JUDGMENT : HHJ HUMPHREY LLOYD QC : TCC. 14th July 2000

1. Weldon Plant Limited (Weldon) made a contract dated 30 August 1995 with the Commission for the New Towns (CNT) for the construction of Duston Mill Reservoir. The contract incorporated the ICE Conditions, 6th Edition. The material to be excavated consisted of clay and gravel. Since Weldon were to be able to sell the gravel the contract rate for gravel removal was 3.60/m;. The clay was however to be carted to an off-site tip for!negative: which the rate was 3.66/m;. The contract made provision for Weldon, at its own risk, to excavate below the design level for the bed of the reservoir (55.06 AOD) and to obtain more gravel which it would also be entitled to sell. On 20 November 1995 the Engineer issued Site Instruction 17 which required Weldon to excavate all the gravel below the bed and to back fill with clay to the design level. Weldon notified the Engineer that this instruction would give rise to a claim. The Engineer valued the additional gravel extraction and clay back fill at bill rates. He determined that Weldon was entitled to an extension of time of 7.74 weeks and valued certain additional costs as prolongation claims. Weldon did not consider that the Engineers treatment of the consequences of S.I. 17 was correct, so the ensuing dispute was referred to arbitration. Mr D.T. Simmonds was appointed arbitrator.

2. In award 1 the arbitrator decided that Weldon had had an option to extract the gravel, rather than an obligation to do so (as had been suggested by CNT). He concluded that S.I. 17 was a true variation under clause 51 of the ICE conditions. Amongst other things, he said in his reasons:-

   It was therefore to be the contractors decision whether he undertook this work or not but if he did the normal relevant provisions of the contract did not apply and the operation was at his own risk.

   Further, it would appear that he could stop at any time if, for example, extraction became uneconomical, if unforeseen circumstances arose or he was running out of time. There was no stipulation making below bed excavation an "all or nothing" operation.

3. In award 2 the arbitrator had to establish the principles upon which the variation was to be valued. He said:

   "Conclusions on principle

   In its submission the Respondent expressed its views on the interpretation of clause 52(1) supporting these with reference to the extracts from Hudson and from Powell-Smith and Stephenson. With due respect to the learned authors I would hesitate to accept that these extracts set down the law on the matter as was stated at paragraph 23.

   I consider that here there is a particular situation. Normally there is no question but that the contractor is required to execute extra work ordered and he does not challenge the authority of the Engineers instruction. However Instruction 17 did not order more work in the usual sense. In this case Weldon had had the option not to carry out the work which became the subject of Instruction 17. That option was removed and consequently a fair valuation is I consider appropriate and I accept the Claimants argument that it should not be worse off as a result of having complied with the Instruction. It would be improper for Weldon to suffer financially because of the situation imposed upon them.

4. The parties were not able to agree a valuation which gave effect to this decision, so a third hearing took place in June 1999. The arbitrator issued award 3 on 9 August 1999. Unfortunately the document was not signed by him, although, curiously, the signature of a witness appeared on the last page. When Weldon applied for permission to appeal against this award, CNT maintained that the application was out of time, as time ran from 9 August. An extension of time was granted to enable Weldon to make its application, but without prejudice to CNTs argument as to the proper date of the award. The arbitrator corrected the oversight by signing the award on and dating it 15 September 1999.

5. CNT had contended that since the covering letter of 9 August 1999 had been signed, the award was to be treated as having been signed and dated by the arbitrator on that day. It is vital that a decision, such as an arbitral award which determines the rights and obligations of the parties to a contract, should be properly signed and dated so that there can be no doubt both that the document is that authorised by the arbitrator and that it was made on the date it bears. Section 52(3) of the Arbitration Act 1993 makes it a statutory requirement that an award should be signed. Section 54 of the Act requires the award to be dated. Unless section 52(1) applies these statutory requirements must be met, since whether or not an award has been properly signed or dated should not be a matter of inference, although, of course, there may be circumstances in which an inference can and should be drawn since section 1 of the 1996 Act has the effect of requiring section 52 to be construed in accordance with the principles set out in section 1. It may therefore be possible, consistent with section 1, to draw such an inference in order that the objective of Afair resolution is obtained. Had the point been argued I do not consider that Weldon was required to seek an extension of time. In addition Weldon had made related applications the determination of which might have overlapped the proposed appeal.

6. I deal first with Weldon's appeal. Weldon also have two applications: for a declaration pursuant to section 67(1) and (3) of the Arbitration Act 1996 that the arbitrator had no jurisdiction to determine what extensions of time should be given; and under section 68 for permission to remit the award to the arbitrator on the grounds that in three respects there were serious irregularities.

The Appeal

7. In award 3 the arbitrator reached decisions adverse to Weldon in respect of its claim for the inclusion in a fair valuation of elements for overheads and profit. At the outset of his reasoning he referred to what he had decided in award 2:-

   "THE CLAIM IN PRINCIPLE

In my Award No. 2 I held that S.I. 17 be valued on the basis of a fair valuation and that such valuation should leave the Claimant in the same financial situation it would have been in had the Instruction not been given. My reason for adopting this approach was that under the terms of the contract (as I interpreted them) the Claimant had the choice of whether to proceed below bed level or not. If it had found it had mis-priced work and would be at loss the Claimant could have decided not to proceed; if work had become more expensive because of unexpected conditions it could stop at any time. That choice had been removed.

