JUDGMENT : The Hon Mr Justice Colman : Commercial Court. 13th July 2004

1. The applications by Westland were only potentially successful, as appears from my judgment dated 9 July 2004. The arbitrator awarded interest on the amount of the award for the period from 1985 to the date of the award. However, the interest claim advanced by M r Al-Hejailan had been expressly confined to the period from 1995. The main issue at the hearing was whether the arbitrator had jurisdiction to award any interest at all. It was submitted on behalf of Westland that he did not. Two grounds were relied on. It was said firstly that he had no jurisdiction to award a quantum meruit based on an annual retainer, the scope of his jurisdiction extending only to an award by reference to an hourly rate. The argument on this point involved a detailed investigation of the events leading up to the Kerr award, as well as the subsequent arbitration before Mr Tackaberry. The second ground was that counsel for Mr Al-Hejailan had expressly withdrawn any claim for interest in the course of his submissions in the Kerr arbitration. This point involved further investigation of subsequent events at the second arbitration with regard to whether a claim for interest had been reinstated. In the alternative it was submitted that jurisdiction to award interest was confined to the period from January 1995. If it were concluded that there was any jurisdiction to award interest, there was a further application under section 68 of the Arbitration Act 1996 to the effect that there had been serious procedural irregularity in as much as the interest award had been made outside the scope of the reference and without giving Westland the opportunity to deal with interest in argument.

2. The substance of Westland's applications was therefore that this court should set aside the whole or part of the award by Mr Tackaberry under section 67 or 68 of the 1996 Act to the effect that it should pay no interest. Its alternative case was that it should pay interest only from January 1995, thereby avoiding such part of the award as awarded interest on $450,000 from 1984 to 1994.

3. In the event Westland succeeded on its jurisdiction application in respect of its alternative ground but lost on that application on the main ground. It also succeeded on its application under section 68 to the extent of the award of interest before January 1995.

4. In these circumstances, but for the matters set out below, I would have held that the appropriate orders for costs involved Westland recovering less than 100 per cent of its costs of the applications and the hearing and Mr Al-Hejailan recovering from Westland part of his costs of the applications and the hearing. I should then have notionally set-off his costs to be recovered against Westland's costs to be recovered. The result would have been that Westland recovered 30 per cent of their costs of both applications. This would reflect the fact that, although Westland had to apply to court for orders the effect of which was to reduce the amount of the award by a considerable amount, they had failed on major issues which they had raised and to which the bulk of the time at the hearing had been devoted. Conversely, Mr Al-Hejailan would be entitled to recovery of a part of his costs to reflect the fact that his challenge to the main grounds of the applications had been successful.

5. However, the hearing of these applications was attended by some very unusual circumstances. The person who acted as solicitor for Mr Al-Hejailan was Mr Robert Thoms, an American-qualified attorney who was also a lawyer in Mr Al-Hejailan's law firm in Saudi Arabia. As he was perfectly entitled to do, he had acted as solicitor for Mr Al-Hejailan through the Kerr arbitration and the Tackaberry arbitration, doing, as I understand it, all the work that a solicitor would normally do in a London arbitration and also instructing Mr Chapman as counsel. The latter was perfectly entitled under the Bar Code of Conduct to accept those instructions and to appear in the arbitrations. When it came to the applications before this court, however, the position was that neither Mr Thoms nor his law firm were entitled to act as solicitor: see Solicitors Act 1974, section 20, nor therefore was Mr Chapman entitled to accept instructions to appear for Mr Al-Hejailan (see Code of Conduct of the Bar Part IV para 401). Further, by section 25(1) of the 1974 Act no costs could be recoverable by Mr Al-Hejailan in respect of work done by Mr Thoms or his firm because they were unqualified persons acting as if they were solicitors.

6. Accordingly this court has no jurisdiction to make any costs order in favour of Mr Al-Hejailan. It follows that neither could Mr Al-Hejailan recover costs in respect of counsel's fees. Such costs would ordinarily be included in a solicitor's disbursements but the effect of section 25(1) of the 1974 Act is, in my judgment, to preclude recovery of all costs which would normally be included in a solicitor's bill of costs, including counsel's fees.

7. This unfortunate state of affairs leads inevitably to the consequence that there is nothing to set off against a costs order in Westland's favour. If Mr Al-Hejailan's lawyers could not be entitled to a costs order, he could not be entitled to any reduction in Westland's costs which represented the setting-off of such costs as Mr Al-Hejailan would otherwise recover.

8. In the event, therefore, Westland should recover 70 per cent of their costs of both applications.

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