

14 pages.

ROYAL COURT  
(Samedi Division) 128,

11th July, 1996

Before: Sir Philip Bailhache, Bailiff, and  
Jurats Le Ruez and Qu  r  e

Between: L.C. Pallot (Tarmac) Ltd. Plaintiff

And: Gechena, Ltd. Defendant

Preliminary issues:

- (1) Was there a binding agreement between the parties to go to arbitration;
- (2) If so, is the Defendant estopped from challenging the arbitration award.

Advocate R.A. Falle for the Plaintiff.  
Advocate P. Landick for the Defendant.

JUDGMENT

5 THE BAILIFF: At the beginning of this hearing I invited counsel to consider whether there were ways in which the arguments might be marshalled so as to render the passage of justice shorter. It seemed to me that it was in the interests of justice, and indeed in the interests of the parties that the Court should not be called upon to determine issues and to hear argument upon issues which might not in the event require to be argued having regard to any conclusion at which the Court might arrive.

10 In this case the Plaintiff is suing upon an arbitration award. The Defendant has denied that there was any agreement to enter a binding undertaking to accept the consequences of an arbitration and goes on, indeed, to challenge the conduct of the arbitration and the reasonableness of the decision at which the arbitrator eventually arrived. The Plaintiff replies to those  
15 last submissions by arguing that the Defendant is estopped from contending that the arbitration was not properly conducted and that the arbitrators award was unreasonable.

It appears to me that it would not cause injustice to either party if I were to rule that there are two issues upon which the Court should adjudicate as preliminary issues. Firstly, was there an agreement between the parties to submit to binding arbitration. Secondly, if there was an agreement to submit to binding arbitration is the Defendant estopped from challenging the conduct of the arbitration and the award at which the arbitrator ultimately arrived. If the answer to those two questions is in the affirmative then judgment will clearly issue for the Plaintiff. If the answer to either of those questions is in the negative then the judgment of the Court can only be an interlocutory judgment and argument will have to take place upon the matters raised in the Defendant's answer challenging both the conduct of the arbitration and the reasonableness of the arbitrator's award. The Court, therefore, proposes to proceed in that way.

I now proceed to give the judgment of the Court.

Background - The background to this action may be shortly stated. On 14th June, 1991, L.C. Pallot (Tarmac) Ltd, to which we shall refer as the Plaintiff, submitted a quotation to Faramus Forster, otherwise known as Kenneth Ancrum Forster, for resurfacing a roadway and a footpath with related works in the sum of £6,580.12. The nature of the job was specified in the quotation. The quotation was accepted and the work was executed. Kenneth Ancrum Forster, to whom we shall refer as "Mr. Forster" was not satisfied with the standard of the work and disputed payment of the Plaintiff's account. Proceedings were instituted by the Plaintiff against Mr. Forster.

In his defence Mr. Forster asserted, *inter alia*, that he had contracted with the Plaintiff as a director or agent of Gechena Limited, to which we refer as the Defendant, a company of which he and his wife are the beneficial owners.

In July, 1992, the Plaintiff's legal advisers wrote to the then legal advisers of Mr. Forster and the Defendant proposing that the dispute be submitted to arbitration. After an exchange of correspondence between the legal advisers it was agreed that the action against Mr. Forster be stayed and that the dispute between the Plaintiff and the Defendant be referred to a Mr. Booth, a qualified arbitrator. Terms of reference were drawn up and agreed.

For reasons which are not material Mr. Booth did not in fact conduct the arbitration and instructions were withdrawn from the Defendant's then legal advisers. However, agreement was subsequently reached between Mr. Forster, representing the Defendant, and the Plaintiff's legal advisers that the dispute should be referred to Mr. Harry Hannam, another qualified arbitrator. Mr. Hannam is indeed not only an associate of the

Chartered Institute of Arbitrators but is also a civil engineer and a chartered surveyor. Mr. Hannam's terms of reference were in substantially the same terms as had been agreed between the legal advisers of both parties in respect of the proposed arbitration by Mr. Booth. The terms of reference were signed by Mr. Daniel Young, a solicitor acting for the Plaintiff, and by Mr. Forster on behalf of the Defendant. Subsequently the arbitration took place. Mr. Hannam visited the site of the works and conducted a hearing at which evidence was heard, including evidence from experts employed by both parties.

