**JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC: TCC. 15th June 2005**

**A INTRODUCTION**

1. By an Arbitration Claim Form issued on the 21st March 2005 the Claimant, Benaim (UK) Ltd., referred to throughout the papers as RBA, seeks a number of remedies arising out of an interim Award dated the 21st February 2005.

   The Award was produced by an Arbitrator, Mr. Peter Chapman, the Second Defendant in these proceedings. The arbitration had been commenced against RBA by Davies Middleton & Davies Ltd., in administrative receivership, referred to throughout as DMD, and centred on complaints by DMD about RBA's management of the design process of the new A13 viaduct in Dagenham. The Award, which did not concern quantum, was very largely in DMD's favour and contained a number of important findings against RBA.

2. In these proceedings RBA seek an order removing the Arbitrator under s.24 of the Arbitration Act 1996 ("the 1996 Act") on the grounds that he failed properly to conduct the proceedings leading up to the Award and, as a result, caused RBA substantial injustice. Further and in the alternative, RBA seek permission to apply to set aside the award pursuant to s.68 of the 1996 Act on the grounds of serious irregularity, including the Arbitrator's alleged failure to comply with the general duty imposed upon him by s.33 of the Act. Finally, RBA seek permission to appeal on certain questions of law arising out of the award pursuant to s.69 of the Act. The parties are agreed that, in respect of the orders sought pursuant to ss.68 and 69, both the applications for permission, and the substantive applications, should be dealt with together.

3. Following the exchange of evidence between RBA and DMD – the Arbitrator has chosen not to play an active part in these proceedings – there was a hearing before me on the 10th and 11th June 2005. The majority of that time was taken up with the parties' submissions on the linked applications under ss.24 and 68 of the 1996 Act. Although there is a considerable amount of material before the Court, I have been greatly assisted in considering these applications by the clear analysis adopted by both Mr. Sears Q.C. for RBA, and Mr. Furst Q.C. for DMD.

4. I propose therefore to set out briefly the substantive dispute between the parties (Section B below) and the history of the arbitration (Section C). I set out some of the key passages of the Award in Section D. I then go on to deal with each of the three applications in turn in a sequence which is different to that adopted by the parties during the course of argument. This is because, in my judgment, on an application of this sort, it is logical to take the application under s.24 first (Section E), since, if the Arbitrator is removed, that is the end of the arbitration for all practical purposes. Next I consider the application to set aside the Award as a result of the allegations of serious irregularity under s.68 (Section F below) since that application, if successful, would render the Award, or substantial parts of it, a nullity. Only then do I turn to consider the appeal under s.69 (Section G below) because that application assumes the continued role of the Arbitrator and an extant Award, and is simply designed to ensure that the Award is remitted to the Arbitrator on particular questions. A short summary of my conclusions is set out at Section H below.

**B THE SUBSTANTIVE DISPUTE**

5. Together with Tarmac Construction Ltd ("TCL"), DMD and RBA were involved (in their different ways) in tendering for and carrying out the design and construction of the A13 viaduct in Dagenham. This major civil engineering project comprised a six-lane elevated viaduct structure that crossed a number of roads and railway lines as well as the vast Ford assembly plant.

6. The intention was that TCL would construct the substructure of the viaduct, in particular the foundations and piers; DMD would construct the superstructure of the viaduct, in particular the pre-cast concrete segments; and RBA would design both the substructure and the superstructure. However, it is important to note that the main contract for the design and construction of the entire project was always going to be between the Secretary of State for Transport, as the employer, and TCL, as the main contractor. In essence, therefore, DMD were the proposed subcontractors to TCL in respect of the superstructure and RBA were the proposed subcontractors to TCL and DMD in respect of the design.

7. After at least one earlier design, referred to as the ADP, RBA produced a Tender Design Proposal ("TDP") in respect of the viaduct, which was accepted by the Highways Agency on the 20th August 1996. RBA also produced a Schedule of Principal Quantities ("SPQ") which was intended to identify and quantify the works encompassed within the TDP. DMD produced a fixed price tender for the superstructure work based on the TDP and SPQ, which was accepted by TCL, who in turn submitted a fixed price tender for the whole of the design and construction works to the Highways Agency. On the basis of that tender TCL were then engaged by the Secretary of State for Transport on the 30th August 1996 to design and construct the viaduct.