My decision was deliberate. A contractor is aware that he is obliged to execute ordered variations of the usual kind even though, as now clarified in Henry Boot Construction Ltd v. Alstom Combined Cycles Ltd [[1999] BLR 123], he may lose money because a Bill rate upon which the variation valuation is based is inadequate. Here the Claimant could not have expected to have its freedom of choice removed and hence I decided the valuation rules should be applied to reflect that situation. The principles of any valuation were considered at length in my Award No. 2 and I do not propose to continue that debate."

His reasons for his decision in respect of overheads and profit were as follows:-

"3.3.6 Additional Head Office/Off-site Overheads

The Claimant added to its claimed costs an uplift originally 16.67% but subsequently reduced to an Aagreed 8.6% for head office overheads. The Claimant assumed an automatic entitlement on the basis that the cost figures in its calculations were nett.

In his opening Submission Mr Thomas drew attention to clause 1(5) of the ICE Conditions of contract which states that costs shall include overheads whether on or off site. He also referred to Boot v. Alstom (introduced by the Respondent) in respect of the definition of a fair valuation. The Judge had stated it should include Asimilar [i.e. actual] allowances for overheads Y. In evidence Mr Manning stated that he could not prove that overheads increased as a result of S.I. 17 but resources were detained in connection with the contract and prevented from earning income elsewhere to meet overheads.

The Respondent contended that the Claimant was not entitled to any additional overheads. It had not established that its rates and prices did not include an overhead uplift. An allowance was not evident elsewhere in the Tender hence it must be assumed rates and prices were gross and the Claimant would have recovered its overheads on other work. As regards the alleged denial of opportunity to recover overheads on other contracts, the Respondent argued that S.I. 17 had not delayed the contract and, with reference to Alfred McAlpine Homes Ltd. v. Property & Land Contractors Ltd. [(1995) 76 BLR 59] the Claimant had not demonstrated, even if it had been delayed, that it was prevented from obtaining other contracts as a result.

I have held that on the evidence available Weldon did include an overhead uplift in its Tender rates and prices. For that reason all cost elements have been reduced to nett figures in my calculations. The ICE Conditions of Contract undeniably allow for the addition of an overhead addition (in some form or another) to nett costs. It may be argued that such addition is automatic without need of proof of occurrence of or loss of recovery of overheads. Here however the position is somewhat different.

I have held that the correct ascertainment of any additional costs by the Claimant should put it back in the position absent S.I. 17. That requires the Claimant to establish that it either incurred additional overheads (which has never been seriously suggested) or that it was denied overhead recovery which although strictly a loss nevertheless should be taken into account to achieve the objective of restoring Weldons financial state.

The concept of loss of opportunity to recover overheads (or a diminished recovery) consequent upon a delay to completion was discussed in McAlpine. The principle was upheld but the need for proof of such under-recovery was emphasised. It is virtually impossible (except in the extreme rare circumstances as existed in McAlpine) that a contractor can establish that he did not take on other work because the subject contract was delayed beyond completion and hence he suffered an under-recovery of overheads.

Here I have held that completion was not delayed as a result of S.I. 17 B other factors caused the over-run. In any case Mr. Manning admitted he could not demonstrate that company work load had been adversely affected or that retention of any resources had deprived Weldon of income to fund overheads. Even if he had, reimbursement is not achieved simply by adding a percentage uplift to costs.

In the circumstances I am unable to include any consideration in respect of additional overheads.

Item 3.3.6: NIL

3.3.7 Profit

The exercise in hand is to ascertain what sum may be required to restore Weldon to the financial position it would have been in but for S.I. 17.

It automatically follows that no consideration can be given to an uplift for profit. To add profit to costs incurred as a result of S.I. 17 would, as argued at Mr Fairbairns Closing Submission, paragraph 9.3, place the Claimant in a better position than it would have been in had the Engineer not ordered S.I. 17.

As regards the Aloss of opportunity to earn profit elsewhere argument, similar comments apply as I have made under 3.3.6. Although Mr Manning asserted that his contracts over the period were profitable and his resources could have earned profit elsewhere, the overriding consideration is as I have held B S.I. 17 was not the cause of late completion of the Works.

In the circumstances I am unable to include any consideration in respect of profit.

Item 3.3.7: NIL"

8. Permission to appeal was granted for the following question of law: *"Whether on the facts found by the arbitrator, clause 52(1)(b) of the ICE Conditions permits a fair valuation to be made which excludes an allowance for overheads on the basis that the contractor has to establish that it either incurred additional overheads or that it was denied overhead recovery."*

   This question must be read as including profit since the appeal relates also to paragraph 3.3.7 of the award.

