Decision announced 31st July, 1986
Judgment distributed 4th September, 1986.

(15A)

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IN THE ROYAL COURT OF JERSEY

Before: P.L. Crill, Esq., C.B.E., Bailiff

Jurat H. Perrée

Jurat G.H. Hamon

Between:	CHARLES LE QUESNE (1956) LIMITED	Claimant
And:	~~THE CUSTODIAN TRUSTEES OF THE TRUSTEE SAVINGS BANK OF THE~~ TSB CHANNEL ISLANDS LIMITED	Respondents

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Advocate S. Slater for the Claimant

Advocate P. de C. Mourant for the Respondents

In accordance with a contract of the 1st February, 1984 (The Contract) Charles Le Quesne (1956) Limited (The Claimant) undertook to build a four storey office building at 25-29 New Street, for the Custodian Trustees of the Trustee Savings Bank of the Channel Islands (now called ~~the Custodian Trustees of~~ TSB Channel Islands Limited) (the Respondents). The parties fell into dispute and the matter was referred to arbitration under Clause 35 of the contract. The Vice President of the Royal Institute of British Architects appointed Mr. Peter Hollins, RIBA, ACIArb., a Chartered Architect as the Arbitrator. Rules for the conduct of the Arbitration were agreed by the parties (the Rules). Rule 17 is as follows:

"17. (a) Where the Arbitrator has misconducted himself or the proceedings the parties or one of them may apply to the Royal Court for an order removing him.

(b) Where an Arbitrator has misconducted himself or the proceedings or an arbitration or award has been improperly procured applications may be made to the Royal Court by either party to seek an order to set the award aside and this on such terms including costs as the Royal Court thinks fit."

Rule 19 provides inter alia:-

"19. Subject to subsection (ii) below

(i) An Appeal shall lie to the Royal Court of Jersey on any question of law arising out of an award made on the Arbitration and on the determination of such Appeal the Royal Court may by Order:

(a) confirm, vary or set aside the award; or

(b) remit the award to the re-consideration of the Arbitrator together with the Court's Opinion on the question of law which was the subject of the Appeal;

and where the award is remitted under paragraph (b) above the Arbitrator shall, unless the order otherwise directs, make his award within three months after the date of the Order.

(ii) An Appeal may be brought by any of the parties to the reference:

(a) with the consent of the other party; or

(b) with the leave of the Court

(iii) The Royal Court shall not grant leave under (ii)(b) above unless it considers that having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement and the Court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.

The Arbitrators sat to determine the issues and heard a number of witnesses. The hearing started on the 3rd March, 1986, and lasted for fifteen working days. On the 24th April, the Arbitrator made an interim award limited by agreement of the parties to the question of liability. His award and all the reasons for his decision are as follows:

"(1) That in the execution of the temporary works the Contractor owed the Employer a duty of care, that the Contractor was in breach of that duty as a direct result of which substantial damage was caused by the adjoining property.

(2) That by their inadequate execution of the temporary works the Contractors were in breach of contract in that they did not provide temporary works which would enable them to complete the permanent works satisfactorily.

(3) That the issue of Architects Instruction Number 14 was caused by some negligence or default of the Contractor and that in consequence the Contractor's Notice of Determination made under Clause 26(1)(c)(iv) was null and void.

(4) That the Contractor repudiated the contract by his refusal to proceed with the work following the issue of Architects Instruction Number 16 requiring him so to do.

I therefore find for the Respondent on all four counts.

Ratione Decidendi:

It is common ground that the central issue in this reference is the answer to the question:

Was the issue of Architects Instruction Number 14 caused by some negligence or default of the Claimants?

An appreciation of the reasons why I hold the answer to this question to lie in the affirmative must start from the date in July 1978 when the architect, Mr. Bravery, with the assistance of a structural engineer, Mr. Fincham, was commissioned to design and supervise the construction of a substantial extension to the existing premises of the Trustee Savings Bank in New Street, St. Helier, Jersey. The new building was to include a large basement forming a raft foundation and involving excavation to a depth of approximately 4.5 m below the adjoining street level.

