JUDGMENT : The Hon Mr Justice Colman : Commercial Court. 9th July 2004

1. There are before the court some very unusual applications. First there is an application under section 67 of the Arbitration Act 1996 to set aside in part or to vary paragraph 1 of the Second Interim Arbitration Award of Mr John Tackaberry QC dated 24 December 2003 on account of want of jurisdiction. Second, and in the alternative, there is an application under section 68 of the 1996 Act to set aside or declare of no effect such parts of that same Award on the grounds of serious irregularity. I refer to that Award as "*the Second Award*".

2. The unusual character of these applications arises from their content and their background.

3. The Respondent is an eminent lawyer practising in Saudi Arabia. He has specialised in the field of international commercial law and especially international arbitration. He acted for Westland Helicopters Ltd ("Westland") in relation to a dispute arising out of a contract between Westland and an international treaty organisation called the Arab Organisation for Industrialisation set up in 1975 between Saudi Arabia, United Arab Emirates, Qatar and Egypt to create an Arab arms manufacturing industry. Westland's involvement with this Organisation arose out of the creation of the Arab British Helicopter Company for the purpose of manufacturing and marketing Lynx helicopters in Egypt. Westland received payments in advance and began work on the manufacturing contract. However, in March 1979 Egypt and Israel signed the Camp David Agreement. That led to Egypt being ostracised in the Arab World and to Saudi Arabia, Qatar and UAE terminating the Organisation and putting it into liquidation. That gave rise to considerable disputes between the Gulf States and Egypt which endeavoured to continue the Organisation, but exclusively under Egyptian control. The Gulf States, including Saudi Arabia, entered into negotiations with Westland which had a substantial claim against the Organisation. In July 1979 Westland treated its various agreements under the joint venture as terminated and claimed compensation from the Organisation and its individual members, including Saudi Arabia and the Liquidation Committee. In May 1980 Westland commenced an ICC arbitration against the Organisation and each of the four member states. There followed immensely complex proceedings in the domestic courts of Switzerland relating largely to the jurisdiction of the arbitral tribunal. These proceedings took up a period of nearly nine years. Eventually after vast expenditure of legal costs the jurisdiction issues were determined in favour of Westland and, following arbitral hearings in February 1989 and November and December 1990, an interim award concluded that the Organisation was liable to Westland and that its member states, including Saudi Arabia, were jointly and severally liable. Finally, the tribunal issued a final award through the ICC on 28 June 1993 by which it awarded to Westland damages of £365 million, together with costs of about £20 million and permitted it to retain a further £35 million paid to it in advance. Westland succeeded in recovering about £140 million by means of enforcement of that award against bank accounts in New York, Paris, Frankfurt and London. The Egyptians unsuccessfully challenged garnishee proceedings in this court: see ***Westland Helicopters Ltd v. Arab Organisation for Industrialisation*** [1994] 2 Lloyd's Rep 608. Immediately following that judgment, on 3 August 1994 Westland reached a settlement with Egypt and the successor organisation which it controlled giving Westland £190 million including the £140 million which it had already recovered.

4. In the meantime, the Respondent had been introduced to Westland in 1982 as a Saudi Arabian lawyer who might be able to help to pursue the claim against that government.

5. On 22 March 1985 he and Westland had entered into a contract expressed in an Engagement Letter from Westland. It included the following terms:

   "We write to confirm that we wish to continue to retain your services as special legal counsel in Saudi Arabia to advise and to assist us to such extent as we may from time to time request in negotiating a final settlement of our claim against the Kingdom of Saudi Arabia and the other member states of the Arab Organisation for Industrialisation (AOI) for compensation for losses and for an indemnity against claims arising out of the dissolution of AOI in 1979.

   In your capacity as special legal counsel in Saudi Arabia you will have particular responsibility for advising us on all matters of Saudi Arabian law and practice and their interaction with international law and practice and for preparing (subject to our review) such legal advice, opinions, researches, memoranda and other documents as we may from time to time request. You may also from time to time propose for our consideration what you deem to be an appropriate and/or effective strategy for a resolution of the above-mentioned claim or propose in general terms strategies related to our interests in the Kingdom of Saudi Arabia, all within the legal framework in the Kingdom and in continuous consultation with us.