9. Clause 52(1) of the ICE Conditions reads as follows. I have inserted references to "Rules" 1 to 3, as set out in Lord Lloyd's judgment in the Court of Appeal in ***Henry Boot Construction Ltd v. Alstom Combined Cycles Ltd*** [2000] BLR 247. He entered the caveat: *"But it must not be forgotten that Rules 2 and 3 are part of the same continuous sub-paragraph."*

   "Valuation of ordered variations

   (1) The value of all variations ordered by the Engineer in accordance with clause 51, shall be ascertained by the Engineer after consultation with the Contractor in accordance with the following principles.

   [RULE 1]

   (a) Where work is of similar character and executed under similar conditions to work priced in the Bill of Quantities it shall be valued at such rates and prices contained therein as may be applicable[.]

   [RULE 2]

   (b) Where work is not of a similar character or is not executed under similar conditions or is ordered during the Defects Correction Period the rates and prices in the Bill of Quantities shall be used as the basis for valuation so far as may be reasonable[.]

   [RULE 3]

   failing which a fair valuation shall be made.

   Failing agreement between the Engineer and the Contractor as to any rate or price to be applied in the valuation of any variation, the Engineer shall determine the rate or price in accordance with the foregoing principles and he shall notify the Contractor accordingly.

10. Mr David Thomas for Weldon submitted that the arbitrator's reasoning was erroneous in law. The arbitrator had approached the valuation of overheads and profit as if they had been part of a claim for loss and expense under the JCT form of contract such as was considered in Alfred McAlpine Homes Ltd v. Property & Land Contractors Ltd (1995) 76 BLR 59. The claim was for the fair valuation of varied work carried out within the contract period and no prolongation element was sought. Mr Thomas relied upon what I had said in two cases: ***Henry Boot Construction Ltd v. Alstom Combined Cycles Ltd*** [1999] BLR 123 at page 137: *"a fair valuation Y generally means a valuation which will not give the contractor more than his actual costs reasonably and necessarily incurred plus similar allowances for overheads and profit Y"*, and in ***Floods of Queensferry Ltd v. Shand Construction Ltd*** [1999] BLR 315 at page 324, where I said much the same. However in both cases I was primarily concerned about the limits or parameters of a fair valuation, ie that actual and reasonable *"cost plus..."* cannot be other than fair as it is in the nature of an indemnity. To include more in an valuation is usually unfair to the paying party (but it does not of course follow that less is unfair to the other party). Mr Thomas also referred me to Hudson's Building and Engineering Contracts, 11th Edition, paragraph 7-106. He pointed out that in the ICE Conditions the word cost was defined in clause 1(5): *"The word "cost" when used in the Conditions of Contract means all expenditure properly incurred or to be incurred whether on or off the Site including overhead finance and other charges properly allocatable thereto but does not include any allowance for profit."*

    He then referred to clauses 12(6), 13(3), 14(8), 31(2) all of which required profit to be added to *"cost"*, as defined. He submitted that consistency with such provisions required a valuation under clause 52(1) also to include profit for there was no reason to confine a valuation under clause 51(2) to *"cost"* ie to overheads as the only *"on-cost"*. He also submitted that in clause 52 the use of contract rates and prices for the purposes of valuing variations under Rules 1 and 2 necessarily meant that the contractor would recover overheads and profit since they would be an integral part of the contract rates and prices. He argued that a fair valuation under Rule 3 could not omit any element which would be a necessary part of the compilation of a contract rate or price, such as overheads and profit. Mr Thomas case was therefore, that (1) the contract rates and prices included elements for overheads and other such costs as well as profit; (2) a valuation under Rules 1 and 2 would therefore include such elements; (3) a valuation under Rule 3 which did not include such elements would not be a Afair valuation for the purposes of the contract. He equated the ordering of a variation to work outside a contract and a fair valuation to the assessment of a quantum meruit for such work and referred to Keating on Building Contracts, 6th ed., at pages 86 and 102. Mr Thomas also referred to page 186 of Mr Max Abrahamson's Engineering Law and the ICE Conditions, 4th ed.

11. Mr Coulson submitted that no point of principle arose since award 3 dealt only with the valuation of a variation which had arisen in a particular situation. The arbitrator had decided that Weldon had been deprived of its option and that the principles upon which the valuation should be carried out should reflect that deprivation. He therefore adopted a Adamages approach requiring Weldon to establish precisely what costs or loss it had in fact incurred. He was entitled to arrive at a fair valuation in that way. His reasons made it clear that he had not received any evidence that Weldon had incurred additional overheads. He had recorded Mr Manning's evidence eg that *"he could not prove that overheads increased as a result of S.I. 17 but resources were detained in connection with the contract and prevented from earning income elsewhere to meet overheads"* and *"he could not demonstrate*

that company work load had been adversely affected or that retention of any resources had deprived Weldon of income to fund overheads". Mr Coulson maintained that there was no principle that a contractor can always recover a percentage up-lift in relation to a head office and off-site overheads on varied work. Indeed Weldon had not put its case on the basis of incurring of such additional overheads, and it had to demonstrate that it had been denied overhead recovery by loss of other work etc. It was submitted that as a matter of law such evidence was a pre-requisite for a claim for head office overheads, without that evidence the claim was bound to fail.