8. As is common in the construction industry, the legal relationships between TCL, DMD and RBA were not formalised until a later stage. On the 17th June 1997 DMD entered into a Joint Venture Agreement ("JVA") with TCL, pursuant to which they agreed to design and construct the superstructure of the viaduct for £14,951,461.44. On the same date DMD and TCL entered into a Design Agreement with RBA pursuant to which RBA agreed to carry out a range of services relating to the design of the viaduct. Both contracts were expressly made retrospective and therefore covered some elements of work and services, such as RBA's production of the TDP and the SPQ, which had already been performed.

9. It was DMD's case in the arbitration that the problems began in about November 1996 when, at a meeting on the 7th November, RBA's representatives told Mr. Davies of DMD that the TDP was not buildable. DMD also relied on RBA's letter of the 13th January 1997, which referred to a number of changes to the TDP as offering "the most economic and buildable solution for this project".

10. It is common ground between the parties that the TDP was changed in a variety of ways in late 1996 and early 1997. The issue between the parties was how and why those changes came about. It was DMD's case that, effectively, the changes had resulted from inherent inadequacies within the TDP and, since their tender had been based upon that TDP, they had suffered losses of £5 million or more as a result. It was RBA's case that there was nothing wrong with the TDP and the changes that occurred were part of usual design development.

**C THE ARBITRATION**

11. DMD commenced arbitration proceedings against RBA on the 11th April 2002. The Points of Claim was not served until the 14th March 2003, and was amended on the 31st October 2003. In addition to the claims arising directly out of the differences between the Tender Design Proposal and the Final Design, there were additional claims against RBA arising out of late delivery of design information; the failure to identify the presence of overhead power cables that traversed the viaduct; and additional works said to be due to other errors, omissions and failures in RBA's design. The total value of the claim in the arbitration, including overheads, profit and financing charges, was put at £11,794,546.35.

12. RBA's Points of Defence and Counterclaim was served on the 11th June and amended on the 12th December 2003. Paragraph 5 of that document helpfully sets out a summary of RBA's defence to the claims made. RBA denied that the TDP was unbuildable and maintained that "the requirement for a more flexible solution came about as a result of constantly moving pier positions and consequent changes in span length over which RBA had no control". RBA also contended that "the Final Design was, or should have been, a simpler and faster scheme to cast than the Tender Design Proposal, which is precisely what RBA was attempting to achieve by designing the deviator/anchorage blocks in the way that it did".

13. On the 10th February 2003 the Arbitrator ordered that there should be a split trial. He said that "The period for the 5th-23rd January 2004 shall be set aside for the hearing of liability issues. The period of the 8th-12th March 2004 shall be set aside for the hearing of quantum issues." On a number of occasions thereafter he referred to the first hearing as an "entitlement" hearing, an expression reflected at para.154 of RBA's Opening Submissions for that hearing.

14. In the event, the first hearing took up both slots in January and March 2004, and lasted for 17 days. DMD were represented by Mr. Richard Stead, of counsel, RBA were represented by Mr. Sears Q.C.

Following the exchange of lengthy written Closing Submissions, both of which were over 200 pages long, there was a further hearing, at RBA's request, on the 2nd August 2004. Unfortunately the Award was not published for another six months although, according to the Arbitrator's fee notes, it appears that its actual production occupied just 112.5 hours during this period.

**D THE AWARD**

15. The Award of the 21st February 2005 ran to 55 pages. Rather surprisingly, given its importance to the parties and the delay in its production, the paragraphs were not numbered. In order to facilitate any cross-referencing, in this judgment I have gratefully adopted the manuscript numbering added by Mr. Gard, DMD's solicitor. There were a total of 182 paragraphs within the Award.

16. After a very short introduction (paras.1 to 10), the next section of the award, from paras.11 to 24, set out various clauses of the Joint Venture Agreement between TCL and DMD and the Design Agreement between TCL and DMD, on the one hand, and RBA on the other.