The age and condition of the adjoining properties was a matter of considerable significance in deciding the type of foundation; whether it was practicable to excavate to this depth and in so doing to cause no more than an acceptable amount of damage to either property. In this decision, the structural engineer gained confidence from the recent successful completion of a similar building to that proposed on a site within 100 m of the T.S.B. land. The earlier building differed however in that it was founded on piles and the depth of excavation for the semi-basement was substantially less than that contemplated

for the T.S.B. site.

The soil survey on which the new design was based had been compiled some five years earlier for a proposed building on the same site but without basement and founded on piles. The results of two of these bore-hole tests were subsequently repeated in abbreviated form in the tender documents and gave information which I deem to have been inadequate for the economic design of the temporary works required during construction of the raft. It was however sufficient to enable a competent structural engineer with a reasonable knowledge of soil mechanics to design such works satisfactorily from the given data on an "at worst" - if uneconomic - basis.

It is apparent that the Respondent's design team made certain assumptions as to the appropriate method of excavation and temporary retention of the soil on all four boundaries, assumptions which were necessary for the detailed design of the permanent works. It may then be asked why, in view of the comprehensive nature of the design, contractual arrangements were selected which separated the design of the temporary from the permanent works, expressly leaving this aspect to the contractor but at the same time suggesting gratuitously in a sketch drawing, number 78282/SK4, the method which had been assumed and which it was now thought he might care to consider.

I believe the answer to this question may lie in the architect's familiarity with the Standard Form of Building Contract J.C.T. 63 and his assumption that this was the more appropriate form of contract for the major part of the work, that in the superstructure. In adapting this form, however, for the essentially civil engineering work of constructing the basement, the architect had to resolve an incompatibility between a basic tenet of J.C.T. 63, that the contractor alone should be responsible for choice of method provided always that it produced the required result, and the need in such a sensitive operation to ensure adequate specialist knowledge in the design, implementation and supervision of the whole of the substructure, including both temporary and permanent works. Had the substructure been constructed under a separate engineering form of contract, it is possible that the subsequent problems would have been avoided. This however is not at issue.

The choice was made to use J.C.T. 63 and the subsequent attitudes and administrative procedures adopted by the design team followed this form meticulously. The contractor decided to follow the suggestion made in drawing 78382/SK4 and his staff engineer, Mr. Johnson, prepared a satisfactory design and established a sound sequence of operations for the temporary works using "at worst" criteria. The importance to be attached to this design and operational sequence was not appreciated, however, by the Site Agent, Mr. Parker, nor by his superior, Mr. Weaver, and, with increasing confidence in the site conditions, departures were made in the temporary works from both the design and sequence of operations. In addition the standard of workmanship from the commencement of the excavation was below that which might reasonably be expected from a competent civil engineering contractor, particularly in the omission of several struts and whalings, the use of struts as whalings or at too steep an inclination and the wholly inadequate footing of struts against the central dumping. It was the departures from the staff engineer's design and sequence of operations, associated with the low standard of workmanship, which was the direct cause of the damage by settlement of the original T.S.B. building, the damage by settlement in Burrards Place and 75% of the damage by settlement in No. 31 New Street. The latter building was shown to be in such a poor structural condition that it was particularly susceptible to movement.

I accept the Claimant's statement of its obligations under this contract with regard to the temporary works: that it imposed an obligation to provide at its own expense temporary works which would enable it to complete the permanent works satisfactorily. I find that the relatively small part of the permanent substructure which the Claimants completed before work ceased was adversely affected by the defective nature of the temporary works in the following ways:

(1) by over-stressing of the concrete as a result of premature removal of struts before the concrete had obtained full strength;

(2) by omitting props, the retaining wall and section of raft constructed had a factor of safety of less than 1 against sliding as time-related soil pressures developed;

(3) by irregularities in the temporary works which caused a material reduction from the designed thickness of cover to the steel reinforcement at the corner of the retaining wall.

It has been argued that the defects in the temporary works constituted a temporary disconformity. In the case of the permanent works, the disconformity was not temporary and the argument cannot therefore apply.