   If your advice and assistance under this Agreement result in the negotiation of a final settlement of our claim we will pay you, subject to clauses 2(d), 2(e) and 2(f) below, a contingency fee at the rate of 10% of the net amount of any money hereafter received by us from the Kingdom of Saudi Arabia by way of final settlement of our claims in this matter (excluding any moneys already received under our contracts with AOI and the Arab British Helicopter Company). This contingency fee will be reduced by the amount of fees and expenses already paid to you under the provisions of paragraph 2(a) and (b) above.

   If the net amount of any money hereafter received by us from the Kingdom of Saudi Arabia by way of final settlement of our claims in this matter exceeds £55 million we will pay you a further contingency fee at the rate of 15% in respect of any sum received by us in excess of £55 million."

6. The letter also made express provision for remuneration of the Respondent at agreed hourly charging rates for advice and assistance in the matter of Westland's claim up to the date of the letter.

7. The appointment of the Respondent was for an initial period of 12 months from 1 January 1985 and to continue thereafter unless terminated by either party. It further provided: *"If at the date of termination of this agreement no money or other compensation has been received by us from Saudi Arabia as a result of the negotiation of a final settlement of our claims in this matter then notwithstanding anything else contained in this agreement you undertake as a demonstration of your understanding of our position, forthwith to reimburse to us any fees and expenses paid to you under the provisions of Clauses 2(a) and (b) above less only the amount of any fees or expenses paid by you to Clifford Turner for work done on our behalf in this matter."*

8. The agreement was expressed to be subject to English law and London arbitration.

9. By letter dated 8 June 1987 Westland sent to the Respondent a letter terminating the agreement contained in the Letter of Engagement.

10. Following the settlement agreement of August 1994 between Westland and Egypt and others, the Respondent, by letter dated 17 October 1994, claimed that he was entitled to a success fee arising out of that settlement. He quantified his claim as ranging from £5 million to £30.25 million depending on the applicable percentage and which sums recovered by Westland were to be taken into account. In that letter he relied solely on his entitlement to a success fee. However, in a letter dated 13 February 1995 he wrote: *".. I must state clearly that there are two elements to my claim:*

(i) the success fee which remains for me very much an open issue; and

(ii) the normal and ordinary lawyer's time which I actually spent on the Westland/AOI matter in the years since 1987….

In any case, I shall ask our accountant to prepare a statement for a limited number of hours which I am sure will be within your reasonable expectations. The hours are limited, but it is the impact of these limited hours which you refuse to acknowledge in the success fee."

11. Westland rejected any claim based on a success fee but, recognising that the Respondent had devoted time to the dispute with the Organisation over the years, indicated that it might be prepared to pay on the basis of application of a reasonable fee rate to the hours worked. This was unacceptable to the Respondent.

12. The late Sir Michael Kerr was appointed sole arbitrator and, having heard oral argument in February 1999, he issued an interim award ("*the Kerr Award*") on 24 March 1999. At that arbitration the Respondent based his claim for a success fee on the submission that although the contract in the Letter of Engagement was formally terminated, this was for cosmetic purposes and that there was an implicit continuation of the success fee agreement up to the time of the settlement in 1994. However, he also advanced an alternative case based on quantum meruit, should it be determined that there was no contract of engagement in force from June 1987. That alternative claim ought also, it was submitted, to be quantified at a reasonable sum calculated by reference to the size of the settlement, thereby reflecting the restitutionary basis of quantum meruit. He relied on ***Way v. Latilla*** [1937] 3 All ER 759. There appears to have been no specific submission to the arbitrator by the Respondent that an alternative basis for quantification could be a reasonable fee for the number of hours proved to have been worked since 1985. However, Westland submitted that the appropriate methodology for calculating the amount recoverable by way of quantum meruit was "*a fee reflecting time spent by reference to reasonable hourly charges and subject possibly to an uplift"* to reflect difficulty and responsibility involved.