On 6th July, 1993, he issued his award directing that the Defendant should pay £6,480.12 to the Plaintiff. The award represented the contract sum less £100 in respect of the pointing of some curb stones which the arbitrator determined had not been properly done. Awards were also made in respect of interest and costs.

The Plaintiff, who had requested a written and reasoned award, was ordered to pay the additional costs thereby incurred in the sum of £225. The document was collected from Mr. Hannam by the Plaintiff's legal adviser and a copy was forthwith sent to the Defendant. The Defendant immediately expressed dissatisfaction with the award and wrote on 9th July, 1993, by fax to the Arbitrator in the following terms:

*"Dear Sir,  
Arbitration L.C. Pallot (Tarmac) Ltd. -v- Gechena Ltd.*

*Thank you for your arbitration between L.C. Pallot (Tarmac) Ltd. -v- Gechena Ltd.*

*Messrs. Rothwell and Partners are instructed to obtain a 3" boring machine to get an exact identification of the amount of tarmac laid on site and if necessary we will contest your judgment in the Royal Court.*

*Yours faithfully,  
K.A. Forster. F.P.C.S.  
Director".*

A copy of that letter was sent to Messrs. Bois & Bois and to L.C. Pallot (Tarmac) Ltd.

The Defendant did not in fact take any steps to challenge the award but maintained its dissatisfaction and refused to pay the amount awarded. On 3rd September, 1993, an Order of Justice was issued by the Plaintiff seeking to enforce the award. Pleadings were filed and the matter now comes before us some three years after the arbitrator's award and five years after the execution of the works.

At an early stage of the hearing and after listening to arguments from both Counsel we ruled that we would, in the interests of justice, confine ourselves to hearing argument on two preliminary issues raised by the pleadings which were capable of being decisive of the action. The first issue, which was raised by the Defendant, was whether there had been a binding agreement between the parties to submit the dispute to arbitration. The second issue, which was raised by the Plaintiff, was whether the Defendant was estopped from challenging the enforceability of the award which now had a character of a chose jugée.

The first issue.

Mr. Landick submitted that the documents setting out the agreement to refer the dispute to arbitration, and in particular an exchange of correspondence between Advocate Melia, then acting for the Defendant, and Mr. Young acting for the Plaintiff, demonstrated that the arbitrator's award was not intended to be binding. It is necessary to set out the correspondence in full. On 4th January, 1993, Advocate Melia wrote to Mr. Young in the following terms.

*"We acknowledge receipt of your letter dated 22nd December 1992 enclosing an engrossed letter of instruction to Mr. Booth. We should be obliged if prior to our signature being affixed to same, you could confirm to us that following a determination by the arbitrator regarding the reasonableness of your client's account and the matters regarding costs which are covered in the letter of instruction, and the settlement of the relevant obligations by the appropriate party, that all matters in relation to the action will be deemed settled and that the proceedings initiated by your client will be withdrawn with no order as to costs".*

Mr. Young replied on the following day.

*"We refer to your letter dated the 4th January 1993 concerning the above.*

*We confirm that provided the appropriate party settles the obligations pursuant to the arbitrator's determination in this matter then our client company will withdraw its action with no award as to costs. We shall take your signature upon the letter of instruction to Mr. Booth as being an acceptance that the confirmation herein provided is reciprocated by your client in relation to the matter of costs in the proceedings.*

*We look forward to receiving the signed copy of the letter of instruction by return".*

Mr. Landick submitted, as we understood him, that the phrase "and the settlement of the relevant obligations by the appropriate party" opens the door to either party to refuse to settle following which the proceedings instituted by the Plaintiff against Mr. Forster would revive. He further submitted that the insistence of Mr. Young on keeping alive the action of the Plaintiff against Mr. Forster meant that the Plaintiff had reserved a bolt hole and accordingly that the arbitration was not intended finally to determine the issues between the parties. Mr. Forster was called as a witness and gave evidence that his understanding was that the agreement was not binding. He said that he had been advised by Advocate Melia that he could argue with the arbitrator's award if he was unhappy with the result. He understood from Advocate Melia that the arbitration was not full and final.