17. Thereafter, at paras.25 to 91 inclusive, the Award set out a full summary of DMD's case. At paras.92 to 105 there was a much briefer recitation of the main points put forward by RBA. RBA complained generally in these proceedings that the Arbitrator did not here do proper justice to their arguments. I certainly agree that there is an apparent imbalance in this part of the Award, but that cannot of course on its own be a legitimate ground for complaint. What matters is whether, when he came to deal with the substantive issues between the parties, the Arbitrator fairly dealt with the evidence and RBA's submissions thereon.

18. Paragraphs 106 to 175 contained what the Arbitrator called ***'Discussion and Findings'***. This is the crucial part of the Award. Although it is both unnecessary and inconvenient to set out all the relevant findings in this Judgment, it is perhaps helpful if I identify what seem to me to be some of the most important paragraphs.

**(a) Paragraph 108** *"In a technically complex case as this there are many issues that have been raised and argued between the parties that do not bear directly on the principal issue to be decided, and during the process of preparing this award it has become apparent to me that detailed discussion of such surrounding issues is more likely to confuse than to assist. Hence I have attempted to concentrate on those issues that I consider are crucial to the determination of the case."*

**(b) Paragraph 116** In commenting upon the evidence of Mr. Simon Bourne, the project director for RBA, the Arbitrator said: *"His responses to many of Mr. Stead's questions were evasive and as his examination proceeded I formed the opinion that his objective was to protect his company in the arbitration proceedings, and thus he avoided direct answers to questions that might expose RBA's shortcomings. As will be evident from other parts of this award, on the evidence I have concluded that the ADP/TDP left much to be desired as designed, and I have little reservation in concluding that the design team that Mr. Bourne established for the preparation of these designs was neither sufficiently experienced nor, I regret to say, sufficiently supervised."*

**(c) Paragraph 117 RBA's** project manager, Mr. Gerard Brennan, was described by the Arbitrator as *'a convincing witness' who 'clearly had a significant positive impact on the design process after he joined the A13 team'.*

**(d) Paragraph 118** In contrast, the Arbitrator was concerned with Mr. Hambly, the design engineer. He said that Mr. Hambly had joined RBA from university as a graduate engineer and his first job was the structural design work for the A13. He went on: *"Mr. Hambly answered Mr. Stead's questions with confidence and zeal. He struck me as an intelligent individual with an enthusiasm for engineering. However, from his testimony I became increasingly concerned that he had been left to his own devices in preparing the TDP and all his intelligence and enthusiasm could not compensate for the inevitable lack of experience of a graduate engineer. As parties are aware, I sought comments from the expert witnesses on this very matter during the hearing."*

**(e) Paragraph 124** The Arbitrator, when commenting on RBA's experience, concluded that: *"Its experience in externally prestressed pre-cast bridge design was relatively light, RBA never having actually been the designer on an externally prestressed pre-cast bridge similar to the A13. In such a situation it would*

*not be unusual for RBA to have engaged - either as sub-consultant or by employment - persons who did possess the right level of experience in the particular field of bridge design that was being considered. They did not do this."*

**(f) Paragraph 126 :** On the crucial question of expert evidence the arbitrator was unequivocal in his view. "The determination of this case primarily concerned the credibility and competence of the expert evidence. I found Mr. Nicholson an entirely convincing witness. His pedigree was impeccable and I quickly became satisfied that he had the knowledge and experience required of an expert in this relatively new area of bridge design and construction. He understood the duties of a designer working for a contractor during tender preparation, and I found this of particular importance. He was subjected to some extremely testing cross-examination by RBA's extremely competent counsel [Mr. Sears Q.C.] but hardly waivered from his consistent and well-presented viewpoint. His answers were complete and easy to understand and not once did I get the impression that he was loading his opinion in favour of one party at the risk of being unfaithful in his duty of impartiality to the tribunal. I was not so convinced with Mr. Farooq in his evidence. First I had doubts as to his expertise in the field of externally prestressed pre-cast glued segmental bridge design, which this case is about. He did appear to be more of a generalist bridge engineer than a specialist designer. I was concerned over the differences in his CVs and over his limited experience in preparing alternative tender designs under design and construct contracts. In contrast to Mr. Nicholson, throughout Mr. Farooq's evidence I had the impression that by the nature of his responses he was defending RBA's position rather than giving me his independent expert views in response to Mr. Stead's able and searching questions. Consequently, I have found it more difficult to accept Mr. Farooq's evidence than I have found in accepting Mr. Nicholson's.