13. It is to be observed, as a matter particularly material to these applications, that in opening the case for the Respondent before the arbitrator Mr Jeremy Carey, who appeared on behalf of the Respondent, stated: *"Can I then come to the easy topics; interests and costs. There is no claim for interest in this case, we are as it were asked to make clear our position and interest is not claimed by Mr Hejailan."*

14. The Kerr Award rejected the Respondent's claim based on the implicit continuation of the Engagement Letter agreement and his consequent entitlement to a success fee. In relation to the alternative claim in quantum meruit the Award stated in paragraph 12.12: *"Finally, Mr Hejailan's alternative general claim for a quantum meruit fee must also fail on the material before me. It clearly cannot be related to the outcome of the AOI dispute for the reasons already stated, and there is also no material on which I could make an award for legal fees based on normal hourly rates. This would require an invoice with sufficient particulars which, although mentioned, was never supplied by Mr Hejailan. Since he had every opportunity of submitting one and Westland have always made it clear that such an invoice would be considered for payment in the normal way, I have felt that it was perhaps my duty to make a Final Award dismissing any claim for further fees. But in the end I decided that, on balance, Mr Hejailan should have a further opportunity to produce an invoice and make a claim on this basis, if he wishes to do so, since the essence of the arbitration up to this point has been his claim for a fee based on Westland's success in the AOI dispute, and since there is clearly a basis for some additional fees earned during the periods after 22 March 1985, the date of the contract, up to which his previously rendered invoices for hourly charges were duly paid."*

15. The formal part of the Award stated at paragraph 14:

"Mr Hejailan's claim for a success fee in relation to the outcome of the dispute between Westland and AOI fails and is hereby dismissed, as well as any claim for a quantum meruit which is based wholly or in part on this outcome.

All other matters, if any, remaining in issue between the parties in relation to this dispute are reserved, as well as any matters arising out of this Award to the extent permitted by section 57 of the Arbitration Act 1996."

16. Following this Interim Award, there was a serious deterioration in the relationship between the Respondent and Sir Michael Kerr. It was eventually agreed between the parties that he should resign and that another sole arbitrator should be appointed. In the result, Mr John Tackaberry QC was appointed by the President of the Law Society.

17. The Respondent had already submitted to Sir Michael Kerr an invoice claim for £2 million. He explained that the nature of the effort that he had devoted to achieving a settlement from 1987 onwards did not admit of precise identification of the number of hours expended. It involved "delicate and cumulative tasks that require preparation and organisation of a series of social functions large and small scale from time to time", a process which had taken place over a period of almost ten years. Such activities were expensive and an hourly rate of £500 would be too low because the value of such, whether successful or not was "basically arbitrary". The figure of £2 million was arbitrary. Nothing was normal and ordinary about the services, including the appropriate compensation for them.

18. Mr Tackaberry made a number of pre-trial orders which resulted in a number of further pleadings and written submissions from the Respondent. None of those documents included a claim for remuneration on anything other than the basis of an hourly rate for the time spent by him and in particular none of them put forward an annual retainer fee as a basis of calculation. By a letter to Mr Tackaberry dated 22 January 2001 the Respondent stated: *"Moreover, considering that these fees have been owed to me since my first demand made in 1995, there should either be a factor representing interest in the hourly rate itself, or an explicit award of interest to cover the six years of non-payment."*

19. Westland did not raise any objection to this interest claim at an administrative hearing before the arbitrator which took place on 23 January 2001. Indeed, their representative at that hearing observed that Westland did not propose to put in any written response to that letter.

20. A hearing in relation to the quantification of the Respondent's claim took place on 26-27 June 2001. It was preceded by an exchange of skeleton arguments. The Respondent's skeleton made no reference to an interest claim. However, the skeleton submitted by counsel for Westland stated at paragraph 56:

*"Matters have not been clarified by Mr Hejailan's suggestion that the hourly rate should include a factor representing interest, as an alternative to an explicit award of interest: *Mr Hejailan's letter dated 22 January 2001 [CB2/C/63]* (There is no other or separate claim for interest under English substantive or procedural law)."*

and at paragraph 57: "*It is Westland's case that:*

i the hourly rate should represent a fair rate for a lawyer of Mr Hejailan's standing for the specific time when the work in question was done; it should not include any other extraneous factor such as interest;"