Much has been made of the need for time to investigate the soil condition following the recognition of the presence of sub-artesian water.

I find that the presence of such water could be inferred from a reasonably competent interpretation of the bore-hole data given in the Bill of Quantities. I believe its presence was not appreciated by the design team nor by the various consultants until Mr. Coffin pointed out the potential problems that it could cause. The salient point is that the contractor, having assumed responsibility for the design of the temporary works, should have recognised the sub-artesian water problem at the commencement of the contract and have taken steps to deal with it in the design of the temporary works. Having considered the matter at some length, I do not accept by way of defence the argument that the contractor could not have been expected to recognise the need for expert interpretation of the bore-hole data in the Bill of Quantities and the significance of the two levels at which water was struck. The possibility of the presence of water under pressure is well understood by building and civil engineering contractors generally and I find that the information given was sufficient to put a reasonably competent contractor on notice of the prudence of obtaining specialist advice.

I find that the cause of the issue of Architects Instruction Number 14, postponing the work for an indefinite period, was due to several factors:

(1) the grave concern felt by the architect, as now advised by the panel of consulting engineers, as to the true cause of the damage that had occurred to the adjoining buildings: whether due to relaxation of the trench sheeting and struts as a result of bad workmanship, or whether due to settlement consequent upon changes in the water table or whether due to softening of the boaring stratum of clay due to release of sub-artesian water or whether due to some other cause, much of the evidence having been buried when the contractor back-filled the

excavations with sand;

(2) a temporary loss of confidence by the architect in the competence of the contractor to execute the remainder of the basement without further damage and possible collapse of No. 31, deriving from the adverse report by Mr. Coffin dealing with inter alia, the defective workmanship in the existing excavation;

(3) on his own evidence, a growing concern by the architect for the safety of persons on or adjacent to the site;

(4) a need for time in which to resolve the impasse caused by the contractor's refusal to proceed and his apparent renegation in respect of the design of the temporary works.

All the above reasons bear on the failure of the contractor to carry out the excavation, the temporary and the permanent works in a safe, effective and satisfactory manner and therefore I conclude that the issue of Architects Instruction Number 14 was due to ".....some negligence or default of the contractor" and that this was a cause, substantially more than de minimus, of the issue of the said Instruction.

I further hold that the need for a general investigation of the causes of failure arose directly from the above cause and the investigation was not undertaken because the opportunity to do so occurred as a result of delay from some other cause."

The Claimant in the present Representation now asks the Court firstly, to set aside the interim award because, it says, the Architect misconducted himself Arbitrator in the following ways:

(a) relying on his own expertise in determining the four factors set out on page 5 of the interim award without informing the parties that he was going to rely on his personal experience and giving them an opportunity of making representations thereon;

(b) making a finding (factor number 2 on page 5 of the interim award) for which there was no evidence;

(c) making the four findings on page 5 of the interim award contrary to the

weight of the evidence before him and which no reasonable Arbitrator could have reached if he had properly directed himself;

(d) exceeding his authority and jurisdiction by making a finding on page 4 of the interim award as to the direct cause of the damage by settlement of the original Trustee Savings Bank building, in Burrard Place and Number 31 New Street;

(e) refusing to clarify the reasons for his award after having agreed that he would do so pursuant to the Claimant's acceptance of the offer contained in the Arbitrator's letter dated the 24th day of April, 1986.

Secondly, in the alternative, the Claimant asks the Court to grant leave to appeal on a question of law and to order the Architect to give further reasons for Arbitrator his award. It advances the same reasons for this request as for the first and repeats its request for the interim award to be set aside.