12. First, I remind myself that the appellant has to establish that the arbitrator was wrong in law. Matters of valuation are primarily questions of fact. The principles of and approaches to valuation, customarily applied or which ought to be applied, generally stem from established or common practice or opinion within the industry, and result in judgments made in arriving at the valuation. Such matters do not give rise to questions of law. On the other hand, the meaning of a contract is a question of law, and if the contract contains provisions which are or may constitute the rules by which valuations are to be made, then their interpretation is or may give rise to a question of law. Clause 52(1) indeed begins by setting out principles which are contractual rules, as ***Boot v Alstom*** shows. It also concludes with reiteration in mandatory language: *"Failing agreement between the Engineer and the Contractor as to any rate or price to be applied in the valuation of any variation, the Engineer shall determine the rate or price in accordance with the foregoing principles"* [my emphasis]. The decision of the Court of Appeal in Boot v. Alstom provides a recent, if striking, example of an instance of what might have appeared to be a question of valuation in reality turned on a question of law. In my judgment therefore, the appellants case cannot be dismissed simply because it concerns a valuation.

13. Secondly, in my judgment clause 52(1) contemplates that the contractor will be able to recover in a valuation of a variation, those elements included in the contract rates or prices for overheads and profit. In my judgment Mr Thomas is right in submitting that any other interpretation of clause 52 would be inconsistent with the many other provisions of the ICE conditions where the clear intention is that the circumstances for which the contractor is not responsible which are not its risk both entitle the contractor to additional payment but also require that payment be not limited to cost (which under clause 1(5) includes overheads) and that profit on the cost expenditure or loss should be recovered.

14. On the other hand I do not consider that the reference to profit in the clauses mentioned by Mr Thomas in themselves lead to the conclusion that profit must be recovered in a fair valuation under clause 52(1). Furthermore the definition of cost in clause 1(5) appears only to demonstrate that where the contractor has established cost which has been Aproperly incurred or to be incurred the contractor is also entitled to overheads on such cost, but the use of words such as Aexpenditure and Aproperly incurred and Aproperly allocatable thereto suggest that any inquiry will have to be carried out as to the amount to be included for overhead charges. In most cases it is to be assumed that expenditure for costs inevitably attracts ordinary overhead charges, since such expenditure cannot be made by a contractor without ancillary work being done or office and other resources being deployed the costs of which is part of the overheads of the business, and which is recovered by an appropriate addition to the base costs, i.e. an *"on cost"*.

15. Nevertheless Mr Thomas was right to draw a comparison between such provisions and clauses 51 and 52. Variations are performed by the contractor involuntarily, as it were, in the sense that the contractor does not tender to do the variation since it is of course unknown at the date of tender or contract. A contractor offers to carry out variations ordered under clause 51 that may be required by the Engineer to meet the employers needs, but that offer is not unqualified. First, the variation must be within the scope of the Works. Secondly, the variation must be valued in accordance with clause 52, the provisions of which are clearly directed to seeing that the contractor will not have to bear the costs of the variation, except to the extent that, where Rules 1 and 2 apply, the contract rates or prices were inherently insufficient, or to the extent that the costs incurred are not reasonably or properly to be treated as forming part of the valuation. The contractor therefore takes the risk that its rates and prices for the work may not cover its costs of carrying out a variation which is the same as or comparable to contract work, just in the same way that the employer takes the risk that by having second thoughts more might have to be paid for the work than might otherwise have been the case had the need been known prior to the date of contract and rates or prices for the work in question then obtained. Subject therefore to the circumstances falling within Rules 1 and 2 of clause 52(1), the contractor would be entitled to a fair valuation which would ordinarily be based upon the reasonable costs of carrying out the work, if reasonably and properly incurred (if need be tempered so that it is not too far out of line with the contract rates: see Hudson paras 7-105 et seqq. passim). Clearly if, in the execution of the work, cost or expenditure is incurred which would not have been incurred by a reasonably competent contractor in the same or similar circumstances, then such costs would not form part of a fair valuation. The rules set by clause 52(1) thus should not leave the contractor at a disadvantage, except to the extent that it was of its own making or volition. In my judgment therefore, although I do not accept the premise that variations fall outside a contract (since clause 51 presupposes that they fall within the scope of the Works) Mr Thomas is right to assimilate a fair valuation to the assessment of a quantum meruit in a contractual matrix.

16. Although the commentary in Keating on clause 52(1) provides no assistance on the constituent elements of a fair valuation, the passage at page 86 cited by Mr Thomas does say that in assessing a reasonable sum *"useful evidence .... may include..... a calculation based on the net cost of labour and materials used plus a sum for overheads and profit..."*. Mr Max Abrahamson says much the same at page 186 of his book:

"8. "Fair Valuation" will normally mean cost plus a reasonable percentage for profit (but not contingencies if the work is being valued after it has been carried out on actual not estimated costs) with a deduction for any proven inefficiency by the contractor, but if there is proof of a general market rate for comparable work it may be taken into consideration or applied completely."