**(g) Paragraph 127 :** As to buildability of the TDP, the Arbitrator said: *"I find this word to be in need of definition for the purposes of this award, and I define it herein as meaning more than a physical or dimensional incompatibility … I consider the issue of buildability in the context of the TDP as being more one of whether, if built, the bridge would safely have been capable of construction within the constraints and provisions of the contract and, if constructed, would have withstood the live loading and dead weight that was to be imposed upon it. Thus buildability is more a performance issue than merely a physical or dimensional one."*

**(h) Paragraphs 128-129 :** The Arbitrator devoted some time to the design size of the anchor/deviator block within the TDP. This was a key element of the viaduct construction because these blocks either anchored or diverted the cables which gave the bridge its structural strength. DMD said that a deviator block designed at 1200 mm, the length they said that was shown in RBA's sketches, would never have worked. RBA said that the 1200 mm shown on those sketches was an error and the correct size was 1500 mm when scaled from drawings. They also said that it was never their intention to base the TDP on 1200 mm blocks. The Arbitrator concluded that this was a central issue. He said*: "The deviator block was dimensioned at 1200 mm but scaled 1500 mm. The deviator block was of fundamental importance in the design of the bridge and this incompatibility between dimension and scale measurement indicates to me that RBA was not as alert as they should have been to the significance of this crucial feature. Evidence was given as to whether a stated dimension or a scale measurement was the correct way of determining the size of the construction element. I have no hesitation whatsoever in deferring to the view that stated dimensions take precedence over scale measurements … After considerable deliberation I have concluded as a matter of fact that on the evidence available to me the TDP included a 1200 mm deviator block and I reject the suggestion that it was designed at 1500 mm. As the parties will realise, this finding has a significant bearing on the outcome of this arbitration."*

**(i) Paragraphs 112 and 143 :** The Arbitrator made specific findings on the meeting of the 7th November and the letter of the 13th January. As to the meeting, he concluded, at para.112, that the meeting did take place on the balance of probabilities and that it was of an informal nature. As to the letter of the 13th January, he found, at para.143, that that letter was of significance. He said *"This letter sets out the rationale behind the changes being made at that time by RBA. The letter does not state that these various changes were as a result of DMD's requests or post-TDP requirements, and I see that omission as*

*indicative at that time that RBA was not blaming DMD as the reason that changes were made. I am drawn to the inevitable conclusion that the letter, being at the end of the concept design phase, was RBA's explanation of why it had, primarily at its own instigation, caused the design changes to be made. This fits in entirely with my other findings as to the true reason behind the changes set out above."*

**(j) Paragraph 143 (latter part) :** The Arbitrator then went on immediately in para.143 to conclude, in general terms, how and why the TDP had been changed. He said: *"I concur with DMD that as RBA realised in late 1996 that the TDP was inadequate, DMD should have been advised immediately, and decisions might then have been made that could in some measure have safeguarded DMD's commercial exposure. Instead I find that RBA's approach was to make design changes to rectify the inadequacy of the TDP without properly notifying DMD of the reasons behind such changes, and then to state that the design had developed to such an extent that reversion to earlier design approaches was impractical. My view, based on the evidence, is that reversion was not merely impractical but impossible as by that time RBA knew that the TDP was unbuildable but for obvious reasons was disinclined to admit this. I find RBA negligent in failure to advise DMD of the true situation at the appropriate time."*

**(k) Paragraph 144-153 :** These parts of this section of the Award are concerned with the Arbitrator's findings on specific allegations against RBA, such as delay in completing the detailed design, further complexity, difficulties with reinforcement fixing and the like. It is unnecessary for me to set out these passages in this part of the Judgment.