Some explanation is needed here to interpret part of the award. Part of the contract involved temporary works. On the 23rd July, 1984, the Bank's Architects issued a notice to postpone (AI 14), that is to say, in effect, it instructed the Claimant to stop work. About a month later the Claimant itself withdrew from the contract, after the issue by the Architect of AI 16. The dispute between the parties centered on the three following matters: First, did the contractor have an obligation properly to design and execute the temporary works; we were told by Mr. Mourant for the Respondents, and Mr. Slater acquiesced for the Claimant, that it was accepted during the hearing that they did have such a responsibility. Secondly, was the execution of the design properly carried out. Again we were told it was common ground that the design had not been executed properly. That left, therefore, one main issue which was, as the Architect sets out on page 2 of Arbitrator his award at the beginning of his reasons, "was the issue of Architect's instruction No. 14 caused by some negligence or default of the Claimant". The two matters which the Court has to answer were, by agreement of the parties, presented to us as follows: (a) Did the Arbitrator misconduct himself or were the proceedings in some way misconducted, as alleged in paragraphs 5 and 6 of the Representation, and, (b) does the Claimant have a right of appeal from those proceedings.

We consider first, what is misconduct of an Arbitrator? The Royal Court has recognised arbitrations on the principle that "la convention fait la loi des parties". We have no statutes which correspond to the Arbitration Acts of the United Kingdom, but insofar as English cases refer to the Common Law, the Court has been prepared to consider them. The Claimant says that the Arbitrator misconducted himself in law and (certainly in paragraphs 5(b) and (c) of its complaints) in matters of fact as well. Further, his refusal to clarify his reasons amounted to misconduct. Jersey Courts, in common with English Courts, have claimed an inherent jurisdiction to set aside arbitration awards. The grounds upon which the Royal Court will interfere with an arbitration award were set out in Le Gros -v- The Housing Committee (1974) Jersey Judgments, vol.2, part 1, page 77. At page 86 the Court said this:

> "The first issue raised before us was whether the Court has the power to interfere with an arbitration award and, in our opinion it undoubtedly has such a power if, for example, the arbitrators exceed their authority, are wrong in law, deny the parties justice, and reach a conclusion devoid of reason. In all such cases the Court has an inherent jurisdiction to have put right that which is wrong. What the Court cannot do is to interfere with an award which has been regularly made. A power of discretion properly exercised by a person or a body having the legal authority to exercise it is generally unassailable."

We consider these four matters. No allegation is made that the Arbitrator exceeded his authority. The proceedings did not deny the Claimant justice, although perhaps the Claimant's allegation in paragraph 5(e) of its complaints approaches nearest to this. The award could not be said to be devoid of all reason; on the contrary, the Arbitrator's reasons appear to be logical and consistent. We interpret the Court's remarks also as meaning that the Royal Court will not interfere with a finding of fact by an Arbitrator properly arrived at: Pothier (1821 Edition) at page 152 (in dealing with the request to have an award registered in the Court records):-

"La partie au profit de qui il est rendu, assigne l'autre par devant son juge,

pour en faire prononcer l'homologation; le juge l'homologue sans entrer dans l'examen du fond de la contestation, pourvu que la sentence ne pèche pas dans la forme, c'est-à-dire que les arbitres n'aient point excédé leur pouvoir, et n'aient jugé que la contestation comprise au compromis, et dans le temps fixé par le compromis; car si la sentence renfermoit un de ces vices, l'autre partie pourroit s'opposer à l'homologation, et en soutenir la nullité."

That leaves a mistake in law. The Court is not aware that in Jersey it has been called upon to distinguish between errors of law or fact on the face of the record and such errors which do not appear on the face of the award. We assume that because Section 1(i) of the 1979 Arbitration Act abolishing the English Court's jurisdiction to set aside or remit an award for errors of law or fact on the face of the record, did not extend to Jersey, the Arbitrator made his award in the form he did attaching his reasons to it. Our approach to the question of whether the Arbitrator made a mistake in law or fact has been that we conceive that he made no error of law or fact on the face of the record. The restricted approach of the Royal Court in deciding whether to set aside an award is supported by a number of English Authorities which are referred to at page 367 of Russell on Arbitration (Eighteenth Edition). The relevant extract from that work is as follows:

"Where an Arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted or set aside.

The general rule is that, as the parties choose their own Arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts. In this respect the Courts do not recognise any distinction between the awards of legal and of lay Arbitrators.

"An error of law on the face of the award means.... that you can find in the award or a document actually incorporated thereto, as, for instance, a note appended by the Arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous".