Mr. Falle sought and obtained leave, without objection from Mr. Landick, to call Advocate Melia to rebut this evidence. Advocate Melia stated that she would certainly not have advised Mr. Forster to submit to arbitration on the basis that there was an open door to contest the award if he did not like the result. The arbitration would have been a complete waste of time if either party had had the option of disregarding the arbitrator's award. She had advised that the dispute be submitted to arbitration because the issues could thereby be resolved more simply and cheaply than by litigation.

Mr. Falle also drew our attention to the conduct of Mr. Forster subsequent to the award. On the one hand he appeared to be saying that the award would be honoured by telling Mr. Young that he was collecting cheques from neighbours who were obliged to contribute to the cost of the works. On the other hand he asserted in evidence that it was his intention that the money would be paid over only to be held on a suspense account by the Plaintiff's legal advisers pending resolution of outstanding differences. Yet, if that were his intention it is difficult to understand why he was procuring cheques from the contributors made payable to the Plaintiff.

We reject the evidence of Mr. Forster that he was advised by Advocate Melia that he could argue with the arbitrator's award if he was unhappy with the result. Taken in the round we were unimpressed with Mr. Forster's evidence which was self contradictory and lacked credibility.

We have no hesitation in rejecting the submission that the arbitration was not intended to be binding on both parties. It is quite clear from the terms of reference addressed to the arbitrator and from all the correspondence between the legal advisers on both sides which preceded the appointment of the arbitrator that the dispute was to be resolved by the arbitrator's award. The litigation between the Plaintiff and Mr. Forster was

stayed but that did not derogate from the binding nature of the arbitration agreement.

5 On the first issue we accordingly find in favour of the Plaintiff.

The second issue.

10 Mr. Falle submitted that the Defendant was now estopped from challenging the award of the arbitrator. It was, he contended, a chose jugée. He drew our attention to the English case of Henderson -v- Henderson [1843-60] All ER 378. During the course of his judgment Wigram V.C. stated:

15 *"In trying this question, I believe I state the rule of court correctly, when I say that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their*  
20 *whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest; but which was not brought forward only because*  
25 *they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but*  
30 *to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".*

35 Mr. Falle submitted that in England that rule has been applied to arbitrations. Counsel cited the case of Dallal -v- Bank Mellat [1986] 1 All ER 239. The facts of the case are not material but Mr. Justice Hobhouse stated in the course of his judgment at page 256.

40 *"Maybe, as the arbitration progressed and since the award was published, Mr. Dallal has thought of better ways in which to formulate and present his claim, but that is beside the point. In the arbitration he ought to have*  
45 *presented all the ways in which he sought to sustain his claims. If he omitted to include some of them or left the presentation of some of them too late so that the points he could take were limited by the tribunal, that does not amount to a special circumstance; it is precisely the type of situation for which the Henderson v. Henderson principle exists. Nor, on the evidence before me, is*  
50 *there any basis for saying that Mr. Dallal was unable to present his case effectively due to circumstances beyond*

5 his control. He does say that he did not wish to disclose to the tribunal the names of some of the individuals with whom he was dealing in Iran. But, nevertheless, it was open to him to satisfy the tribunal (which included only one Iranian member) of his bona fides and of the reasons why he was wishing to keep the identity of some potential witnesses private. It was Mr. Dallah's choice how he chose to conduct his case before the tribunal and the type of evidential difficulty on which he has relied in the affidavits he has sworn on the summons would, if accepted as constituting special circumstances, largely nullify the principle in *Henderson v. Henderson*. I am satisfied that the present case falls squarely within the type of mischief to which the *Henderson v. Henderson* principle applies and that there are no special circumstances present which would make it appropriate to exclude it in the present case or to make any exception in favour of the plaintiff".

