JUDGEMENT : JUDGE BOWSHER QC. TCC. 15th February 2001

1. The applicants in this matter seek to question an award made by the second respondent as arbitrator, in an arbitration between the claimant and the first respondent.

2. Although the arbitrator, as required by the Arbitration Act 1996, has been made a party to the action, he has indicated that he does not wish to take part in these proceedings.

3. The arbitration arose out of a land reformation scheme at a site in Wednesbury, West Midlands. The Black Country spine road was planned to be constructed over reclaimed and stabilised land at the site. The site had been the subject of intensive industrial use for over a hundred and fifty years, with the main activities including mining, quarrying, iron and steel manufacture, engineering and indiscriminate waste tipping. The reclamation works included very substantial earth works, involving the removal of 3 million cubic metres of overburden, inter-burden and waste, and the removal of instability problems associated with mine workings for coal teams under the site.

4. The main contract was between the Black Country Development Corporation and Keir Construction. There was a sub-contract between Keir Construction and the first respondent (VHE). There was a sub sub-contract between VHE and **Groundshire** (GS). That last sub-contract was in respect of drilling and grouting of mine shafts on the site.

5. The dispute arose out of the mine shaft works and in particular related to whether the treatment of a substantial number of mine shafts – the vast majority of which had not been identified or recorded as being present at the site – amounted either to a variation or gave rise to a breach of the sub-contract causing delay and disruption in the claimant's works.

6. At no point, whether in their pleadings or during the course of the hearing before the arbitrator, did VHE criticise the quality of any of the works carried out by GS or the rate at which such works were completed. Further, there were no real disputes as to the quantity of the works carried out by them.

7. There were two substantial changes from the sub-contract as originally envisaged. Firstly, the contract documents identified 74 mine shafts on which work must be done. In fact, 1,137 needed to be worked on. Secondly, it had been intended that works were to be treated from ground level, but, by variation, treatment was required from the base of the shaft. Those changes led to claims for payment being made in ways not envisaged at the outset.

8. One of the disputes related to what has been called standing time. VHE accepts liability to pay GS for standing time, in effect for VHE impeding access to work on the increased number of shafts.

9. Another dispute relates to the effect of inflation.

10. GS say that they want some of their claims to payment "*looked at again*", ideally by another arbitrator.

11. VHE say that that way of putting their complaint indicates that GS do not bring themselves within the statutory provisions providing for relief.

The claims

12. The applicant claims the following relief set out in their claim form as follows:

> "*1. The applicant seeks orders that (i) the award delivered by the arbitrator hereinafter referred to as the second respondent David Richards Esq on the 20th September 2000 be set aside in whole or in part under section 68(3)(b) of the Arbitration Act 1996; alternatively be declared to be of no effect in whole or in part under section 68(3)(c) of the Arbitration Act 1996 on the ground of serious irregularity affecting the tribunal, the proceedings or the award, in that there were failings by the second respondent to comply with section 33 of the Arbitration Act 1996 which have caused or will cause substantial injustice to the applicant; (ii) the second respondent be removed as arbitrator under section 24(1)(d)(i) of the Arbitration Act 1996 on the ground that he has refused or failed properly to conduct the proceedings and that substantial injustice has been or will be caused to the applicant; (iii) alternatively to (i) and (ii) above the award be remitted to the second respondent in whole or in part for reconsideration under section 68(3)(a) of the Arbitration Act 1996 on the ground of serious irregularity affecting the tribunal, the proceedings or the award, in that there were failures by the second respondent to comply with section 33 of the Arbitration Act 1996 which have caused or will cause substantial injustice to the applicant.*"

The claim form adds:

> "*2. There is no available arbitral process of appeal or review and no available recourse under section 57 of the Arbitration Act 1996.*"

For the respondent, it is submitted that that statement is not correct. I shall return to that later. I should also make clear that, although the orders requested in the claim form asked that the award be set aside in whole or in part, it is clear that the questioning of the award relates only to some parts, which I shall mention later.

The statute

13. The relevant parts of s 68 of the 1996 Act are in the following terms:

> "*68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.*
>
> *A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:

(a) failure by the tribunal to comply with section 33 (general duty of tribunal) . . .

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may:

(a) remit the award to the tribunal in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

That last sentence is of course of very considerable importance.

14. The relevant parts of s 24 of the Act are as follows:

"24(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds . . .

(d) that he has refused or failed

(i) properly to conduct the proceedings . . .

and that substantial injustice has been or will be caused to the applicant."

15. Section 33 is in the following terms:

"33(1) The tribunal shall

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

16. Section 70(2) of the Arbitration Act 1996 is as follows:

"An application or appeal may not be brought if the applicant or opponent has not first exhausted . . .

(b) any available recourse under section 57,"

of the Arbitration Act 1996.

17. Section 57 reads as follows:

"57(3) The tribunal may on its own initiative or on the application of a party:

(a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award."

Removal of Arbitrator

18. It has been submitted that the test for removal of an arbitrator is the same as the test for remission of an award. I reject that submission.

19. Where an arbitrator has failed properly to conduct the proceedings so that substantial injustice has been or will be caused to the applicant, the court has a choice. The court may remit the award to the same arbitrator or it may remove the arbitrator.

20. Removal of the arbitrator may have serious consequences for the arbitrator. Hence the requirement that he be made a party to the proceedings.

21. Removal of the arbitrator may also have serious consequences for the parties in terms of added costs.

22. It is perfectly possible for an arbitrator who has fallen below the high standards required in the conduct of proceedings to go on to complete the arbitration with all propriety and fairness once his error has been pointed out.

23. Although there are similarities of wording between ss 68 and 24, it is clear that removal of the arbitrator is a most serious step to be ordered following some misconduct of the proceedings. Removal of the arbitrator should only be ordered where there are real reasons for loss of confidence in that arbitrator.

24. If the parties cannot for good reason trust the arbitrator to complete the arbitration fairly and properly even with the benefit of an examination of his conduct by the parties and their representatives and guidance from the court, then the arbitrator should be removed, but not otherwise.

25. In ***Rustal Trading Ltd v Gill & Duffus SA*** [2000] 1 Lloyd's Rep 14, Moore-Bick J agreed with the parties that, when bias was alleged, the same test applied for the removal of an arbitrator under s 24 as for a finding of serious irregularity under s 68. But in the present case bias is not alleged and the decision of Moore-Bick J is in no way inconsistent with what I have just said.

26. It is clear from s 68(3) of the Act that the policy of the Act is that, where something has gone seriously wrong, the first remedy of choice is that the award be remitted to the tribunal for reconsideration, rather than that the award

should be set aside or declared to be of no effect. It must follow that removing an arbitrator must come low on the choice of remedies where some remedy is appropriate.

27. With regard to s 33 of the 1996 Act, counsel for GS relies on paras 5-060 to 5-062 of *Russell on Arbitration*, 21st edition, page 195. I will not read those paragraphs, but they can be taken as read into this judgment.

28. As is indicated in a footnote in *Russell*, all the authorities cited as propositions for this statement were decided under the old law. It is said by the editors of *Russell* that the same principles would be applied to determine whether a tribunal has acted fairly under the 1996 Act.

29. Fairness is fairness, but the results of a lack of fairness required by statute may be changed. The 1996 Act was intended to change the law. It was not merely a codifying statute. The court may be required in some circumstances to enforce or not to disturb an arbitrator's decision, even when the court disagrees with that decision in law or in fact.

30. So also under the 1996 Act the court may be required to enforce or decline to disturb an arbitrator's decision even when the court discerns an element of unfairness.

31. Both ss 68 and 24 of the Act justify action by the court only when substantial injustice has been or will be caused to the applicant, not when a substantial injustice may be caused to the applicant. It follows that even unfairness does not of itself and without more vitiate an arbitral award.

32. It is more important to look at the decisions that the courts made after the 1996 Act came into force than to consider the earlier decisions.

33. For example, counsel for GS relied on ***Interbulk Ltd v Aiden Shipping Co Ltd ("The Vimeira")*** [1984] 2 Lloyd's Rep 66, before the Act. In that case, at page 76, Ackner LJ said: "*Where there is a breach of natural justice as a general proposition it is not for the Courts to speculate what would have been the result if the principles of fairness had been applied. I adopt, with respect, the words of Megarry J in* ***John v Rees*** *[1969] 2 All ER 274 at p 309 where he said: 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change'.*"

34. Though entirely attractive as a general proposition, that is no longer the law as a result of the 1996 Act. The Act does not require the court to speculate what would have been the result if the principles of fairness had been applied, but the Act requires that the court is only to interfere on the ground of serious irregularity in the form of unfairness if the court considers, not speculates, that the irregularity or unfairness has caused or will cause substantial injustice to the applicant.