In the course of his argument Mr Coulson had difficulties in countering the proposition that a fair valuation had to include each of the elements which are ordinarily to be found in a contract rate or price: elements for the cost of labour, the cost of plant, cost of materials, the costs of overheads, and profit. In my judgment a fair valuation has not only ordinarily to include something on account of each of those elements, but also it would not be a fair valuation within the meaning of the contract if it did not do so.

17. Mr Coulson however submitted that this was no ordinary valuation. It is certainly true that there are some unusual features: a negative rate and an option. However in essence, as the arbitrator has decided, S.I. 17 required a variation under clause 51. It required Weldon to carry out work which it was neither obliged to carry out under the contract nor intended to do for its own purposes. It was as involuntary as any other orthodox variation. Since Weldon contended that it had effectively lost money as a result of having to comply with S.I. 17 it was natural that the Engineer or the arbitrator decided that a valuation had to put Weldon in the position that it would, or might, have been in had S.I. 17 not been issued. But this again is not an unusual feature of a fair valuation under clause 52(1) since Rule 3 covers a wide variety of circumstances. The arbitrator decided that the Engineer was wrong also to value the S.I. 17 primarily by reference to Rule 1 and that a valuation under Rule 3 should not only reflect the contractor's actual costs or losses, but also that there should not be over-compensation of the contractor. The point at issue is whether this approach correctly applied the rules or principles in clause 52(1) in not awarding Weldon anything in respect of overheads and profit.

18. I take first the argument that the arbitrator ought to have included something on account of profit. The arbitrator correctly described the exercise as one *"to ascertain what sum may be required to restore Weldon to the financial position it would have been in but for S.I. 17"*. I am unable to accept that the arbitrator correctly applied the contract in not awarding Weldon profit on its costs. I note that Mr Abrahamson says at page 186:

"Further, the limitation that rates are to provide a basis for valuation only so far as is reasonable may in exceptional cases require the engineer to move towards a fair valuation giving the contractor a reasonable profit on the work done." [emphasis supplied]

Whether, as I have held, a fair valuation should include an element on account of profit or whether the arbitrators concept of a fair valuation is that of Arestitutio in integrum, the arbitrator evidently accepted Mr Mannings evidence that work being done by Weldon in that period was profitable, so there is in my judgment no reason why on the facts found by the arbitrator a fair valuation should exclude profit. Indeed in my judgment a fair valuation must, in the absence of special circumstances (none of which have been identified by the arbitrator), include an element on account of profit. First, a contractor is in business to make a profit on the costs of deploying its resources, and accordingly an employer must under clause 52(1) pay profit in a valuation made under any Rule (via the rates or otherwise on a fair valuation) on costs for a valuation under clause 52 would not otherwise be a fair valuation within the meaning of those words. Secondly, a valuation which did not include profit would not contain an element which is an integral part of a valuation under Rules 1 and 2. A fair valuation under Rule 3 would not be in accordance with the principles of clause 52 if it did not include all relevant elements to the valued or represented in some significant manner in a valuation under that clause.

19. Overheads require separate consideration. It is important to be clear which elements of overheads are involved. Some overheads, e.g. site overheads, may be constant and not normally related to base costs (unless they are brought into an assessment of the costs of prolongation by reference to base costs); others are related to them. Overheads may be directly related to the value of work. Thus some will only be recovered if there is proof that they were in fact incurred or increased as they will be or will have been recovered from valuations of the work executed. The arbitrator correctly recognised that *"the ICE Conditions of Contract undeniably allows for the addition of an overhead addition (in some form or another) to nett costs"*. The arbitrator took the view that time related overheads required to be established. To that extent, as a matter of fact, no exception could be taken to his approach. However, the arbitrator did not deal with the addition which in my judgment has to be made in order to ensure that the contractor obtains a contribution from the costs of the business it undertakes towards its fixed or running overheads . For reasons that I have already given it would not be fair if the valuation did not include an element on account of such contribution. It would mean that such a contribution would have to be found elsewhere, presumably from the contractors margin for profit or risk. In my view a valuation which in effect required the contractor to bear that contribution itself would not be a fair valuation, in accordance with the principles of clause 52(1) which are intended to secure that the contractor should not lose as a result of having to execute a variation (except, as I have stated, to the extent its costs etc are of its making). Unlike overheads such as time-related overheads, it is not necessary to prove that they were actually incurred for the purposes of a fair valuation (although their approximate amount must of course be established, eg by deriving a percentage from the accounts of the contractor including where appropriate associated companies that provide services or the like that qualify as overheads.)

20. Accordingly, the question posed will be answered: No, and the award will be remitted to the arbitrator to include in his valuation an amount on account of overheads and profit on the costs and other elements of his valuation.

