted. The court may also expressly or impliedly, restrict the revival of the arbitrator's jurisdiction to reconsider a particular aspect of a matter referred. Where the whole of the award is remitted, it becomes wholly ineffective, and the arbitrator resumes his authority in the reference. Even where only some of the matters referred are remitted, it may be that there is nevertheless no enforceable award even as to the matters not remitted. The court may make it a condition of remission that the applicant should pay such part

> of the award as would not be affected. The arbitrator may not make fresh findings in relation to matters not remitted."

33. Where there is a dispute, as in the instant case, as to the extent of the remission and the consequent revival of the arbitrators' jurisdiction, this gives rise to a question of construction of the order of the court remitting the award. This is how it was put by Ackner LJ (as he then was) in ***The "Vimeira" (No. 1)*** (supra, at page 411):

> "The extent to which [the jurisdiction] is revived will depend upon the order of the Court. Where, for example, an award is remitted to an arbitrator to reconsider one of the matters referred, the Court may, by its order for remission, expressly or impliedly restrict the revival of the arbitrator's jurisdiction in respect of that particular matter. Likewise, where an award is remitted for the arbitrator to reconsider a particular aspect of a matter referred, then the Court may, expressly or impliedly, restrict the revival of the arbitrator's jurisdiction to the reconsideration of that particular aspect."

34. In the instant case, it is common ground between the parties that the task of the court is therefore to construe the order of this court made on 18 December 2008 (set out at para. 15 above). However, the dispute between the parties is whether for this purpose the court is confined to the actual words used in the order itself (as set out in the certificate of the result of the appeal issued by the Registrar on 4 January 2009), or whether it is permissible to look behind the order to the reasons given for it as an aid to its interpretation.

35. The general rule of construction of judgments or orders of a court is stated in ***Halsbury's*** (4th edn, vol. 26, para. 550) in the following terms:

> "When a judgment is clear as to its terms, not even the pleadings nor the history of the action may be utilised to construe the judgment contrary to its clear meaning."

36. As authority for this proposition, the learned editors of ***Halsbury's*** cite ***Gordon v Gonda*** (supra), which is one of the cases upon which SSL primarily relies (reliance was also placed on an earlier decision of the Court of Appeal in ***In re Bank of Hindustan, China and Japan, Alison's case*** (supra), especially per Sir G. Mellish LJ, at page 26). ***Gordon v Gonda*** was an action on a partnership agreement which had been dissolved by the impact of trading with the enemy legislation being extended in 1941 to Hungary, where the plaintiff was then living. The plaintiff was declared to be beneficially entitled to one moiety of the shares issued to the defendant, who was also declared to be accountable to the plaintiff for one moiety of the consideration for which the defendant had sold the shares to a third party. The court also ordered inquiries as to what that consideration had been, what had become of it, and other consequential matters. The inquiries in due course revealed that the defendant had received shares in the third party company in exchange for the shares in which the defendant had been declared to have a beneficial interest and an order was subsequently made that the defendant should pay to the plaintiff a moiety of the amount he had

received on a sale of some of those shares, together with interest thereon at the rate of 5% per annum from the date on which he had received the purchase price. On appeal, the defendant contended that he ought not to have been ordered to pay any sum by way of interest and, alternatively, that the rate of interest which he had been ordered to pay was too high.

37. It was held by the Court of Appeal that the defendant had been declared by the judgment to have been, in effect, a trustee for the plaintiff as to one half of the shares in the company. Despite the fact that the substance of the statement of claim was that a partnership had existed between the parties and that such a declaration was unusual in such an action, the court considered that the declaration itself was unambiguous and that regard could not therefore be had to the pleadings in the action and the history of the case for the purpose of attributing another meaning to the declaration. Sir Raymond Evershed MR, considered that, even if the form of the order had been one appropriate strictly to a partnership action, it might in any case have inevitably followed that, the partnership having been dissolved with no debts or liabilities to discharge, "the defendant thereupon held [the assets] as a trustee as to one-half for himself and as to the other half for the plaintiff" (page 767). In those circumstances, the Master of the Rolls therefore concluded that, in the light of the clear and unambiguous

declaration of the judge, the defendant had been correctly ordered to pay interest at the rate of 5% per annum (which was the rate applicable in cases where a trustee was charged with breach of trust).