"Unless upon the face of the award we can distinctly collect what the Arbitrator intended to decide, and that we can see that he has decided wrongly, the Court will not interfere."

It would seem that although it may be a reasonable inference that the Arbitrator has made a finding which is erroneous in law the Court cannot interfere unless the finding is stated in the award.

Where an award is good on the face, it will be presumed, in the absence of evidence to the contrary, that everything has been rightly and regularly performed."

The reason for the restricted approach in Pothier and the Le Gros case, is that unless there has been a manifest error, both parties are bound to accept an Arbitrator's finding of fact, as he fulfils a quasi judicial function, and is the sole judge of fact.

So far as the alternative prayer is concerned, paragraph (ii), asks that the Arbitrator be ordered to give further reasons. He has not been made a party to the application and, therefore, cannot be ordered to do anything without being heard. According to English practice whenever an application is made to the Court to set aside or to remit an award on grounds of misconduct, technical, or otherwise, the notice of determination should be served on the Arbitrator or umpire concerned: Mustill & Boyd's Commercial Arbitration.

We deal now with the five matters recited in the Representation:

"(a) relying on his own expertise in determining the four factors set out on page 5 of the iterim award without informing the parties that he was going to rely on his personal experience and giving them an opportunity of making representations thereon."

The award does not show that the Arbitrator relied exclusively on his own experience. In any case an Arbitrator may draw upon the fountain of his own knowledge to assist him in a special arbitration for which he has been chosen. (Mediterranean & Eastern Export Company Limited -v- Fortress Fabrics (Manchester) Limited, The Times Law Reports, 9th July, 1948, and Zermalt Holdings -v- Nu-life Upholstery Repairs Limited, Queens Bench Division, Commercial Court, reported in the States Gazette of 21st September, 1985.

"(b) making a finding (factor number 2 on page 5 of the interim award) for which there was no evidence;

(c) making the four findings on page 5 of the interim award contrary to the weight of the evidence before him and which no reasonable Arbitrator could have reached if he had properly directed himself."

These claims appear inconsistent if not indeed, mutually exclusive. Either there was no evidence, in which case it is just possible that there could be a matter of law to be decided: see Nello Simoni -v- A/S M/S Straum, King's Bench Division, 30th November & 1st December, 1949, L.L.R. 1950, 83, 157; or there was some, but insufficient to enable the Arbitrator properly to arrive at his decision. However, the weight to be attached to any evidence is entirely a matter for the Arbitrator. In any case, Mr. Butcher's closing submission suggests that the Claimant accepted that there was some evidence against it, and therefore a case to answer.

"(d) exceeding his authority and jurisdiction by making a finding on page 4 of the interim award as to the direct cause of the damage by settlement of the original Trustee Savings Bank building, in Burrard Place and Number 31 New Street."

Paragraph 8 of the reference to the Arbitrator inferred that there was jurisdiction for the Arbitrator to deal with the question of damage to adjacent properties. Moreover, in the evidence of Mr. F. Coffin, one of the Claimant's ~~then~~ own witnesses, the matter of damage to adjacent offices was dealt with.

"(e) refusing to clarify the reasons for his award after having agreed that he would do so pursuant to the Claimant's acceptance of the offer contained in the Arbitrator's letter dated the 24th day of April 1986."

When the award was ready the Arbitrator wrote to the parties' (English) Solicitors, as follows:-

"Squire Rayfield, Solicitors,
40/42 King Street,
London WC2E 8JS.

McKenna & Co., Solicitors,
Inveresk House,
1 Aldwych,
London WC2R 0HP.

24th April, 1986.

Gentlemen,

Charles Le Quesne (1956) Ltd -v- The Custodian Trustees of the TSB of the Channel Islands

I enclose one copy of my draft Interim Award in this matter, dealing as it does with liability only.

As requested, this award is in draft form and should you wish to apply for some changes in the format or clarification of the reasons, no doubt you will let me know as soon as possible but in any case by Friday, 16th May, 1986.

Yours faithfully,

Peter Hollins,
Arbitrator."