20 Mr. Falle cited cases in which the rule in Henderson -v- Henderson had been applied in this jurisdiction notably Ernest Farley and Sons Limited -v- Takilla Limited [1992] JLR 54 CofA.

25 The applicability of the rule was not seriously contested by counsel for the Defendant. He did, however, assert that there were special circumstances which ought to persuade the Court that the doctrine of *chose jugée* did not apply in this case. Mr. Landick relied particularly upon Le Gros -v- The Housing Committee [1974] JJ 77. This was a case where an arbitration board had been constituted pursuant to the Compulsory Purchase of Land (Procedure) (Jersey) Law, 1961, to assess the value of land to be acquired compulsorily. The Plaintiff sought to challenge the award. Le Masurier, Bailiff, delivering the judgment of the Court, stated at p.86:

35 "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".

50 Mr. Landick submitted that Mr. Hannam, the arbitrator, had exceeded his authority by failing to answer the questions which he was required by his terms of reference to answer. The terms of reference directed the arbitrator to:

5 "Consider the documentation before you, attend on site, view such photographs of the site as the parties may wish to submit to you and give your decision whether the works have been completed to a reasonable standard and that the fee sought by the Plaintiff is reasonable in the circumstances".

10 The arbitrator's award set out the background to the arbitration and recorded the extent and nature of the proceedings. It continued:

"10. at the Hearing, the Claimant contended that:

- 15 (a) Their quotation for the resurfacing of the existing roadway and the reconstruction of a footpath, which quotation was in the total sum of £6,580.12, had by way of a telephone conversation been accepted by the Respondent.
- 20 (b) The resurfacing of the existing roadway and the reconstruction of the footpath had been carried out to accord with the descriptions contained within the quotation.
- 25 (c) that as far as the time for completing the works was concerned time was not of the essence.

30 11. at the Hearing the Respondent contended that:

- 35 (a) It was an implied term of the Contract between the Claimant and the Respondent that the scope of the work of resurfacing the existing roadway would be more than that description of the works which was contained in the Claimant's quotation.
- 40 (b) Because of the Claimant's failure to complete the resurfacing of the existing roadway to a wider specification than that contained within the Claimant's quotation the resurfacing work was defective, and that ponding to an unacceptable level occurred during and after periods of rain.
- 45 (c) The work of reconstructing the footpath had never been completed.

50 NOW I, the said Harry Hannam, having taken upon myself the burden of this reference, and having visited Melbourne Park and having examined, heard and considered the evidence, both oral and written addressed by the parties and their expert witnesses, and the address made to me by the



parties DO HEREBY MAKE ISSUE AND PUBLISH THIS MY  
FINAL AWARD AS FOLLOWS:-

5 12. I FIND AND HOLD that:

12.1 Insofar as it is a matter of fact I preferred the  
Claimant's evidence and I FIND that the Claimant did  
discharge its burden of proof in that:

10 (a) the quotation in the total sum of £6,580.12 had by  
way of telephone conversation been accepted by the  
Respondent.

15 (b) the resurfacing of the existing roadway and the  
reconstruction of the footpath had been carried out  
to accord with the descriptions contained within  
the Claimant's quotation.

20 (c) that as far as the time for completing the works  
was concerned time was not of the essence.

25 12.2 In regard to the Respondent's contentions insofar as  
they are matters of fact I FIND that with the exception  
of some missing pointing in some kerbing, the Respondent  
did not discharge his burden of proof.