35. It follows that there must be some instances of unfairness on the part of an arbitrator where the court should not intervene. It may be that some instances of unfairness that in fact caused substantial injustice to the applicant will not be the occasion for the court intervening simply because there is insufficient evidence to lead the court to consider that the irregularity or unfairness has caused or will cause substantial injustice to the applicant.

36. Mr Acton Davis submitted on behalf of GS that in this connection substantial injustice meant no more than injustice that was de minimis.

37. In support of that proposition, Mr Acton Davis cited the decision of the House of Lords in ***Department of Transport v Chris Smaller (Transport) Ltd*** [1989] 1 AC 1197, [1989] 1 All ER 897. In that case the House of Lords was considering the practice of the courts in deciding applications to dismiss actions for want of prosecution. The House of Lords were seeking to withdraw from the effect of some earlier decisions that made it difficult to dismiss stale applications for want of prosecution. Previous decisions had required that, before a court would strike out an action for want of prosecution, the defendant had to show that he had suffered prejudice from the delay. In the *Smaller* case, the House of Lords decided that such prejudice may be no more than prejudice that was more than minimal. That decision was one million miles from this case.

38. The policy of the 1996 Act is to make it more difficult to question the decisions of arbitrators, not to make challenges easier.

39. The word "*substantial*" appears in many contexts in our law. One simply cannot take a definition of the word from one context and apply it without question to another totally different context. I reject totally Mr Acton Davis's submission as to the meaning of the word "*substantial*". In the present context, I prefer such dictionary meanings as "*having a real existence*", "*essential*", "*of ample or considerable amount, quantity or dimensions*".

40. In the present context, Parliament plainly meant to refer to some injustice that had some real effect as opposed to a failure to deal with arguments that causes affront or disquiet without substantial effect. The highest requirement that justice should manifestly be seen to be done may require that a judicial decision be overturned because of the manner in which it was reached, without it being demonstrated that the result produced injustice. But that is not the system applied to arbitrations by the 1996 Act.

41. Both parties in this case have put in evidence and made submissions on the basis that "*substantial evidence*" means substantial in cash terms. It would be unwise to try to define a term left undefined by the brilliant draughtsmen of the 1996 Act. I would only say that the use of the word "*substantial*" indicates that the court is not to try to give a remedy for every injustice, but the substantiality of the injustice is not to be measured only in money terms.

However, the money is not to be disregarded and, when considering money, the cost of remedying the injustice has to be considered along with other considerations. A measure of proportionality is required and not solely in cash terms but overall.

42. The first case relied on by counsel for the applicant in relation to the duty under s 33 of the 1996 Act was ***Pacol Ltd v Joint Stock Co Rossakhar*** [2000] 1 Lloyd's Rep 109.

43. At the heart of that case was a very simple and fundamental error. The respondents to an arbitration admitted breaches of contracts that raised some issue as to the amount of damages payable. The arbitrators made an award on the basis that the admission of liability was not justified. In such a clear case, it was only necessary for Colman J to state the central principle of the old law without discussing the refinements of the 1996 Act. At page 114, Colman J cited the paras 5-060 and 5-061 of the current edition of Russell on Arbitration to which I have already referred. Colman J also cited a similar passage from *Mustill and Boyd*, second edition, page 312. Colman J also cited ***"The Vimeira",*** to which I also referred, and other cases decided before the 1996 Act.

44. In ***Egmatra AG v Marco Trading Corporation*** [1999] 1 Lloyd's Rep 862, 865, Tuckey J emphasised that serious irregularity on its own does not require sufficient ground for a court to interfere with an arbitral award. He said:

"So I turn to the alternative application based on serious irregularity where section 68 defines a serious irregularity as being:

one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant:

(a) failure by the tribunal to comply with section 33 . . .

which is a failure to act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and:

(d) failure by the tribunal to deal with all the issues that were put to it.

Here Mr Landau, Counsel for Marco, reminded me of what the DAC said of these provisions at paragraph 280 of its report, where they said: *'Irregularities stand on a different footing. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing 'substantial injustice' before the Court can act. The Court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 [which is now s 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.'*

So this is no soft option clause as an alternative to a failed application for leave to appeal. Substantial injustice has to be shown before the Court will intervene."