38. The proposition for which the case is cited as authority and relied on by the appellant is stated most clearly in the judgment of Romer LJ (at page 768):

> "Inasmuch as the defendant never appealed against the order of Danckwerts, J., which was made on Jan. 26, 1954, it is clear that he is bound by the provisions of that order, whatever those provisions may be. For the reasons which the Master of the Rolls has stated, it appears to me to be clear that the order proceeded on the footing of a trusteeship of the defendant of the original one hundred shares which were allotted to him, and on the corresponding footing that the plaintiff was the *cestui que trust* of one-half of those shares. If that is the meaning of the order, then *cadit questio,* because the defendant never appealed it. It is only if the order is open to some other construction, if it is ambiguous in its terms, that it appears to me to admit of the argument which counsel for the defendant addresses to us, viz., that in the circumstances which existed, in view of the pleadings in the action and the acceptance by the judge that there was a partnership and in view also of the general law which is applicable as between partners, the judge cannot have intended to hold that the defendant was a trustee of the shares which were allotted to him. There is no such ambiguity as to render that argument permissible, because the order proceeds (and in my opinion, proceeds only) on the footing of a trusteeship. Even if there were such an ambiguity as counsel suggested and on which he founded his attempt to show that the conception of a trusteeship was not one which ought to be

> accepted, nevertheless if one looks to the observations that Sir William Grant, M.R., made in ***Featherstonnaugh v Fenwick*** *and* to Lord Atkinson's opinion in the ***Hugh Stevenson*** case to which the Master of the Rolls has referred, there was material, one need say no more, on which the judge could find, as in my opinion he did find that, there was a trusteeship."

39. Mr Nelson also relied on ***Lake v Lake*** (supra), to make the same point. That was a case in which the formal order in divorce proceedings reflected the judge's findings that neither the petitioner nor the respondent (who had filed an answer and a cross prayer) had sufficiently proved their cases, with the result that neither of them was entitled to the relief sought by each. However, the trial judge, in the course of giving his reasons for judgment, expressed the view that the wife had committed adultery, and it was from this "finding" that the wife sought to appeal (and not from the formal order dismissing the petition and the cross-prayer in the answer).

40. The Court of Appeal held that there was nothing in the order, which was in the usual and correct form, from which an appeal could lie, since the statutory right of appeal was from the formal judgment or order disposing of the proceedings and did not extend to findings or statements referred to in the reasons given by the court for its conclusion. It was pointed out by the court that the formal order correctly recorded the result of the proceedings and, the wife not having sought to appeal from

that order, there was nothing from which she could appeal (see per Evershed MR, at pages 150 -151 and per Hodson LJ, at pages 151-152).

41. The real issue in ***Lake v Lake*** (supra) was therefore to determine, not so much what the order of the court meant, but what was the order from which a right of appeal lay. Looked at in this way, it is hardly surprising that the decision was that an appeal lay from the formal order of the court and not from anything said by the judge in giving his reasons. This is indeed the principle for which the case was cited as authority by this court in ***Allen v Byfield*** (No. 2) (1964) 7 WIR 69, per Lewis JA at page 75. (And see Civil Procedure, 2006, vol. 1, page 1508, where the case is cited under the rubric "Appeals are against orders, not reasoned judgments". It is also of interest to note that neither Evershed MR nor Hodson LJ, both of whom had been members of the court in ***Gordon v Gonda*** (supra), just two weeks earlier, made any reference to that case in their judgments in ***Lake v Lake***.)

42. In ***Repatriation Commission v Nation*** (supra), a decision of the Federal Court of Australia, the court made an order remitting a "matter" to the Administrative Appeals Tribunal to determine a war veteran's entitlement to compensation for a war caused disease. The question was whether "the matter" encompassed all things in dispute between the parties, or was limited to the particular issue of causation which had been

canvassed by the parties before the court. The judge at first instance (Northrop J) took the view that it was so limited. On appeal, Beaumont J (with whom Black CJ and Jenkinson J agreed) said this:

> "40. The more difficult question is whether, upon its true construction, the order should have been read down, as Northrop J has now held, so as to have remitted to the Tribunal only that part of the claim as was concerned with the alleged *sequela*, that is, the question whether the neurosis was war-caused.
>
> 41. The rule in England is that when a judgment is clear as to its terms, not even the pleadings nor action may be utilised to construe the judgment contrary to its clear meaning (see Halsbury's Laws of England, 4th ed., Vol. 26 at 273). Where, however, the judgment or order is ambiguous, it may be permissible to resort to extrinsic material, including the reasons for judgment, to resolve the ambiguity (see ***Gordon v Gonda*** [1955] 1 All ER 762 at 765, 768).
>
> 42. A similar approach has been taken in this country. If, as in the case of "speaking" order (see, e.g., I.C.I ***Australia Operations Pty. Ltd. v Trade Practices Commission*** (1992) 38 FCR 248 at 262) its true meaning is "immediately plain", the terms of the order will speak for themselves. If this is not the case, the true meaning may be ascertained according to ordinary rules of construction...
>
> Under the ordinary rules of construction evidence of surrounding circumstances is admissible to assist in the interpretation of an instrument if the language is ambiguous or susceptible of more than one meaning, but not admissible to contradict the language of the instrument when it has 'a plain meaning'.

> 43. In my opinion, the language of the order of remitter was susceptible of more than one meaning. The word 'matter' could have meant the whole question being the determination of the respondent's claim for a further pension. But it could also have meant the specific dispute then agitated before the Court, that is, the sequela issue. Although, 'matter' is sometimes used, in the constitutional sense, to describe the whole of a dispute dealt with by judicial process, the language of the Veterans' Act indicates that in other contexts, 'matter' can have a narrower meaning. For instance, as has been noted, by s.18(1), it is provided that it is the duty of the Commission, inter alia to determine all 'matters' relevant to the determination. By s.18(2), certain provisions are made where the Board, the Tribunal or a court makes a decision remitting to the Commission 'a matter' being the assessment of the rate of the pension, or the fixing of the date from which a decision is to operate.
>
> 44. It follows from the ambiguity of the order of remitter that resort may be had, in aid of its true interpretation to the surrounding circumstances. Those circumstances included, of course, the reasons for judgment. When regard is had to those reasons, it appears clearly that the meaning to be given to 'matter' in the present context is the more restricted one, that is, the *sequela* question. That was the only issue tendered for determination by the Court. There was no issue that the sinusitis was war-caused.
>
> 45. It follows that I agree with Northrop J that the Tribunal went beyond its jurisdiction in embarking upon the sinusitis issue"

43. Mr Tarrant's article "Construing undertakings and court orders" (supra), which I have found to be very helpful, identifies two different approaches in Australia in recent times on this question. The first is what

might be described as the "traditional approach", of which ***Gordon v Gonda*** (supra) can be taken as an example, requiring some ambiguity before resort to material extrinsic to the order itself may be had. The second line of authorities, on the other hand, supports the proposition that "Court orders, whether ambiguous or not, should always be interpreted in the context of the reasons for judgment" (2008) 82 ALJ 82, 84). After a review of cases on both sides of the line, Mr Tarrant concludes that the weight of modern Australian authority supports this second line of authorities, which recognises that "Given that ambiguity is inherent in all language, it would be too much to expect that orders can be expected to be self-explanatory, though that be a worthy ideal" (per Santow JA in ***Athens v Randwick City Council*** (2005) 64 NSWLR 58, 79).

44. I have already made reference to the judgment of Ackner LJ in ***The "Vimeira"(No.1)*** (supra, at para. 33). In that case, an award having been remitted to arbitrators for re-consideration in the light of the judgment of the court, one party sought to raise an issue which had not previously been raised in the arbitration. A dispute arose as to whether this was permissible and directions were sought from the court on the question. Ackner LJ observed that the resolution of the problem depended entirely upon the extent to which the arbitrators' jurisdiction had been revived by the order remitting the award (at page 410). On this basis, it was accordingly held that the revived jurisdiction of the arbitrators was limited

to the particular aspect of the matter remitted to them: their jurisdiction was revived "To that extent, and to that extent only", and if one party desired to raise a new issue "which had never been mentioned in the arbitration", it would be necessary to apply to the court for a separate order of remission for that purpose (per Ackner LJ, at page 411).