12.3 Insofar as it is a matter of Law I HOLD THAT the  
Claimant had made substantial performance.

30 13. THUS I AWARD AND DIRECT that the Respondent shall pay to  
the Claimant within 14 days from the date this Award is  
taken up by the parties the sum of £6,480.12, six  
thousand four hundred and eighty pounds and twelve  
35 pence, (which sum allows for the cost of pointing some  
of the kerbs which cost the parties agreed would be  
£100.00, one hundred pounds.) together with simple  
interest in the sum of £1,373.45, one thousand three  
hundred and seventy-three pounds and forty-five pence,  
40 to be calculated at the rate of 8% (eight per cent) per  
annum from the 25th December 1991 until the date of this  
my Final Award, and together with simple interest on the  
sum of £5,106.67, five thousand one hundred and six  
pounds and sixty-seven pence, to be calculated at the  
45 rate of 8% (eight per cent) per annum from the 13th  
January, 1992 until the date of this my Final Award, in  
full and final settlement of all matters in dispute in  
this reference".

50 Mr. Landick submitted that the arbitrator had not determined  
whether the works had been completed to a reasonable standard nor  
whether the fee sought by the Plaintiff was reasonable. Counsel  
queried whether "substantial" performance was the same as

"completion to a reasonable standard" and whether the arbitrator had determined whether or not the fee was "reasonable".

5 In our judgment these linguistic niceties are entirely out of  
place in the context of this case. The arbitrator was not  
deciding the fate of the Crown Jewels. He was arbitrating over  
a small dispute involving minor works carried out for a modest  
sum. It may be that the terms of reference could have been  
10 better phrased. However, in our judgment we have to ask  
ourselves whether, whatever the language employed, the  
arbitrator's award went to the heart of the matters in dispute  
and determined them. Applying that simple test we have no doubt  
that it did. The award determined that the Plaintiff had  
15 executed the works, which it had contracted to execute, subject  
only to a minor defect which led a compensating adjustment. The  
award recorded that the quotation had been agreed and it follows  
in our judgment from the finding that the works had been executed  
pursuant to contract that the fee was reasonable and accordingly  
20 due. We find no force in the submission that the award did not  
determine the issues set out in the terms of reference.

Mr. Landick then submitted that the arbitrator had  
misdirected himself on the burden of proof and that there was an  
error on the face of the record. He drew our attention to  
25 paragraph 12.2. of the award cited above where the arbitrator had  
stated "*the Respondent did not discharge his burden of proof*".  
Counsel cited a passage from another suit in Le Gros -v- The  
Housing Committee [1977] JJ 59. At page 69, Ereat, Bailiff,  
referred to a submission of the Attorney General and stated:

30 "*On the face of it, the Board misdirected itself as to the  
burden of proof. It is well-established that a  
misdirection on such a fundamental matter is of such  
gravity that a decision thus reached cannot be supported  
35 unless it is overwhelmingly clear that the decision would  
in any event have been the same and that therefore no  
injustice occurred*".

The above passage must, however, be read in context.  
40 Earlier in the judgment Ereat, Bailiff, referred to a submission  
of the Attorney General and stated:

45 "*He conceded that the wording used was unfortunate,  
inasmuch as it suggested that there was a legal burden on  
the plaintiff, but in fact it did no more than express the  
practical position. The plaintiff was contending that  
the land had potential value as lower density building,  
the defendant was contending that it had not. The Board  
had been directed to consider whether or not that  
50 possibility existed, and it must follow that there was a  
burden on each side to try to satisfy the Board that its  
contention was valid, because as a matter of commonsense*

it must follow that if one side or the other failed so to satisfy the Board then the other side must succeed.

5 We agree that there was what may be described as a burden  
on both parties to satisfy the Board as to their  
respective contentions, but the burden went no further  
than this, that if either part failed so to satisfy the  
Board, then he or it, as the case may be, could expect the  
10 Board to come to a conclusion which was adverse. Putting  
it another way, the only so-called burden on either party  
was the risk of an adverse decision if one or other of the  
parties failed to submit its case in a sufficiently  
persuasive form or at all".