It is clear that Tuckey J there did not regard the requirement of substantial injustice as being satisfied by something a little more than de minimis. To accept the submission of Mr Acton Davis on this point would be to accept that s 68 is indeed a soft option clause.

45. A decision that I find particularly helpful is that of His Honour Judge Humphrey Lloyd QC, in *Weldon* ***Plant Ltd v The Commission for the New Towns*** [2000] Build LR 496. At para 29, Judge Lloyd said:

> *"Parliament clearly intended that if a party agrees to arbitration then it may have to accept that it will be unable to challenge or have put right an error by the tribunal in its award, whether of fact or of law, unless it falls within section 68 or 69 of the 1996 Act. Any other approach might deprive arbitration of one of its perceived attributes namely that a final decision may be given more quickly than would be the case with other forms of dispute resolution, including litigation.*
>
> *30. Similarly, section 68(2)(d) is not to be used as a means of launching a detailed enquiry into the manner in which the tribunal considered the various issues. It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case of a party so that a substantial injustice has resulted, eg where a claim has been overlooked, or where the decision cannot be justified as a particular key issue has not been decided which is crucial to the result. It is not concerned with the failure on the part of a tribunal to arrive at the right answer to an issue. In the former instance the tribunal has not done what it was asked to do, namely to give the parties a decision on all the issues necessary to resolve the dispute or disputes (which does not of course mean decisions on all the issues that were ventilated but only those required for the award). In the latter instance the tribunal will have done what it was asked to do (or will have purported to do so) but its decision or reasoning may be wrong or flawed. The arbitral tribunal may therefore have failed to deal properly with the issues but it will not have failed to deal with them."*

I then omit some paragraphs from the judgment and return to the judgment from a point where the judge dealt with an issue of fact – and I shall not try to describe that issue of fact. The judge then returns to the general points and says:

> *"The latter raises a point that frequently arises: is an arbitral tribunal obliged to confront a party with a proposed finding when it is not one that a party has sought? Obviously the tribunal should inform the parties and invite submissions and further evidence before making an award if the finding is novel and was not part of the cases presented to the arbitral tribunal. On the other hand in many arbitrations, especially those in the construction industry, there are many findings other than those which the parties have invited the tribunal to make. Matters of quantification and valuation frequently lead to the tribunal taking a course which is not that put forward by either party, but which lies somewhere between. 'Doing the best one can on the material provided' almost inevitably produces such a result. Provided that the finding is not based on a proposition which the parties have not had an opportunity of dealing with the arbitral tribunal will not be in breach of its duties under section 33 nor will its award be liable to challenge under section 68(2)(a) or (d) if it makes such a finding without giving the parties a chance of dealing with it. In many such cases the tribunal will have been appointed for its expertise so that in addition there would be no obligation to consult the parties. Any other course could defeat the objective of avoiding 'unnecessary delay and expense' as provided by section 1(a)."*

46. If evidence and argument is given in relation to a particular issue and one party puts forward proposition A while the other party puts forward proposition B, it would rarely be argued that the arbitrator was not entitled without notice to decide on proposition C if it were a compromise between A and B. But if C was not a position between A and B, it would be a question of fact and degree in every case whether it was unfair for an arbitrator to decide on proposition C without giving notice to the parties so that they could argue the point or perhaps call further evidence about it.

The hearing

47. This application complains of the conduct of proceedings at a formal hearing which began on 17 July 2000. That hearing lasted for 10 days out of an originally scheduled 16 days.

48. At the hearing, both parties were represented by counsel. Five factual witnesses gave oral evidence and were cross-examined, and three expert witnesses gave evidence and were cross-examined – a quantity surveyor for both parties and a mining engineer on behalf of the claimant. Oral evidence was given on oath. The hearing resembled clearly a formal trial of court proceedings.

The award

49. On 26 September 2000, the award dated 20 September was sent to the respective solicitors. It sought to address the issues addressed at the hearing, leaving only the questions of interest and costs. Mr Richards awarded that a sum of £9,571.39 was due to the claimant.

50. By a further letter, dated 28 September 2000, Mr Richards wrote to the parties, saying that he believed he had made an error in part of his award and intended to amend the award so as to increase the amount due to the claimant to £33,391.37 plus VAT. The claim had originally been for a sum in excess of £1 million.