45. ***The "Vimeira" (No. 1)*** was considered and applied by Rix J in ***The "Avala"***, which was a case in which the judge was concerned to ascertain the extent of the revival of the arbitrator's jurisdiction by an order of the court remitting an award in the following terms (page 313):

> "And it is further ordered by agreement of the parties that pursuant to section 22 of the Arbitration Act, 1950 the award of the arbitrator dated the 29th day of July 1993 be remitted to the arbitrator for reconsideration of paragraph 1.6 of the said award."

46. During the course of the parties' preparation for the remitted hearing, one party (for the first time in either the arbitration or the litigation arising from it) fastened upon what Rix J described (at page 314) as a "new point with respect to the quantification of...damages". The question therefore arose whether the arbitrator derived jurisdiction from the remission of the original award as to this new point. Rix J, after referring to ***The "Vimeira" (No. 1)*** in some detail, observed as follows (at page 315):

> "It appears from the judgment of the Court of Appeal in that case that the question of the extent of the jurisdiction remitted under an order

is primarily a question of the construction of the order, but that, as happened in that case, and as may well happen in many, if not most, similar cases, the width of the order has to be construed in the light of the judgment and any discussion before the Court which makes the order.

In the present case, the order of Mr. Justice Tuckey itself is quite bland so far as any definition of the extent of the remission is concerned. It remits par. 1.6 of the award for re-consideration. Nevertheless, as I have already mentioned, Mr. Hancock relies upon the reference in the course of his judgment by Mr. Justice Tuckey to the whole question of the owners' loss being considered upon remission.

In my judgment the extent of the remission in this case has to be interpreted by reference to the order in the light of the background to that order. That background includes not only the judgment of Mr. Justice Tuckey but also of course the circumstances in which the order came to be made, as I have mentioned by agreement and without argument, and also in the light of the issues upon quantum which were raised before Mr. Justice Tuckey by the charterers' notice of originating motion. It is clear, and it has been frankly accepted before me, that the issue now in question, that concerning the bringing into credit of the expenses which would have been incurred by the owners if the voyage to Turkey had been performed, had not been before the arbitrator at the time of his first award, was not raised in the notice of originating motion, had not been before Mr Justice Gatehouse at the time that he gave leave to appeal, and had not been raised or mentioned before Mr. Justice Tuckey upon the hearing of that appeal...

When, however, a Court remits an award to an arbitrator, it is not remitting a whole dispute, unless upon the terms of the order it expressly does so. It generally remits something narrower,

> and when it does so against the background of an arbitration which has already been defined by pleading and argument before an arbitration, it is some one or more of the issues as so defined within the scope of the reference that in general must be considered to be the subject matter of the remission."

47. While it is correct that, as Mr Nelson was at pains to emphasise, both ***The "Vimeira"(No. 1)*** and ***The "Avala"*** had to do in point of fact with attempts to introduce "new points" at the remitted hearings, both cases seem to me to turn on the wider proposition that the question of the extent of the arbitrator's jurisdiction as remitted is primarily a question of construction of the order, with regard to which "the width of the order has to be construed in the light of the judgment and any discussion before the Court which makes the order " (per Rix J, at page 315).

48. Both ***The "Vimeira"(No. 1)*** and ***The "Avala"*** are modern arbitration cases, dealing with the very point that is at issue in the instant appeal, that is, the extent to which an arbitrator's jurisdiction can be taken to have been revived by an order of the court remitting an award. I am therefore naturally inclined to accord them highly persuasive value. In the instant case, just as in ***The "Avala"*** (where the award was remitted to the arbitrator "for reconsideration of paragraph 1.6 of the said award''), it seems to me that the order of this court remitting the award ("the matter is remitted to the Arbitrators to determine the issue of damages only") is "quite bland so far as any definition of the extent of the remission is

concerned", as Rix J thought in that case, thereby necessitating, in my view, resort to the background to the order, including the judgment of Harrison P, to determine the extent of the remission. In ***Gordon v Gonda*** (supra), the order of the court, though unusual in form, was not only quite specific, but also reflected what the Court of Appeal obviously thought to be the just and inevitable conclusion in the circumstances.