21. In the course of the hearing the following references to interest were made.

22. Mr Johnny Veeder QC, counsel for Westland, stated: "*There is no claim for interest and, of course, a professional person cannot claim interest on a bill until he puts in an appropriate bill. We have not had an appropriate bill."*

23. In his final speech Mr Robert Thoms, the Respondent's Saudi Arabia-based attorney, stated: *"Mr Chapman will discuss the question of interest. I just want to make the point that we are saying with regard to setting the rate of the fee that as an alternative to awarding interest, but you may instead prefer to award interest, one can take into account that Mr Hejailan first made this request for fees in the nature of this invoice claim in February of 1995. We are of course now in June of 2001, and therefore one could almost balance off the fact that we need a single fee for a 10 year period by saying that due consideration can be given to the fact that whatever the fee is it was not paid in 1995 and that can be a factor to be taken into account. Of course, again, since it is not a mathematical exercise, these can be considered as factors, not as mathematical figures."*

24. Mr Jeremy Chapman, the Respondent's English counsel, stated in his final speech:

"It is said in the respondent's skeleton argument at paragraph 56 that the claimant has no separate claim for interest other than the argument put forward by my learned friend, Mr Thoms, that there should be some element of interest taken into account in the calculation of the quantum meruit and in my respectful submission that is not right. If one looks at core bundle 2, at page 63 which is one of the claimant's submissions in his letter to you of 22 January 2001, you will see under letter F there, that the claimant is seeking in the alternative an explicit award of interest to cover the six years of non-payment. That is a sufficient reference, in my respectful submission to a power under the 1996 Act, contained in s.49(3)(a) a very well known power to award interest and I am sure you will be well aware, Sir – more aware than I am – that s.49(3)(a) is in extremely wide terms and gives the arbitrator the power to award simple or compound interest from such dates at such rates and with such rests as the arbitrator might think fit on any sum that is awarded in the arbitration.

In the claimant's respectful submission it is not a good point to say there is no alternative claim for interest. It is there, there is no reference to the Act, but that is not a sufficient defect to debar the claimant from a claim for interest."

25. A long delay then occurred before anything was heard from Mr Tackaberry. Then on 4 March 2003 he sent a letter to the parties which stated that:

i) the Respondent did undertake activities to further Westland's interests in Saudi Arabia and that he should be compensated for that;

ii) it is impossible to value this work by means of a traditional hours and rate calculation to value such work;

iii) given that such work had been done, it was unsatisfactory to reject the claim in limine because no time records had been kept;

iv) the type of activity undertaken was that which might be undertaken as part of a general retainer;

v) the arbitrator was presently minded to value the work by reference to the annual rate for a general retainer;

vi) as the parties had not previously addressed him on this approach, they should have an opportunity of doing so by 27 March 2003 with replies by 10 April 2003.

26. The letter made no mention of interest on such amount as might be arrived at by this methodology.

27. Westland responded by objecting that the arbitrator had no jurisdiction to investigate a general retainer method of valuation. His jurisdiction was confined to determining the only outstanding issue following the Kerr Award, namely the Respondent's claim for legal fees based on normal hourly rates supported by a properly particularised invoice and appropriate contemporaneous evidence. The claim could only be for work done during the period June 1987 to January 1994. Westland maintained this objection at a final hearing on this issue which was held on 26 November 2003.

28. Mr Tackaberry issued the Second Award on 24 December 2003.

29. He held at paragraph 43 that he did have jurisdiction to apply the general retainer method of valuation because in paragraph 12.12 of the Kerr Award the arbitrator had not imposed any limit or rules on the way that the Respondent might bring forward a claim for time that he unquestionably spent in the service of Westland. "All that was definitely being ruled out of court was a success fee or a quantum meruit based on outcome". He went on to value the quantum meruit claim on the basis of an annual retainer of US $50,000 over nine years, giving US $450,000 in total. He further awarded interest at 8 per cent simple for half the period up to 1994, which gave $612,000 and awarded interest on that total at 6 per cent from 1995 up to the date of the Second Award, a further nine years. His award was in declaratory form pending further determination of costs issues. The total amount of interest awarded was thus US $455,760. Westland has since then indicated its willingness to pay US $450,000 to the Respondent without interest.