The issues

51. At the hearing, the issues for determination were set out by the arbitrator under the following headings:
    1. The terms of the mining treatment sub-contract.
    2. Variation.
    3. Valuation.
    4. Standing time.
    5. Damages.
    6. Interest.

The complaints

52. The applicant complains of the arbitrator's conduct in relation to four issues: (1) the contract period; (2) standing time; (3) valuation; (4) inflation. I will deal with the complaints regarding those four issues in turn.

The contract period

53. At its boldest, the complaint of the applicant about the finding regarding the contract period was that the applicant's case was that it should be 14 weeks, while the respondent's case was that it should be 40 weeks. But the arbitrator took neither period nor any compromise between the two but said that the period should be 44 weeks.

54. That is an over-simplification of the position. The period of 14 weeks was related to some evidence. The case of the respondent, on the other hand, was that the period was as long as it takes. In her closing speech, Miss Doerries on behalf of the respondent, submitted that that was 40 weeks.

55. It is true that the arbitrator did not give proper notice to the parties that he was going to decide on a period of 44 weeks, but one of the issues in front of the arbitrator was the period over which the applicant was to carry out the sub-contract works. There was extensive oral evidence by witnesses on both sides as to what was intended and what was feasible, reference to contemporaneous statements, and consideration of a Keir Construction programme. Further, the experts had agreed the number of rig days and the quantity of work executed in respect of which there was no complaint by the applicant. The applicant did not plead a positive case as to this, but asserted a period of 14 weeks by reference to correspondence which post-dated the contract. The respondent asserted that the applicant was to carry out its works in accordance with VHE's progress on site by reference to a letter dated 23 March 1993, which was incorporated into the contract, and further relied on written documents and oral evidence to support the proposition that the applicant anticipated during the first few

months that the works would take approximately 40 weeks. The respondent also relied upon work carried out by the applicant over a period of approximately 8 months in respect of which no complaint was made, as indicating that the period of 14 weeks contended for was wholly unrealistic.

56. The arbitrator came to a decision which he was perfectly entitled to come to, namely that the applicant's works were to be executed concurrently with the respondent's works within a period of 44 weeks, relying upon the Keir contract programme and by consideration of the time which was spent by the applicant carrying out work in respect of which it was common ground there was no complaint. The arbitrator relied upon the joint statement of the experts as to the number of rig days and the quantity of work executed in this period.

57. The parties did address the arbitrator on the question of intended contract period, on the contract programme, and on the issue of works actually carried out and time taken. The arbitrator came to a decision that he was entitled to reach. If, before the hearing ended, he had said that he had in mind a period of 44 weeks, I cannot imagine that anything more could have been said to him other than that the appropriate period was 14 weeks.

58. I reject the complaint under this head.

Standing time

59. Both parties agreed before the arbitrator that standing time was payable.

60. The respondent denied that standing time was a variation.

61. The claimants claimed that standing time was a variation and fell to be varied under cl 9(2) of the contract.

62. Extraordinarily, the claimants now complain that the arbitrator did not tell the parties that he was going to accept the claimants' submission and treat standing time as a variation.

63. I quote from the written submissions put before me by counsel for the applicant: *"However, as with his approach to the contract period, the arbitrator did not, either during the hearing or prior to the publication of the award, inform the parties that he regarded or was considering regarding standing time as a variation to be treated like all other variations, nor did he indicate that he proposed to value it differently to the approaches urged by the parties and considered in cross-examination."*

64. The last sentence of that passage that I have quoted has been demonstrated by Miss Doerries on behalf of the respondent to be totally unfounded. I refer to the sentence: *"nor did he indicate that he proposed to value it differently to the approaches urged by the parties and considered in cross-examination."*

65. Miss Doerries drew my attention to a passage in the transcript of the proceedings before the arbitrator, in which the arbitrator raised with Mr Croall, counsel for the applicant, the question of valuing standing time on the basis in fact adopted by the arbitrator, namely contract rates plus uplift. Mr Croall gave a reasoned and full answer. That is at Day 8 pages 190 and 191 of the transcript.