**(l) Paragraph 154 :** *In referring to the TDP and the Final Design, the Arbitrator was again clear. In this paragraph he said: "It is clear to me that the Final Design comprised a far more robust and 'beefy' design than that contained in the TDP. As I have stated above, I am satisfied that this beefing up of the design was as a result of Mr. Brennan, on behalf of RBA, finding that the TDP design was not viable or realistically buildable and needed to be strengthened before construction began. I find no evidence of significance to support any other finding. Furthermore, I find that the need to redesign the viaduct superstructure was the supervening cause for delays to DMD, in segment manufacture and viaduct construction. By this I do not mean to say that DMD was perfect in all its construction activities, and there is some evidence that does indicate to me that DMD took longer to reach optimum pre-cast segment output than with better pre-cast site supervision and control it might have done. However, in arbitration and litigation it is the dominant cause that needs to be ascertained, and in this case I find the recurring culprit to be the redesign of the viaduct structure by RBA."*

**(m) Paragraph 156 :** The Arbitrator found that the SPQ prepared by RBA contained *"numerous inadequacies … in that it did not reflect what was in the event the design necessary to comply with the contract requirements, namely the final design, and consequently there was a breach of the contractual obligations imposed upon RBA".* He added that: *"Perhaps I should add here that it would be taking contractual compliance too far to expect the SPQ to be absolutely correct in every aspect. Design development was to occur and both RBA and DMD should have expected some difference between the SPQ at tender and the final quantities constructed. What is reasonable depends on the circumstances. I do not intend to speculate or state a percentage herein. However, the situation on the A13 viaduct design went further, in my opinion, than the design development of a suitable design. As I have found above, I hold the view that the TDP would not have worked, primarily because the deviator block was undersized, but also because the pre-stress conceptual design had not been adequately considered in that significant changes to the number of buttresses, size of concrete components and reinforcement were necessary."*

**(n) Paragraphs 162 and 163 :** The Arbitrator's conclusion was that RBA had failed to advise either TCL or DMD about the cost consequences of these various design changes. He said that in his judgment it would have been wrong for RBA to assume that the Joint Venture partners would have been able to sort out the commercial impact caused by RBA's design changes. He was clear that RBA should have advised both contractors, in advance of instigating design changes, to seek agreement from the Joint Venture as a whole.

**(o) Paragraphs 176 onwards :** These are the paragraphs of the Award in which the Arbitrator summarised his conclusions. As I have said, he found that, in a number of respects, RBA were in breach of the terms of the Design Agreement and/or negligent.

19. To summarise the technical case, the Arbitrator concluded that the changes from the TDP to the Final Design arose out of deficiencies within the TDP which RBA, particularly Mr. Brennan, realised at the time had to be altered and corrected. The deficiencies which the Arbitrator found related to both structural inadequacy and the practical difficulties that would have been involved in building to the TDP. As to the structural inadequacy he found, amongst other things, that the TDP incorporated at 1200 mm deviator block (para.128) which would have failed in shear (para.130); he found that RBA should have done strut and tie and shear calculations which would have revealed the inadequacies in the TDP (para.136); he found that RBA should have done a line beam analysis, and if they had done, the need for a third anchor block mid span on spans exceeding 60 metres would have been revealed (para.137); and he found that there was a fatal inconsistency between segment weight and segment length (para.139). As to the practical difficulties, he found, amongst other things, that the reinforcement to be placed within the 1200 mm block would not have been feasible (para.130); and he found that the number of anchorages and deviators increased because the TDP was not itself buildable (para.135). He considered RBA's explanation for the changes as put forward in their evidence, and he rejected them, concluding at para.143 that by late 1996 "RBA realised … that the TDP was inadequate".

20. These conclusions were founded to a large extent upon the Arbitrator's clear view, as an engineer himself, on the factual and expert engineering evidence presented to him, both in documents and orally during the hearing. It was his view of this evidence that led him to conclude that the TDP was not buildable. Although his findings are sometimes terse, even brusque, his overall approach seems to me to be the very essence of specialist arbitration.

21. I should make one final point about the Award generally before going on to consider the individual elements of RBA's applications. Mr. Furst Q.C. began his submissions by saying that RBA's attacks on the Award, although variously dressed up as questions of law or allegations of serious irregularity, in truth amounted to no more than an attempt by RBA to reargue many of the points of detail before me on which they had been unsuccessful before the Arbitrator, and that such an approach was wholly contrary to the spirit and letter of the 1996 Act. Whilst I consider that a few of the points raised by RBA are matters which fall properly to be considered under the 1996 Act, I do accept the overall force of Mr. Furst Q.C's submission. I find that many of the matters relied upon by RBA in these proceedings are the product of an illegitimate attempt to reargue the detail of the arbitration. Whilst the arguments before me were cogently put by Mr. Sears Q.C. and betrayed an enormous amount of hard work on his part and that of his instructing solicitors, the very fact that he has been obliged to argue matters in such detail, by reference to the lengthy written submissions in the arbitration, transcripts of evidence and the like, demonstrates, in my judgment, how far RBA have strayed from the narrow path prescribed by the 1996 Act.