Submissions in support of the Applications

30. It is submitted by Mr Vernon Flynn on behalf of Westland that Mr Tackaberry had no jurisdiction to award interest because:

i) he had no jurisdiction to award any sum calculated by reference to a notional annual retainer;

ii) there being no jurisdiction in respect of i), there could be no jurisdiction to award interest on that impermissible capital award;

iii) the Respondent had expressly withdrawn from the Kerr arbitration any claim for interest and nothing that had subsequently passed had reinstated such a claim as an issue referred to Mr Tackaberry;

iv) since the Respondent had only made a claim for interest for the period 1995 to 2001, there was no jurisdiction to award interest for any different or more extensive period.

31. Alternatively, if there were jurisdiction to award interest, there had been a serious procedural irregularity within section 68 of the 1996 Act because:

i) The arbitrator had not permitted any submissions as to the resurrected interest claim; and

ii) The arbitrator had not permitted submissions in respect of the period 1985 to 1994.

32. Jurisdiction to award Interest

33. Westland, although not formally admitting that the arbitrator had, as he concluded, jurisdiction to resolve the dispute as to quantum by reference to an annual retainer never applied to set aside the Second Award on the grounds that he had no such jurisdiction. It is said that this was a decision taken "for commercial reasons". However, the consequence of that decision is that, in as much as the Second Award determined that such jurisdiction existed, there is a decision binding on the parties to that effect. Moreover, it is now too late either to apply to set aside the Award under section 67 or to appeal it by applying for leave to appeal under section 69.

34. It follows that it is not open to Westland to deploy as a basis for their case that the arbitrator had no jurisdiction to award interest the submission that there was no jurisdiction to award the capital sum by reference to which such interest was awarded. This is because there is an issue estoppel in respect of the Award as to the capital sum. The dispute as to the jurisdiction of the arbitrator was one of the issues to be determined by the Second Award. It is true that the Tackaberry reference started out on the issue as to whether the Respondent had adduced evidence to quantify his quantum meruit claim by the methodology identified in paragraph 12.12 of the Kerr Award and that the annual retainer methodology had been introduced by Mr Tackaberry himself and not by the Respondent. Nevertheless, once that methodology had been challenged on behalf of Westland, the arbitrator's jurisdiction to take that course became a distinct issue and that issue was conclusively determined by the Second Award.

35. The determination by an arbitrator that he has jurisdiction in respect of a given dispute can be the subject of re-consideration by the court by means of the procedure under section 67 of the 1996 Act. By section 70(3) any application challenging the arbitrator's jurisdiction under section 67 has to be brought with 28 days of the award. That period has now long since elapsed and, accordingly, the arbitrator's determination of his jurisdiction has become unchallengeable and therefore final.

36. There is no doubt that the general principles of issue estoppel apply as between arbitration awards relating to the same reference. Thus in ***Fidelitas Shipping Ltd v. V/o Exportchleb*** [1966] QB 630 Diplock LJ. stated at p643: *"Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the*

disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal. An arbitrator today has power to make an interim award determining particular issues separately from other issues in the arbitration. It is, I understand, conceded by Mr Goff, on behalf of the owners, that if the arbitrator does so, his interim award creates an issue estoppel as respects the issue determined by the interim award. Neither party can at any subsequent hearing in the arbitration advance arguments or adduce evidence on that issue directed to disputing the correctness of the determination previously made."

37. By parity of reasoning, where issues A and B have been determined by an arbitrator who has issued an interim award and the losing party wishes to use a procedure under the 1996 Act for challenging the arbitrator's conclusion on issue B but not on issue A, it is not open to him to challenge the conclusion on issue B by arguing that the arbitrator should have reached a different conclusion on issue A.

38. There is, however, another reason why it is not open to Westland to base their challenge to the award of interest on want of jurisdiction to award an amount based on an annual retainer. That is that, until this point was taken in their counsel's skeleton argument, it had not been relied on by Westland as a ground of challenge of the arbitrator's jurisdiction.