66. I reject the complaint under this head also.

Valuation clause 9(2)

67. In his award the arbitrator construed the meaning of cl 9(2) of the contract with regard to the pricing of variations as follows: *"In my view the contract lays down a strict order of precedence. First, contract rates apply. Secondly, if those rates should not be applied, analogous or uplifted rates apply. Finally, if an analogous rate or uplift cannot be calculated, fair rates apply. Fair rates will generally be cost based but must also reflect the bargain the parties made. Loss making elements may not be ignored."*

68. For the applicant it is said that that is wrong and the contract on its true construction required only a two-stage process. If this were an appeal on a question of law, I would consider that argument. But it is not.

69. The complaint is that the arbitrator's failure to indicate to the parties his view of how cl 9(2) operates has led him to apply the wrong test.

70. That submission simply does not hold water. The second day of the hearing of the arbitration was a reading day, and on that day, 18 July 2000, the arbitrator wrote to the parties a letter setting out his preliminary views on the question of the working level variation so that the parties might comment on them. The whole of that letter merits attention, but for the sake of brevity I will only read para 3:

> "3. *The three rules for valuation in clause 52(1) of the main contract – to be found in* Henry Boot v Alston Combined Cycles *– which may apply through clause 9 of the subcontract, fall to be considered. If rule 1 applies, the BoQ rates remain unaltered. If rule 2 applies, I must decide what change in effort there has been and determine an uplift to the rates in relevant terms. If rule 3 applies, the value should reflect the positions the parties would have been in without the variation. The scale of gains or losses the claimants would have experienced should be constant. In all instances regard should be had to the method of measurement and the pricing structure that can reasonably be ascribed to the claimants' work."*

71. At the hearing on 19 July 2000, Mr Croall mentioned that letter, and on 1 August 2000 Mr Croall made lengthy submissions about cl 52 and also cl 9(2) and the *Henry Boot* case.

72. As to that, Mr Acton Davis complains that the arbitrator did not say "Mr Croall, you are wrong".

73. I reject this head of complaint, though in doing so I must make it plain that I am not saying that I agree with the arbitrator's construction of the contract. I make no finding regarding that construction. I do not see that the

arbitrator was under any obligation to express his disagreement with Mr Croall's submissions at the time. Indeed if such disagreement had to be expressed on every occasion when the tribunal disagreed with counsel, hearings would be much longer than they already are.

The calculation of the valuation

74. The complaint is phrased in these words: *"Paragraph 10.5 of the award sets out the arbitrator's calculation based upon a final uplift to the rates applicable at reduced ground level. However, this differs from the approach either party was arguing for at the hearing. Indeed although the arbitrator says he is adopting the approach of Mr Cable, he in fact included a number of elements that did not feature in Mr Cable's calculations and were not at any point canvassed with the parties: (1) the reduction of standing time cost by 18 per cent to reflect running cost; (2) the introduction of a deemed working cost figure in an attempt to give effect to a finding that 90 per cent of the work was originally to be carried out at ground level and to assist in the calculation of an uplift."*

75. The answer of the respondent is as follows: *"The applicant claimed that the works were to be varied under cl 9(2) of the contract."*

Much of the time taken in the hearing was spent considering different approaches to valuing the works under 9(2). Mr Cable, the respondent's expert, put forward several alternative calculations. Mr Ayres, the applicant's expert, put forward his valuation, which was wholly abandoned by the applicant in closing when counsel for the applicant accepted Mr Cable's approach, D2, as appropriate for calculating a fair valuation and when applying like and analogous rates. D2 proposed valuing the work by calculating an uplift to the contract rates by considering cost and recovery of the plant.

76. The arbitrator approached the valuation by proceeding to value the works under cl 9(2) based on the approach set out in Mr Cable's D2.

77. The arbitrator made various adaptations to D2. The applicant complains that the reduction of standing time cost by 18% reflect running cost. That is only one example. Others were given in oral submissions. It is said on behalf of the applicant that, in respect of each of four points taken on behalf of the applicant, the logic of the arbitrator is not easy to see. It is said that, if he had revealed his thinking, he might have been persuaded to reach different views.

78. Mr Acton Davis concedes that this might be a case of a quantity surveyor arbitrator using his own expertise, but he should still have given the parties the opportunity to deal with his own expertise.