Jurisdiction

21. Weldon apply for a declaration pursuant to section 67(1) and (3) of the Arbitration Act 1996 that the arbitrator had no jurisdiction to determine what extensions of time should be given. In paragraph 3 of the award, the arbitrator stated: *"The Claimant is not entitled to an extension of time and the extension of 7.74 weeks given by the Engineer is withdrawn."*

    Weldon maintained that the arbitrator exceeded his jurisdiction in arriving at this decision.

22. The point is a short one. An award should be read supportively (or benevolently, as it is sometimes said). In the context of the Arbitration Act 1996 the principles set out in section 1 suggest that an award should be given a reading which is likely to uphold it rather than to destroy it.

    The dispute referred to the arbitrator was whether or not the Engineers decision on S.I. 17 was correct. This was submitted to the arbitrator in March 1997. In April 1997 CNT served a separate notice of arbitration in relation to extensions of time generally. It is clear from the arbitrators reasons that he did not consider the question of extension of time, other than in the context of S.I. 17. Indeed he expressly stated at one point in his award (under head or section 3.6.1 on page 31) that he was not deciding whether the Engineers decision as to the date when the works did or did not achieve substantial completion was correct. This is an integral part of the other submission to arbitration made under the separate notice.

23. Accordingly, paragraph 3 of the award is to be read as being confined to the decision that Weldon was not entitled on an extension of time for S.I. 17. It is in my view putting far too strained a reading on it to suggest the arbitrator was deciding that Weldon were not entitled to any extension of time for any other reason, having regard to the grounds which were outside the dispute referred to him. On that basis Weldon's application is dismissed.

Serious irregularity

24. Weldon claim that the award should be remitted to the arbitrator on the ground that in three respects there had been a serious irregularity within section 68 of the Arbitration Act 1996. Briefly the grounds are as follows:

    1. Profit on revenue received from gravel sales
    Weldon sold all the gravel extracted by it to Pioneer Aggregates, with the exception of gravel which Weldon required for its own contracts such as one for Wilson Bowden Properties at Riverside, and another for Higgs and Hill at Swan Valley. In order to measure the net loss that Weldon incurred as a result of having to excavate below design level a rate had to be determined based on the value of the gravel to Weldon. It contended that although overheads and profit were deducted from the revenue received for Riverside no such deduction was made for Swan Valley. This was an inconsistency and an irregularity within section 68(1)(a) and (d). CNT maintain that the arbitrator's calculation does not include overheads and profit and when Weldon put the point to him after the award had been published he said that he had made no mistake.

    2. Gravel left behind
    It was agreed that there was 42,722 m^3 of gravel below the design bed of the reservoir. CNT apparently contended that this figure should not be used in the calculation of Weldon's losses since it included gravel left behind or wastage and was based on a survey and not actual quantities. Weldon argued to the contrary and that the clay fill quantity should be increased. The arbitrator disagreed with Weldon but decided that the figure should be adjusted by 770 m^3 for gravel that had been left behind. Weldon maintained that the figure was not capable of adjustment in view of the agreement and contended there was an irregularity within section 68(2)(a) and (d). CNT's case was that the arbitrator had plainly considered the question of the amount of any reduction for gravel left behind, and assessed an appropriate allowance at 770 m^3.

    3. Overhead and profits on clay
    In its reply Weldon claimed that it lost the recovery of overheads and profit on clay that would have been disposed of off site if it had not been required by S.I. 17 to use that clay as backfill below the design bed. Weldon maintained that the arbitrator failed to deal with this part of its case in its reply. CNT accepted that Weldon had advanced a case of this nature in outline in its reply but maintained both it was not sufficient to do so and that its detailed case had not been set out until after the award was made when in its letter of 20 September 1999 Weldon's solicitors put forward a calculation suggesting that the amount claimed was some ,23,000.

25. Section 68 of the Arbitration Act 1996 states, in part:

    "(1) A party to arbitral proceedings may Y. apply to the court challenging an award in the proceedings on the grounds of serious irregularity affecting the tribunal, proceedings or the award. ...

    (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 B

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

    .....

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

    Section 33 of the Act states:

    "(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 of matters of procedure and evidence and in the exercise of all other powers conferred on it. "

26. Weldon's case is that the award was affected by some serious irregularity. The effect of Mr Thomas submissions was that wherever the tribunal arrives at an incorrect decision there will be unfairness to the party. Since section 33 requires the tribunal to act fairly and impartially there will therefore have been a failure to comply with section 33 which for the purposes of section 68(2) will or may constitute a serious irregularity affecting the award. Mr Coulson submitted that was far too extreme in the interpretation to be placed upon section 33 and sections 68(2)(a). He relied upon the commentary on the Act by Harris, Planterose and Tecks, 1st ed. (at page 250) (2nd ed at page 305) in which the authors say that a challenge on the grounds of serious irregularity *"is only intended to be available in cases where the arbitral procedure has so far departed from what might reasonably have been expected as to justify the corrective intervention of the Courts."* The authors later say that the powers are necessary *"to rectify glaring and indefensible irregularities that would occasion injustice."* Mr Coulson also referred to a decision of mine: ***Gbangbola and anor v. Smith & Sheriff*** [1998] 3 All ER 730 and to the decision of Colman J. in ***Pacol Limited v. Joint Stock Co Rossakhar*** [1999] 2 All ER (Comm) 778 which was another case in which the arbitral tribunal had not notified the parties of its intention to decide a particular point.