39. The arbitration application claim form stated that Westland applied pursuant to section 67 of the 1996 Act for an order *"setting aside in part and/or varying paragraph 1"* of the Second Award, the grounds for the application being set out in the attached Witness Statement of Jeremy Carver of Westland's solicitors. However, that witness statement confined itself to challenging the arbitrator's jurisdiction as to awarding interest by the Respondent. It made no mention of want of jurisdiction in respect of the award of a capital sum giving rise to want of jurisdiction in respect of interest.

40. The principles of finality under the 1996 Act are fundamental to its underlying philosophy. It was on the basis of these principles that this court stated in relation to section 73 of the Act in ***JSC Zestafoni G Nikoladze Ferroalloy Plant v. Ronly Holdings Ltd*** [2004] EWHC 245 (Comm) at page 16, paragraph 64: *"The principle of openness and fair dealing between the parties to an arbitration demands not merely that if jurisdiction is to be challenged under section 67 the issue as to jurisdiction must normally have been raised at least on some grounds before the arbitrator but that each ground of challenge to his jurisdiction must previously have been raised before the arbitrator if it is to be raised under a section 67 application challenging the award."*

41. The only qualification to this requirement was to be found in the saving to Section 73(1): *"… unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."*

42. A similar approach should clearly apply to the statement of grounds for an application to challenge the arbitrator's jurisdiction under section 67. If the applicant knew of a particular ground of challenge when he issued his application but did not include it, he should not be permitted to introduce that ground at a date which is after the expiration of the period of 28 days from the award specified in Section 70(3) of the Act.

43. For these reasons, even if there had been no issue estoppel, Westland would not have been permitted to raise this additional ground at this stage.

44. Having regard to these conclusions, it is unnecessary for me to consider the substance of the assertion that the arbitrator had no jurisdiction to calculate the amount of a quantum meruit on the basis of the application of an annual retainer. However, it is appropriate that I should make the following comments. The relevant issue can be very shortly stated: did the Kerr Award conclusively determine that the only correct method of valuation was the application of an appropriate rate to a proved number of chargeable hours? I have no doubt that it did not. Sir Michael Kerr, having rejected the only argument on valuation advanced up to that time, namely that based on the size of the settlement between Westland and the AOI, went to state that there was no evidence on the basis of which he could make an award based on application of normal hourly charging rates, an approach apparently mentioned by the Respondent but not supported by any evidence such as an invoice. It was to produce that evidence that the Respondent was to be given "a further opportunity". The submission that the arbitrator had conclusively determined that, apart from the amount of the settlement, this was the only relevant evidence of value, which could be adduced by the Respondent is, in my judgment, to read far too much into this award. No doubt the alternative methodology presented by hourly charging rates occurred to and was mentioned by the arbitrator because the Respondent had previously mentioned it and because Westland had indicated a willingness to entertain such an approach. He was making a suggestion of a way in which the Respondent might at least salvage something from the wreckage of his main contentions. To identify this as determination that it was the only way he might do so is to give to this paragraph a meaning which it simply does not have. Accordingly, any objection to Mr Tackaberry's jurisdiction to apply this methodology was, as he concluded in the Second Award, misconceived.

45. I now therefore consider Westland's further submission founded on the Respondent's initial exclusion of any claim for interest and his subsequent failure to raise any such claim before Mr Tackaberry.

46. Before doing so, however, it is necessary to say something about an arbitrator's normal jurisdiction in respect of awards of interest.

47. Section 49 of the 1996 Act provides that the parties are free to agree on the powers of the tribunal as regards the award of interest and that, unless otherwise agreed, the provisions of that section are to apply including:

> *"(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case;*
>
> *(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;*
>
> *(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.*
>
> *(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs)."*

48. The jurisdiction of an arbitrator in relation to any particular claim for a money award, whether in debt or damages, depends upon whether such claim falls within the jurisdictional scope of the agreement to arbitrate and, where an arbitration has already been commenced, whether the claim in question falls within the scope of the reference. Once the jurisdiction of the arbitrator has been engaged by the reference to him of a particular dispute or group or class of disputes, which fall within his jurisdiction as pre-defined by the agreement to arbitrate, his jurisdiction is further confined by the scope of the reference and he cannot make an award in relation to a claim which is not within that scope unless all parties agreed that the scope should be widened sufficiently to include it.