79. I agree with those submissions made by Mr Acton Davis on these points as to valuation. But what follows?

80. Counsel for the respondent submits that the court should not interfere because the applicant has not exhausted its remedies under s 57 of the 1996 Act. There are difficulties about that submission. If, in response to an application by a party under s 57(3) the arbitrator had clarified the award by adding paragraphs explaining his thinking, the applicant would still be in the situation that he had not had an opportunity to make submissions about that thinking. On the other hand, with the benefit of that clarification, the parties and the court would be much better placed to consider what best should be done.

81. If the arbitrator had been asked for clarification and he had explained his reasons, we would now probably be in one of three situations: either (a) the claimants accept those reasons as being logical and sensible and indicate they do not wish to ask for permission to make further submissions to the arbitrator; or (b) the respondents acknowledge that the reasons are illogical and indefensible and they propose a compromise agreement to vary this part of the award; or (c) the parties take up opposing positions, one supporting and the other attacking the reasons being given by way of clarification.

82. In the event of (c), the parties would be able to give to the court reasoned arguments why the unfairness complained of did or did not cause substantial injustice. It would not have caused substantial injustice if, for example, there were no sensible arguments that could be put forward to challenge the matters put forward by the arbitrator as by way of clarification.

83. The present situation is that, without clarification from the arbitrator, if I remit the matter for further consideration by him, that reconsideration will have to begin by his explaining his reasons and the parties will then go through the thought processes that they would have gone through if the clarification had been requested before application was made to the court.

84. That is an indication of the good sense of s 70(2)(b) of the Act. I have no choice whether I enforce s 70(2)(b) of the Act, but I have thought it desirable that I give my reasons for thinking that it is entirely appropriate for this case.

85. I refuse the application in relation to this head of complaint because the applicant has not first exhausted any available recourse under s 57 of the Arbitration Act 1996.

Inflation

86. It was common ground at the arbitration that something should be awarded for inflation. Both counsel so submitted.

87. The applicant complains that the arbitrator took a different course. At para 10.10 of his award, he wrote: *"As a result of the variation uplift and prolongation costs being calculated by reference to actual cost, the calculation inherently takes account of the effects of inflation arising through the work being executed over an extended period."*

I find that no recognition is necessary for the effects of inflation.

88. Miss Doerries says that that paragraph shows that the arbitrator did take inflation into account and, if the applicant's complaint is that he got it wrong, that is a different matter and should be raised by appeal.

89. Miss Doerries further submits that: *"It should be noted that the claimants did not at any stage indicate on what basis the claim for inflation was being advanced. The respondent's position was that, if there was a claim for inflation, it had to relate to the period which was extended as a result of any breach of contract by the respondent. Save for this, there was no contractual or other basis upon which the applicant should be awarded any inflation."*

90. Mr Christopher Fellowes, solicitor for VHE, in a witness statement, commented on a witness statement given on behalf of GS by Mr Russell Alan Deards, solicitor, and he refers to Mr Deards as "RAD".

91. Mr Fellowes wrote: *"It is alleged at paragraph 16 of RAD's statement that 'there were a number of errors of common ground. These do not need to be set out in full here. However, it is to be noted that compensation for the effects of inflation ought to be given on the basis that inflation over the period of works was 8.33 per cent in total. This was the position of the respondent's expert, Mr Cable, and was adopted in submission by the respondent's counsel'."*

Mr Fellowes continued: *"The actual text of the joint experts' report provides 'an exercise had been carried out, showing that inflation was 8.33 per cent for the period between April 1993 and April 1996, which is agreed between LJA and DRC – see page 4 of the joint experts' report'."*

92. I agree with Mr Fellowes that, even if it was common ground between the parties' experts that 8.33% ought to have been allowed for inflation in the partial award and they did not go so far, the arbitrator was not bound to use such a figure in his partial award.

93. It is clear from the submissions that only a rate for inflation was agreed.

94. Mr Fellowes concluded: *"For the reasons set out above, I do not believe that there has been a serious irregularity. In any event, if there has been a serious irregularity, I do not believe that it has caused a substantial injustice as the financial consequences are in the region of £9,000."*

95. I accept that argument. I would only add that many of us would regard the sum of £9,000 as substantial. But in relation to the cost of fighting about it, it may fade into insignificance in this particular case.

Conclusion

96. For all these reasons, I reject this application in its entirety.

C Al-Aimee Doerries for the Respondent instructed by Rowe & Maw;
J Acton Davis QC and S Croall for the Applicant instructed by Pullig