15 We concur with that analysis. The arbitrator's duty was to  
employ his expertise and to view the evidence and the submissions  
from an objective, neutral position. It was for the Plaintiff to  
satisfy him that the works had been properly executed in  
accordance with the description set out in the quotation. It was  
20 for the Defendant to satisfy him that the works were defective on  
account of ponding to an unacceptable level or otherwise.

In our judgment the arbitrator's approach to his function was  
correct and in accordance with his duty. We accordingly reject  
25 this submission of Counsel for the Defendant. We can find no  
error on the face of the record.

Both counsel addressed us at some length on the  
jurisprudential roots of the law of arbitration in this  
30 jurisdiction.

Mr. Falle, for the Plaintiff, urged that arbitration was a  
means of settling commercial disputes and that the Court was  
entitled to look, and should look, to English text books and case  
35 law for guidance in declaring the current principles of Jersey  
law. To look back to ancient dusty tomes and to invoke some  
forgotten procedure to defeat the expectations of modern  
commercial practice would be wrong.

40 Mr. Landick for the Defendant submitted that our law of  
arbitration was to be found in Pothier and other French  
authorities. In particular he relied upon a passage from the  
Oeuvres de Pothier (Nouvelle Edition, 1825) Tome 14: Partie II:  
Chapitre 4: Article II, which laid down a requirement that the  
45 arbitrator's award should be registered by the Court.

50 *"La partie, au profit de qui il est rendu, assigne l'autre  
partie 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 pêche 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; ca si la sentence renfermoit un de ces vices, l'autre partie pourroit s'opposer à l'homologation, et en soutenir la nullité".

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10 It is the case that there is no statute in Jersey governing the law or procedure of arbitration. There is no doubt, however, that arbitration as a mode or resolving disputes is known to Jersey law. There are numerous references to arbitration both in the Recueil des Lois and in the records of this Court. We find some force in the submissions of both Counsel. In our judgment, however, the position may be shortly stated. In Jersey, the law of arbitration is rooted in the law of contract. The maxim *la convention fait la loi des parties* is applicable to arbitrations. Other than in the case of statutory arbitrations where the obligation is imposed by the legislature, an arbitration is a consensual matter. Pothier may well be a guide to which the Court will have recourse in the law of arbitration as generally as in the law of contract. We reiterate, however, the cautionary note sounded by this Court in Selby -v- Romeril (11th August, 1995) Jersey Unreported, where the Court stated that "*our law cannot be regarded as frozen in the aspic of the 18th century*". It is the Court's duty to develop the law to accord with contemporary commercial practice and the Court may well find it convenient to do so by reference to English authorities provided that they do not derogate from fundamental principles of our law.

25 So far as the procedure in our Courts is concerned, however, we do not need to look beyond our own shores. No local authority was drawn to our attention suggesting that the award of an arbitrator requires to be registered before entering into effect. The practice of which we take judicial notice is that an award once given is immediately effective.

30 We return, therefore, to the second issue to be determined in this case. If the parties to a dispute lawfully agree to submit the issues in question to arbitration and the arbitrator makes an award determining those issues the Court must, in general, enforce that award. A Court cannot permit a party to challenge an award merely because he does not like it. The maxim *interest reipublicae ut sit finis litium* - it is in the public interest that there should be an end to litigation - appears to us to apply here. As a matter of public policy it is just and convenient that certain disputes, particularly where technical or esoteric issues are in question, should be determined by arbitration. It would have very unfortunate consequences if the Courts were too readily to agree to review an arbitrator's award. There is, of course, a narrow band of circumstances where the Court should assert its jurisdiction to do so. We do not purport here to circumscribe that band. Clearly the circumstances set out in the extract from Pothier cited by counsel for the Defendant where for example the arbitrator has failed to answer the questions referred

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to him or there is an error on the face of the record, are instances where the Court has power to strike down or interfere with the award. We are satisfied that no such circumstances obtain here. The award was regular and determined the issues  
5 between the parties. We accordingly uphold the submission of counsel for the Plaintiff and hold that the Defendant is estopped from challenging the award which has the character of a *chose jugée*.