49. When on the opening day of the hearing before Sir Michael Kerr counsel for the Respondent informed the arbitrator that the Respondent made no claim for interest, the effect was to curtail the scope of the reference to exclude a claim for interest and to do so on whatever basis the claim was put, whether in contract for a success fee or on a quantum meruit. The reference of a dispute involving a claim for a monetary award would ordinarily include a claim for interest on the amount of any award. That claim would be part of the dispute which had been referred. Its withdrawal would thus confine the reference to a resolution of the dispute as to the capital amount of the debt or damages claimed. It follows that thereafter the jurisdiction of the arbitrator to award interest could arise in that arbitration only if the scope of the reference in that arbitration were widened to include a claim for interest. If a claimant having once abandoned one part of his claim subsequently sought to reinstate it, he could do so only by consent of the opposing party or, without such consent, by permission from the arbitrator. In the latter case, considerations of justice and fairness to the opposite party might well arise.

50. In the present case, therefore, the relevant question is whether the Respondent at any time before the Second Award effectively reinstated a claim for interest on the capital sum awarded.

51. The first possible source of reinstatement is that passage in the Respondent's letter to Mr Tackaberry dated 22 January 2001 which I have quoted in paragraph 18 above. That passage clearly states that, in view of the fact that the fees attributable to the quantum meruit basis of claim had been outstanding since 1995 when he first demanded payment, the applicable hourly rate should either be increased by a factor to reflect that delay in payment "or an explicit award of interest" for 6 years should be made. In my judgment, that clearly refers to an alternative claim for a free-standing award of interest on the capital sum calculated from 1995 when the first demand for payment was said to have been made.

52. Westland did not object to that letter in terms suggesting that there was no longer any reference to a claim for interest. Indeed, they sent no reply to that letter. However, in their skeleton argument for the substantive hearing before Mr Tackaberry they included the passage quoted at paragraph 21 above, referring to the Respondent's 22 January 2001 letter and adding that there was "no other separate claim for interest under English substantive or procedural law".

53. Whereas, it is unquestionably the position that at this stage attention was focussed on the deployment by the Respondent of the argument that the hourly rate of charge should be increased to take account of the delay since 1995, there can be no doubt that at least in his letter of 22 January 2001 he had quite explicitly put forward a claim for a separate award of interest. However, there was nothing in his skeleton argument about that. Nor had there been in his earlier statement of case of 18 October 2000.

54. Accordingly, by the start of the hearing on 26 June 2001, the absence of any reference to interest in the Respondent's statement of case or skeleton argument left it unclear whether he intended to pursue the reinstatement of the claim for interest advanced in the 22 January 2001 letter. When Mr Veeder QC addressed the arbitrator at that hearing on 27 June 2001 his assertion that there was no claim for interest quoted at paragraph 22 above was accurate only to the extent that the claim in the letter had not been repeated in the statement of case or skeleton argument or at the hearing. The oral submissions of Mr Thoms quoted at paragraph 23 above referred to an hourly rate enhanced to take account of delay "*as an alternative to awarding interest*" but did foreshadow further submissions as to interest to be made by Mr Chapman. It was in the oral submissions of Mr Chapman quoted at paragraph 13 above where, referring back to the 22 January 2001 letter and to section 49(3)(2)(a) of the Arbitration Act 1996, the claim for a separate award of interest was put clearly before the arbitrator. According to the transcript, there was then a brief discussion between the arbitrator and Mr Veeder about various outstanding matters but prefaced by the arbitrator asking this: *"That I think brings everything to an*

end. Does anybody have any procedural complaint, he said, somewhat unusually, because if so I would like to know about it now while I can still do something about it."

55. Nothing was then said about Mr Chapman's submissions about interest and it was not suggested to the arbitrator that he had no jurisdiction because an issue, as to interest was not part of the reference.