49. I would in any event, if I were at liberty to choose, prefer the second line of Australian authority identified by Mr Tarrant, to the effect that context and background are always essential tools to the construction of court orders, as indeed they undoubtedly are to the interpretation of documents generally (as Gloria Smith J held, applying ***Attorney General v Prince Ernest Augustus of Hanover*** [1957] AC 436; and see now ***Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co*** [1976] 3 All ER 570, esp. per Lord Wilberforce at 574 and ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98, esp. per Lord Hoffman at pages 114-115). This must, it seems to me, be even more so in this case, where the arbitrators were being asked to re-open in its entirety an issue to which they had previously devoted more than a third of their written reasons. It being common ground that, as Lord Hoffman remarked in ***Michael Carter v Harold Simpson*** (supra, para. [19]), "the powers and duties of the arbitrator cannot exceed what is necessary to give effect to the order for remittal", I would have thought that they

were fully entitled in those circumstances to have regard to the judgment of the court, as they did, to identify the limits, if any, of the revival of their jurisdiction by the order of the court.

50. Looked at in this way, I entertain no doubt whatsoever, upon a reading of Harrison P's judgment as a whole, that on its proper construction the order of this court was intended to direct the arbitrators to a reconsideration of the issue of damages as regards the treatment of the unrecoverable expenses only. On this point I find myself in full agreement with the arbitrators and Gloria Smith J.

51. But even if this court were obliged to adhere strictly to the traditional approach, that is, in the absence of any ambiguity, to look no further than the four corners of the order itself, there is, in my view, an obvious ambiguity in the order itself. As was pointed out in ***Repatriation Commission v Lionel Nation*** (supra), and as Mr Mahfood submitted, the word "matter" as used in sub-paragraph (2) of the order is capable of bearing both the wider meaning attributed to it by the appellant and the narrow meaning for which the respondent contends. If that is so, and in my view it plainly is, then ***Gordon v Gonda*** (supra) is itself authority for saying that resort may therefore be had to the surrounding circumstances, including the reasons for judgment, which make it perfectly clear that the order for remission by this court was for the purpose of a reconsideration by the arbitrators of their treatment of the unrecoverable expenses only.

The second issue - fresh evidence

52. SSL maintains that the possibility of the sale of the hotel, as well as the market conditions in the tourism industry, were both issues in the original arbitration, with the effect that, the award having been remitted on the question of damages generally, it has a right to adduce, and the arbitrators have a duty to hear, fresh evidence having an impact on these issues.

53. On the question of what evidence may be called on a remitted hearing, **Halsbury's** states the following (op. cit., loc. cit., at para. 697):

> "Where an award is remitted to the reconsideration of the arbitrator or umpire, his original powers are thereby revived in relation to the matters remitted. It is his duty to hear such further evidence as the parties may wish to present, unless the remission is merely for the purpose of correcting some formal defect or making some alteration in the award which would not involve the hearing of further evidence."

54. SSL submitted that, given the known facts of the sale of the hotel and the tourism industry now being "in the doldrums", VRL's position with regard to evidence of this being placed before and considered by the arbitrators pursuant to the order remitting the award amounts in effect to an effort to hold on to "their windfall damages". Those damages were awarded by the arbitrators on a footing that is now demonstrably unsound and the subsequent events (which are "accomplished facts")

must be taken into account by the arbitrators in order to compensate VRL for its true losses.

55. SSL relied for this submission on the recent decision of the House of Lords in ***The Golden Victory*** (supra). That case arose out of a charterparty in respect of a vessel, the Golden Victory. The facts of the case, as Lord Brown observed (at para. [69]), "could hardly be simpler" and the following summary of the relevant facts is taken from the judgment of Lord Scott (para. [27]):

> "[27] The charterparty of 10 July 1998 whereby the appellants (the owners) and the respondents (the charterers) agreed on a charter of the vessel, Golden Victory, for a period ending on 6 December 2005 contained a provision (cl 33) enabling either party to cancel the charter if war or hostilities should break out between any two or more of a number of named countries. The named countries included the United States of America, the United Kingdom and Iraq. The charterers in breach of contract repudiated the charter on 14 December 2001 when the charter had nearly four years still to run (but subject, of course, to the cl 33 possibilities of cancellation). The owners accepted the repudiation on 17 December 2001 and claimed damages for the charterers' breach of contract. The owners' claim went to arbitration and, after various issues had been determined by the arbitrator, all in the owners' favour, but before the arbitrator had assessed the quantum of the damages payable by the charterers, the outbreak, in March 2003, of the second Gulf war occurred. The charterers said that if the charterparty had still been on foot when the second Gulf war began they would have exercised their cl 33 right to bring the charter to an end. They submitted, therefore,