**E THE APPLICATION UNDER SECTION 24: REMOVAL**

**The Relevant Sections of the 1996 Act**

*22.* Pursuant to s.24 of the 1996 Act, the Court has the power to remove an Arbitrator on a variety of grounds. The only ground relied on by RBA in the present case is s.24(1)(d), namely that the Arbitrator has: *"… refused or failed – (i) properly to conduct the proceedings … and a substantial injustice has been or will be caused to the applicant."*

23. It seems clear that although the expression "***failure to conduct the proceedings properly***" is not defined in the Act, it will include a failure to comply with the Arbitrator's duties under ss.33 and 68(2)(a), (b) and (c) of the Act. To that extent therefore I respectfully agree with the commentary to that effect at p.291 of the second edition of **Mustill & Boyd's Commercial Arbitration, 2001 Companion**.

24. The relevant parts of s.33 relied on by RBA provide as follows:

*"(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….*

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

25. The relevant parts of s.68 relied on by RBA provide as follows:

*"1. A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award….*

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

*(a) Failure by the tribunal to comply with section 33 (general duty of tribunal) …*

*(d) Failure by the tribunal to deal with all the issues that were put to it …*

*(f) Uncertainty or ambiguity as to the effect of the award …*

*(h) Failure to comply with the requirements as to the form of the award…."*

26. I deal in greater detail in Section F below with some of the many authorities under s.68(2) of the Act concerned with setting aside an Award due to serious irregularity. At this stage it is sufficient to note that in order to obtain an order removing an Arbitrator under s.24, RBA need to demonstrate that in this case the Arbitrator failed to conduct the hearing properly, either because he did not give them an opportunity to present their case, or because he failed to deal with the issues put to him, and that a substantial injustice has resulted in consequence. In addition, so it seems to me, RBA must show that his failure and its consequences are so serious that setting aside the Award under s.68 is not sufficient remedy, and that the only appropriate remedy is his removal as Arbitrator pursuant to s.24.

**The Basis of the Application to Remove the Arbitrator**

27. The application under s.24 in the present case is said to depend upon the same matters on which the application under s.68 (serious irregularity) is made. I therefore deal with the substance of those complaints in Section F below. However, in my judgment, with one exception, none of the complaints relied on under s.68 could, even if they were upheld, justify the removal of the Arbitrator under s.24 in any event. Perhaps in recognition of that, paras.72 to 74 of the Grounds of Application document originally put forward by RBA seek to emphasise two particular points in support of the application to remove the Arbitrator: his failure to adjourn the quantum hearing set for May 2005 until after the judgment on these applications, and his findings that RBA caused delay in circumstances where, as RBA maintain, such matters were to be left over to the quantum hearing.

28. The first of these grounds is no longer relevant. Although he originally indicated that he would not adjourn the quantum hearing, the Arbitrator eventually acceded to the sensible suggestion that it would be inappropriate to embark on any further arbitration hearing until the outcome of these applications was known. Thus the only specific complaint emphasised by RBA in support of the application to remove the arbitrator concerns his findings on delay. That is the only "particular" matter raised in para.149 of Mr. Sears Q.C's helpful skeleton argument. Moreover, when I asked Mr. Sears Q.C. why the draconian remedy under s.24 was appropriate in this case, he explained that if he was right and the Arbitrator had made findings on delay that he should not have done, RBA considered that it would be very difficult, if not impossible, for the Arbitrator to deal fairly with the delay issues when they came to be argued, and thus removal was the appropriate remedy. This exchange further confirmed that the delay point was the cornerstone of RBA's application under s.24. I agree with Mr. Sears Q.C's approach. The complaint about the Arbitrator's findings on delay is, in my judgment, the only ground which, if right, could even conceivably lead to his removal under s.24. It is therefore the one exception to which I referred at para.27 above.