27. Section 1(c) of the Act states that *"in matters governed by this Part the Court should not intervene except as provided by this Part.*" Section 68 requires the court to be satisfied that there has been a serious irregularity. If there has been any irregularity of one or more of the kinds set out in section 68(2)(a) and if the court is satisfied that it has caused or will cause substantial injustice to the applicant then it may intervene. Harris, Planterose and Tecks record that the Act was intended to *"reflect what the [DTI's Departmental Advisory Committee] referred to as "the internationally accepted view that the court should able to correct serious failure to comply with the 'due process' of arbitral proceedings" "*. The Act goes further than Article 34 of the UNICTRAL Model Law on International Commercial Arbitration as it is not confined to the award and its grounds are wider but its time limits are shorter. These reflect both the ability of our national courts to intervene speedily and the desire to safeguard confidence in arbitration as a form of dispute resolution. There will be no such confidence if certain categories of serious error were not correctible for the object of arbitration is to obtain the fair resolution of disputes (see section 1(a)). However, the court will not intervene unless it is satisfied of a substantial injustice. There is no need to weigh any irregularity as to whether or not it is serious since section 68(2) defines what is meant by a serious irregularity, except to the extent some of the kinds of irregularity may require a judgment as to whether or not, for example, there has been real unfairness for the purposes of section 68(2)(a) and section 33.

28. I do not accept the proposition that simply because the award contains an error which is unfair to a party there must have been a failure to comply with section 33 on the part of the tribunal and thus a serious irregularity for the purposes of section 68(2)(a). First, there is nothing in the Act to suggest that it intended to allow the court to intervene to put right mistakes of fact or of law which could not have been put right under earlier legislation. The Act was intended to "restate and improve the law relating to arbitration" and in view of the well established policy of the courts to intervene only in cases where there had been some unfair treatment or result which warranted intervention, the grounds must remain limited. Secondly, such a proposition, if correct, would enable a dissatisfied party to challenge an award on the grounds for an error of fact or of law under section 68(2), and thereby to open up the whole course of the arbitral proceedings so as to invite the court to conclude that there was some unfairness, whereas it is in my view plain from the Act that the only method of appealing against a decision, as such, is provided by section 69 (appeal on point of law). Whilst there will be occasions when there is an overlap between an appeal under section 69 and a challenge under section 68 the latter should not be used as an indirect method of appealing against a decision of fact, other than in an exceptional case. Thirdly, section 33 is primarily concerned with the tribunals failure to conduct the proceedings fairly and impartially, and, although a failure to comply with section 33 is placed first in section 68(2), it is in reality more in the nature of a general provision of which section 68(2) contains further examples. However, section 33(2) does expressly state that the tribunal has to comply with the general duty set out in section 33(1) not only "in conducting the arbitral proceeding, in his decisions on matters of procedure and evidence Y" but also "in the exercise of all other powers conferred on it". It might be said that in making an award the arbitral tribunal is exercising a power conferred on it, but I doubt if section 33(2) is to be so read since the making of an award or awards is the very object of an arbitration. In my view section 33(2) is referring to those powers available to the arbitral tribunal which will enable it ultimately to make the award or awards which it determines should be made. However, such an interpretation might preclude a court from acting to correct a culpable injustice in the award itself, such as that which led the Court of Appeal recently to exercise powers under the 1950 Act to put right a mistaken award: ***Danae Air Transport SA v Air Canada*** *[*1999] 2 All ER (Comm.) 943; [1999] 2 Lloyd's Rep. 547. For the purposes of the 1996 Act such a situation would clearly require sections 33 and 68 (for example) to be given the teleological interpretation called for by section 1 so as to achieve the object of arbitration which is "*to obtain the fair resolution of disputes*". Subject to that reservation, no form of dispute resolution is free from error. Parliament clearly intended that if a party agrees to arbitrate 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.

29. Similarly section 68(2)(d) is not to be used a means of launching a detailed inquiry 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 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 a 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.

30. I now turn to the three matters relied on by Weldon. In each of them I shall assume in the light of the cases presented that, despite the amounts at stake, the result, if Weldon were right, would or might result in substantial injustice to Weldon, having regard to the overall sums at stake and the elements comprised in Weldons claim, if there has been a failure falling within the relevant paragraph of section 68(2).

1. Profit on Revenue Received from Gravel Sales

31. In order to ensure that Weldon was not worse off as a result of S.I. 17 it was necessary to bring into account what Weldon had received for the additional gravel that it had to dispose of. It had used gravel for its purposes on its contracts at Swan Valley and Riverside. It seems clear that in arriving at the appropriate credit an allowance had to be made for overheads and profit. This was done in the case of Riverside but Weldon maintain that it was not done in the case of Swan Valley since the calculation in Appendix 7 to the award does not show it. CNT advanced a case to show that Weldon's claim excluded overheads and profit so that it followed that no deduction for overheads and profit was required and it specifically said so in paragraph 8.2.19.12 of its defence.