10 It follows that the Order of Justice must be confirmed. In accordance with the prayer we give judgment in favour of the Plaintiff for (a) the sum of £6,480.12 - representing the cost of the works, (b) £772.69 - representing interest payable pursuant to the award, (c) £1,830 - representing the arbitrator's costs, (d)  
15 £2,258.91 - representing the Plaintiff's costs in relation to the award. Interest on the above sums will be paid at the Court rate from 20th July, 1993, that is the date upon which the sums became payable pursuant to the award until the date of payment. I am prepared to hear Counsel on the question of costs.  
20

Judgment on Costs.

In Jones -v- Jones No.2 (1985-86) JLR 40 this Court cited with approval the words of the Lord Justice Brandon in Preston -v- Preston [1982] 1 All ER 41; (1981) 125 Sol. Jo. 496 where he said:  
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*"It appears to me that it is necessary before the Court departs from the general basis of taxation laid down in paragraph 2, Order 62, rule 28 of the rules of the Supreme Court, and directs taxation on the more generous basis authorised by paragraph 3 of that rule, that there should be some special or unusual feature in the case to justify the Court in exercising its discretion in that way".*  
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35 I have, therefore, asked myself whether there is, in this case, any special or unusual feature which justifies the award of full indemnity costs. This case concerned a modest amount of some £6,500 being the value of works carried out by the Plaintiff for the Defendant. As the Court has found there was an agreement to refer the issue to arbitration. The arbitrator decided the  
40 matter in favour of the Plaintiff. Following the award there was prevarication by the director of the Defendant, Mr. Forster, and promises of payment which were not met. The attempts by the Plaintiff to enforce the arbitral award have been contested at every stage. The result is that costs have now been incurred  
45 both by the Plaintiff and by the Defendant which must exceed the value of the award itself. It is not difficult to envisage that a less persistent Plaintiff might well have abandoned any attempt to obtain that which the arbitrator had decided was its due. The  
50 conduct of the Defendant has been tantamount to an abuse of process and I accordingly order that the Defendant pay the Plaintiff's costs on a full indemnity basis.

### Authorities

T.A. Picot Limited and Vekaplast Windows (C.I.) Limited -v- Michel, Crill and Hamon (trading as Crills) [1993] JLR 348.

Ernest Farley and Sons Limited -v- Takilla Limited [1992] JLR 54.

Rahman Showlag (suing on his own behalf and as authorised representative of the Heirs of the Estate of Sheikh Ahmed Showlag) -v- Mansour and First Union Corporation S.A. [1991] JLR 367.

Cooper -v- Resch (formerly Cooper) [1987-88] JLR 428.

Dallal -v- Bank Mellat [1986] 1 All ER 239.

Duquemin and Duquemin -v- Kontrol Ltd. [1985-86] JLR N2.

Cleveland Bridge and Engineering Company Limited -v- Sogex (International) Limited [1982] JLR 101.

Le Gros -v- The Housing Committee [1974] JJ 77.

Le Gros -v- The Housing Committee [1977] JJ 59.

Henderson -v- Henderson [1843-60] All ER 378.

4 Halsbury 2: para. 684.

Russell on the Law of Arbitration (19th Ed'n): pp.391-4.

Bernstein: Handbook of Arbitration Practice (1987): pp.151-2.

Oeuvres de Pothier (Nouvelle Edition, 1825) Tome 14: Partie II: Chapitre 4: Article II.

Selby -v- Romeril (11th August, 1995) Jersey Unreported.

### Costs Authorities

Jones -v- Jones No. 2 (1985-86) JLR 40.

Preston -v- Preston [1982] 1 All ER 41; (1981) 125 Sol. Jo. 496.