He was asked by Messrs. Squire Rayfield, for the Claimant, for a delay until 31st May, 1986, which he granted. On 28th May, Messrs. Squire Rayfield wrote to the Arbitrator asking for clarification. The Bank's Solicitors McKenna & Co., opposed their request for application and in turn wrote to the Arbitrator on 29th May, as follows:-

P. Hollins, Esq.,
50 Ferrol Road,
Gosport,
Hampshire,
PO12 4UG.

29th May, 1986.

Dear Sir,

Charles Le Quesne (1956) Ltd. -v- The Custodian
Trustees of the Trustee Savings Bank of the C.I.

We have received a copy of a letter of 23rd May, 1986 from Messrs. Squire Rayfield to you enclosing a "request for clarification".

We refer you to Counsel's closing statements on 21st March, 1986. It was agreed between Counsel for both parties that the only purpose in sending the award in draft, to the parties, before signature was to obtain an opinion on a point of Jersey Law where such opinion would need to be sought before the award could be finalised.

Counsel for the claimants agreed that there was little or no difference between the parties as to the law in relation to the matters in dispute. The purpose of publishing the award in draft was to deal with some "unforeseen" point of law.

The claimants request for clarification does not raise any point of law as envisaged by Counsel for both parties at the conclusion of the hearing. We maintain it raises no point of law at all. There is no point of law raised which prevents the Award being signed.

Under the rules of the arbitration the claimants are only entitled to clarification of the award with leave of the Royal Court of Jersey. The respondents would oppose the granting of leave by that Court in the terms of the request now submitted to you. The respondents rely on paragraph 19 (iv) of the Rules and the respondents will maintain that the request does not fall within the terms of Rule 19 (iv).

We therefore oppose the claimants request for clarification and request that you now sign the interim award; the claimants are free to apply to the Royal Court of Jersey for leave to request further reasons, if so advised.

Yours faithfully,

cc: Squire Rayfield."

Rule 19 (iv) is as follows:

19. (iv) "If an award is made and on an application made by a party to the reference:-

(a) with the consent of the other party to the reference, or

(b) with the leave of the Court.

It appears to the Royal Court that the award does not sufficiently set out the reasons for the award, the Court may order the Arbitrator to state the reasons for his award in sufficient detail to enable the Court, should an Appeal be brought under this section, to consider any question of law arising out of the award.

Finally, the Arbitrator wrote to the (English) Solicitors for both the parties, as follows:-

"Squire Rayfield, Solicitors,
40/42 King Street,
London WC2E 8JS.

McKenna & Co., Solicitors,
Inveresk House,
1 Aldwych,
London WC2R 0HP.

6th June, 1986.

Gentlemen,

Charles Le Quesne (1956) Limited -v- The Custodian Trustees of the Trustee Savings Bank of the Channel Islands

You will recall that I expressed misgivings at the Hearing when Counsel requested that the award be published in draft form. Subsequent reflection, and the request by the Claimants for clarification of numerous matters of fact in the draft award, has not brought reassurance. Indeed, after much consideration, I have decided that it is in the interest of the parties that I now sign and publish the award. Two signed copies are therefore enclosed for each party. It is however only right and courteous that I should discuss the point of principle raised by the Claimant.

An essential aspect of good arbitration is that it should produce finality and avoid escalation of costs on appeal. Only where a point of law affects the award is there recourse to the High Court or, in the present case, first to a Jersey advocate and then to the Royal Court. The delay involved in this two-stage process could well postpone settlement by up to a year and add considerably to the costs of the reference. As correctly stated by Messrs. McKenna and Company in their letter of the 29th May, 1986, the purpose of the request for a draft award was to enable some unforeseen point of Jersey law to be dealt with more economically than would be possible under the Rules once the award had been signed. The first questions therefore are whether a point of law is raised by the Claimant's request and whether it was 'unforeseeable'. In my view the answers to both are negative.

The Claimant's request for clarification has, as its objective, not the elucidation of some point of Jersey law on which my award has relied, but of the reasoning in order to establish whether, in arriving at various findings of fact, I may have unwittingly gone outside the evidence. I say "unwittingly" because I have certainly not done so consciously or deliberately. You will recall my reference to this principle on at least two occasions during the Hearing, when I particularly made the point that my own questions to witnesses were timed to enable Counsel to respond if they wished. Again, in my remarks to an earlier witness I expressly stated that I was bound in law to decide in accordance with the evidence adduced and not my own technical knowledge of the subject.