32. This part of Weldon's case illustrates why its interpretation of section 68(2)(a) may lead to a detailed investigation of what took place in the arbitration. In order to decide whether Weldon is right it would be necessary to look at everything that had been presented to the arbitrator. It is neither desirable nor necessary to do so. It is common ground that a deduction should have been made and since the arbitrator expressly referred to it in the context of Riverside, I am sure that he was aware that a similar allowance might be needed for Swan Valley. Whether or not that allowance was made the arbitrator has arrived at his decision and has also been invited to say there was some slip or mistake that may be corrected under section 57(3) of the 1996 Act. The arbitrator has evidently concluded that the rate that he used for Swan Valley did not require any further adjustment. CNT had argued that Weldon's rate should not be adjusted. Weldon had an opportunity of dealing with that case which the arbitrator has apparently accepted. In my judgment the arbitrator has not failed to deal with the issue of overheads and profit in relation to Swan Valley, nor has Weldon been treated unfairly.

2. Gravel Left Behind

33. In my judgment CNT is right in its submission that an issue of fact arose as to whether the agreed measurement which was the result of a survey should be used to determine the costs of disposing the gravel which were presented as actual costs. The arbitrator clearly saw it as such and decided that there should be an adjustment of 770 m^3. Weldon's figure of 1320 m^3 was plainly considered by the arbitrator. Weldon's case appears to be that the arbitrator ought to have allowed it to argue for 1320 m^3 or why 770 m^3 was incorrect. The former was plainly in issue - see the evidence referred to by Mr Fairbairn in paragraph 25 of his witness statement. 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). In my judgment the arbitrator was entitled to arrive at his decisions that the agreed measurement did not cover gravel left behind and the there should be an adjustment of 770 m^3 on that account, without specifically informing Weldon of his intentions and inviting submissions from it. There was no breach of section 33 nor did the arbitrator fail to deal with all the issues. On the contrary, in this respect, he has dealt with the issue. Weldon may not like the result but there is no failure falling within section 68(2)(a) or (d).

Overheads and profit on claim

34. Weldons case raises a not uncommon point. The starting point of an inquiry under section 68(2)(d) as to whether or not an arbitral tribunal failed to deal with an issue must be to determine what was the dispute referred to arbitration, and what were the critical issues resulting from that dispute which the tribunal had to decide. In this context it needs to be borne in mind that in the majority of cases a tribunal is not required to set out its conclusions on alternative cases as they do not need to be decided once an earlier and more crucial issue has been decided. Sometimes an arbitral tribunal will draw up a list of the issues which are to be decided. If that list is accepted by the parties or is otherwise correct, then it should not be necessary to look further. This is a course that is profitably to be adopted particularly where a party is not legally represented. Not only does it assist the parties to the dispute but it also provides the tribunal with a sure foundation and a measure of protection against challenge under, for example, section 68 or section 69. Where, as has happened in this case, a traditional approach is adopted, the issues have to be chiselled out of extensive pleadings and written submissions.

35. I do not think there is any doubt that there was an issue as to the treatment of the revenue that might have been earned, and the application of the contract rate for clay disposed of off site, had S.I. 17 not been issued. Nevertheless, in an arbitration of this kind where a party presents a case with apparent precision and seeks specific sums of money, it is not in my judgment sufficient for a party simply to signal a potential area for the arbitrator to investigate and to decide, but it must also present the case upon which a decision is required. I do not consider that the fact that the issue was raised in Weldons reply is of itself a reason for saying that it was not an issue in the proceedings, since it is not uncommon for a substantive claim to be made in this way both in arbitration and in litigation. If the other party is prejudiced then it should make an appropriate submission so an appropriate direction is given for the presentation of the claim in its proper place, or for its removal from the proceedings (depending upon the degree of prejudice). Of more moment, however, is the fact that the claim was not quantified. This was clearly not an arbitration in which the arbitrator was expected by the parties to make his own inquiries. The arbitrator had to decide on the claims presented by the parties as set out in extensive written material and other evidence. In my view it is very clear that Weldon did not put forward a claim for the loss of recovery of overheads and profit which was quantified in such a way that the arbitrator could recognise it as an issue to be decided. Accordingly, there was no failure for the purposes of section 68(2)(d). Similarly, I can see no reason why, for example, the arbitrator should have informed Weldon that he was not intending to make a quantified award in respect of this claim in the absence of detailed calculations. It was up to Weldon to put forward its case. Weldon did not do so, and it cannot complain that it was not treated fairly for the purposes of section 68(2)(a).

36. Weldon's two applications will therefore be dismissed.

David Thomas appeared for Weldon Plant, the appellant and claimant, instructed by Masons.
Peter Coulson appeared for the Commission for the New Towns, the defendant, instructed by Denton Wilde Sapte.