> that the owners' damages for their (the charterers') breach of contract should be assessed by reference to the period from 17 December 2001, when the contract came to an end on the owners' acceptance of their repudiation, to March 2003, when the contract would have come to an end if it had still been on foot. The owners disagreed. They said the damages should be assessed by reference to the value of their rights under the charterparty as at 17 December 2001. That assessment could properly take account of the chance, assessed as at 17 December 2001, that a cl 33 event enabling one or other party to terminate the contract might occur, but should not take account of the actual occurrence of any event subsequent to 17 December 2001."

56. In a majority decision, the House of Lords decided (in agreement with the arbitrator and the courts below) in favour of the charterers, holding that the well established rule requiring damages for breach of contract to be assessed as at the date of the breach did not require subsequent events occurring before the actual assessment to be ignored. What Lord Scott (who was joined by Lords Carswell and Brown in the majority) described (at para. [29]) as the "fundamental principle governing the quantum of damages for breach of contract", is that the victim of the breach should be placed in the same situation, as far as money can do it, that he would have been in had the contract been performed (para. [32]). While the assessment at the breach date rule can usually achieve that result, this will not always be so and in the instant case, the terminating event (the outbreak of war) having in fact occurred

before the damages came to be assessed by the arbitrator, it was no longer necessary for him to estimate the likelihood of it occurring, the actual facts now being known. The arguments of the shipowners to the contrary on these facts offended "the compensatory principle" of damages for breach of contract (per Lord Scott, at para. [38]). Lord Bingham, with whom Lord Walker agreed, dissented strongly, emphasising the virtues of certainty, finality, ease of settlement, consistency and coherence, all important considerations in commercial transactions, served by adherence to the general rule ([paras. [22] and [23]).

57. This is obviously a decision of some importance in relation to the principles of compensation for breach of contract, despite one leading textbook on the law of contract having already expressed a preference for the minority view, on the basis that "the approach of the majority introduces unwelcome uncertainty" (Treitel, The Law of Contract, 12th edn, para. 20-071). It is hardly surprising that Mr Nelson should have urged it strongly upon us. However, I consider that there is a critical distinction to be made between that case and the instant case, which is that in ***The Golden Victory*** (supra) the arbitrator had not yet embarked upon the assessment of damages. In the instant case, the arbitrators have already assessed the damages to which VRL is entitled and, save to the extent that their jurisdiction has been revived by the order of this court remitting

the award to them for consideration of the impact of the unrecoverable expenses, they are accordingly functus officio.

58. While it is a fact that the issue of the possible sale of the hotel was among the issues which were originally before the arbitrators, it is also the case that their award was in the end arrived at on the footing that there was no sale of the hotel in prospect in the foreseeable future. This was also the position when the matter came before Harris J and the Court of Appeal (see para. 14 above). In the light of my conclusion that the remission of the award in this case was for the limited purpose of allowing the arbitrators to revisit the issue of the unrecoverable expenses, I do not think that it is open to SSL to re-open the matter to adduce fresh evidence on the fact of the sale and conditions in the tourism industry generally.

59. I therefore agree with Gloria Smith J's conclusion on this point that if SSL wished for the arbitrators to re-open the matter of damages generally, it would have required a separate order of remission for this purpose. While I accept, as SSL contends, that Ackner LJ's comment on the point in ***The "Vimeira" (No. 1)*** had to do with an issue that had not been originally part of the arbitration proceedings, I do not think that this makes a difference in principle to the conclusion that the arbitrator's jurisdiction will only be revived by remission in the ordinary way to the extent required for the purposes of the remission, and no further.

Conclusion

60. These are my reasons for concurring with the decision of the court to dismiss this appeal, with costs to the respondent to be taxed, if not sooner agreed. In the light of the conclusions to which I have come on the main issues in the appeal, I have not found it necessary to express a view on the issues of res judicata and issue estoppel also canvassed before us by the respondent in the counter-notice of appeal.

DUKHARAN. J.A.

I too agree.

PANTON P;

ORDER

Appeal dismissed, with costs to the respondent to be agreed or taxed.