56. In my judgment, the effect of all this was that the Respondent had effectively advanced an independent claim for interest and no objection had been raised as to the arbitrator's jurisdiction to entertain it. That left the arbitrator to decide whether such a claim was part of the reference and, if so, with a discretion under section 49 whether to award interest. However, since the claim as formulated in the 22 January letter and orally was limited to interest for the period from January 1995, he was certainly not empowered to award interest which related to any period before that. The claim having been limited in that way, there was no reference to him of any issue relating to an award of interest for any earlier period. Against that background he was entitled to conclude that the scope of the reference included an independent claim for interest in respect of the period from January 1995 and, having so concluded, to exercise his discretion to award interest referable only to the period from January 1995.

57. It is right to add that in as much as the independent interest claim had been explicitly raised at the hearing and the facts relevant to any argument as to want of jurisdiction in respect of that issue were available to those representing Westland at that hearing, for they were clearly present when Mr Chapman made his submissions and must have had a copy of the 22 January letter, the lack of objection to jurisdiction as to this issue there and then does, in my judgment, very clearly preclude Westland from taking by this application a point on jurisdiction which could then have been raised. Indeed, the arbitrator specifically invited procedural complaints and none were advanced. In these circumstances, Westland is precluded by Section 73(1) of the 1996 Act from raising this ground of objection to jurisdiction after the Second Award was made. The most they can now say is that they are entitled to object to the Second Award to the extent that it calculates interest from a date earlier then January 1995.

Serious Irregularity

58. It is submitted that if the arbitrator did have jurisdiction to award interest at all, there was serious irregularity under section 68(2) of the 1996 Act in as much as (a) before making his Award he failed to allow submissions as to that claim even though it had at the outset been expressly abandoned and (b) he awarded interest calculated by reference to the period from 1985 to 1994 in spite of the fact that interest had only been claimed from January 1995. This application is put on the basis that:

i) the arbitrator denied Westland the opportunity to address the issue and then did not give them a reasonable opportunity of putting their case or dealing with that of the Respondent contrary to section 68(2)(a);

ii) the arbitrator exceeded his powers contrary to Section 68(2)(b);

iii) the arbitrator failed to conduct the proceedings in accordance with the procedure agreed by the parties contrary to section 68(2)(c).

59. In my judgment, there can be no doubt that the arbitrator gave a sufficient opportunity to those representing Westland to address the issue of interest. If at any stage up to the close of the hearing on 27 June 2001 or, indeed at the close of the second hearing on 26 November 2003 or even after that but before the Award, they had sought to challenge the reinstatement of a separate interest claim, they could clearly have done so.

60. If Mr Chapman's closing submission as to interest had to be challenged, as it certainly did on Westland's case, Westland could easily have done so that day in response to the arbitrator's invitation or later when their advisers had access to the transcript of the hearing, which must have been very soon after that. If those representing Westland wished to submit that the arbitrator should not exercise his discretion under section 49 or should do so in some particular way, they could clearly have done so then or during the delay of over two years before the Second Award emerged.

61. To term what happened here a serious irregularity would be to return to the pre-1996 Act era of ***King v. Thomas Mckenna Ltd*** [1991] 2 QB 480, an approach which section 68 was expressly designed to replace.

62. In as much as the arbitrator awarded interest for the pre-1995 period, if he had jurisdiction, there was serious irregularity, for none was claimed. Otherwise, if he had jurisdiction, his award of interest was clearly open to him. As, I have already held that his award of interest for the pre-1995 period was made without jurisdiction and has been effectively challenged under Section 67, the application under Section 68 gives rise to no additional relief.

Conclusion

63. To the extent that under the Second Award there was an award of interest for the period up to the end of 1994, the arbitrator had no jurisdiction to make that award, but he did have jurisdiction to make an award of interest from the period from 1995.

64. There was no serious irregularity under Section 68 in relation to the award of interest for the period from January 1995.

65. Submissions as to the relief which should now be ordered can be made at the handing down of this judgment.

Mr Vernon Flynn and Ms Catherine Callaghan (instructed by Clifford Chance LLP) for the Applicant
Mr Jeffrey Chapman and Mr Adam Zellick (instructed by Salah Al-Hejailan) for the Respondent