There are, however, two ways in my view in which this reliance on the evidence may properly be qualified. Firstly, it is well established that an Arbitrator may assess the worth of evidence against the background of his own technical knowledge and experience. Secondly, I hold that where the evidence is silent, or no more than circumstantial, it cannot affect the Arbitrator's over-riding duty to determine all questions put to him and this may necessitate his making the best of what little direct or circumstantial evidence is before him.

A case in point is that raised by the Claimant in its request for clarification of my comments relating to the concern felt by the architect, Mr. Bravery (Sheet 5, Factor 3). My findings were based on the evidence given by the witness, assessed in the light of my own experience as an architect and my understanding as a fellow-professional of the attitudes which those words indicated. No truly direct evidence of what was in the architect's mind was taken or indeed was possible. It must be inferred from his actions and his words, spoken and written, together expressing attitudes an appreciation of which was important to an understanding of the communications culminating in the issue of A.I. 14.

The resulting conclusions however cannot be construed as having been arrived at outside the evidence.

The words of Ronald Bernstein, DFC, QC, FCIArb, are perhaps pertinent to the present situation:

"The search for perfect justice is self-defeating. There are inescapable practical limitations on the process of telling the parties of the tribunal's knowledge and experience and reasoning before publication of the judgment or award. To show the parties a draft before publication invites further submissions and a further draft and so on. Costs are already too high, and reconvening a hearing would in most cases lead to a quite unacceptable increase. Inviting written submissions on the draft is not always practicable, because although it might appear less costly than reconvening a hearing, each side must be given at least one chance to comment on the other's submission, and the delay would often be enormous. So the (arbitrator's) knowledge and experience must be disclosed at or before the (only) hearing. The problem is to know what knowledge and what experience need to be disclosed." (Chartered Institute of Arbitrators Annual Conference, Montreux, 1985).

Having re-read the award in this case, I believe that the degree of "knowledge and experience which needs to be disclosed" has indeed been disclosed.

Yours faithfully,

Peter Hollins,
Arbitrator."

In our opinion the Arbitrator was entitled to write as he did. We cannot find that the Arbitrator misconducted himself, and so far as the Representation is concerned, we answer the first matter in the negative and decline to set the award aside.

We turn now to the second matter, that is to say, whether we should give leave to appeal.

The only matter on which an appeal may lie, is that of law, as we have previously said; but that is reinforced, by Rules 19. (i) to (iii). Even if there is a matter of law to be decided, that does not give a party wishing to appeal an absolute right: Rule 19 (iii) limits that right. In our view of the five matters set out in clause 5, (a) and (d) could give rise to some question of law, but

(d) is more a matter of mixed law and fact; (e) arises after the official award was made; leaving (b) and (c) which are matters of fact. There is really very little law left. We think it highly unlikely that the small question of law that might possibly be appealed could substantially affect the rights of the Claimant. Nevertheless, we are asked by the Bank to strike out all the Claimant's application.

The main principle which guides an English Court in exercising its discretion in such a case, and we think that principle applies equally to the Royal Court, is that: "the parties will not lightly be driven from the seat of judgment, and for this reason the Court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases". (paragraph 430 of Halsbury 4th Edition, vol. 37). But of course that basic principle has been whittled down by the parties themselves, having regard to the restrictions which we have mentioned imposed in Rule 19. (iii). It is here that the observations of Bingham J. in the Zermalt Holdings case, are relevant. On page 1137, he says:

> "At the outset, and before making any allusion to the facts of the case at all, it is perhaps right to emphasise two things. The first is that, as a matter of general approach, the Courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

The differences of law have already been dealt with by the Arbitrator, and it should be noted, of course, that this is not a case of an application to strike out pleadings before a trial. Accordingly, we refuse the Claimant leave, and we order the Representation to be struck out. The Claimant will pay the Bank's costs.