**The Complaint**

29. The specific findings as to delay made by the Arbitrator, which are the subject of this complaint in RBA's Grounds of Application at para.59, are:

(a) A reference to "*the delay to the start of construction due to the delayed RBA design*" (para.146);

(b) A finding that Nineve, the specialist mould subcontractor, *"was delayed by the late RBA design and that such delay impacted upon the ability of DMD to perform its own obligations under the JBA"* (para.146);

(c) A finding that "*the delay caused by complexity was … a direct result of the change in design between TDP and final design"* (para.146);

(d) A finding that RBA were liable for the delay caused by the need to apply anti-corrosion coating to the reinforcement (para.148); and

(e) A finding that *"the need to redesign the viaduct superstructure was the supervening cause for delays to DMD in segment manufacture and viaduct construction"* (para.154).

In addition, in the course of his oral submissions Mr. Sears Q.C. identified at para.145 of the Award a further finding about which he also complained. There the Arbitrator found: *"To my mind, the predominant cause of the delay to construction was the necessity for RBA to redesign the viaduct as a result of its own shortcomings."*

It seems to me that, to all intents and purposes, this is saying the same thing in a slightly different way as the finding at para.154, referred to at (e) above. It therefore adds nothing new.

30. Mr. Sears Q.C. at para.121 of his skeleton argument, contends that these findings were made despite the fact that the hearing which led to the Award *"was only concerned with liability and not with quantum, it having been agreed that planning and programming matters would be held over until the quantum hearing"*. Essentially, therefore, he submits that adverse findings were made by the Arbitrator against RBA which were outside the agreed scope of the hearing in January and March 2004, and were therefore made without allowing RBA the opportunity to deal with the relevant issues.

31. As a matter of principle, it seems to me that if an arbitrator orders Issues 1 to 5 to be dealt with at one hearing and Issues 6 to 10 to be dealt with at a second, and the parties therefore call no evidence on Issues 6 to 10 at the first hearing, any findings made by the arbitrator on Issues 6 to 10 in an award following that first hearing may well result from a serious irregularity, that could lead to the setting aside of at least those parts of the award and even, in extreme cases, the removal of the arbitrator himself. Mr. Furst Q.C. accepted that if RBA could demonstrate that something of that sort had happened here then s.68 might be triggered, although he had additional points to make about the absence of substantial injustice. However, Mr. Furst Q.C's principal submission was that the Arbitrator dealt properly with the matters raised in the first hearing, including questions of delay, and cannot now be criticised under section 68(2), particularly given that the boundary between liability and causation was regularly blurred by both parties.

32. Accordingly, it seems to me that the first thing that I must do is determine the intended and actual ambit of the first hearing in January and March 2004, and then go on to consider whether or not the five findings of delay complained of fall within or outside that ambit.

**The Ambit of the Hearing in January and March 2004**

*33.* As I have already pointed out in para.13 above, the Arbitrator ordered a split between liability and quantum. It appears that the Arbitrator made clear that he interpreted liability to mean 'entitlement'. Neither concept was defined further, nor was there any written record agreed by both parties and/or the Arbitrator setting out in detail what they envisaged being dealt with in the first hearing and what would be left over for the second. This was an unfortunate omission and it has led to considerable argument before me about what was and was not included within that first hearing. So, for instance, in his written outline submissions, Mr. Furst Q.C. expressly rejects the suggestion that the first hearing *"was not intended and did not in fact deal with the elements of delay set out at s.23 of DMD's Closing Submissions"*.

34. Generally, an order separating liability from quantum is not, without more, a very meaningful exercise. In construction cases there are often extensive arguments about causation. That is particularly true of cases in which there are allegations of delay. Thus in this Court, orders splitting the trial will usually require that any causation issues be dealt with at the first hearing, because it is typically an integral part of any proper consideration of liability. It may be that that was what the Arbitrator had in mind when he used the word "***entitlement***"**.** Certainly, as Mr. Sears Q.C. frankly told me, his uneasiness that that is what the Arbitrator might have had in mind led him to take issue with the Arbitrator's use of the word 'entitlement' more than once during the arbitration itself.

35. In my judgment, it is difficult, if not impossible, for me to try and work out now what the Arbitrator or the parties intended by the original order splitting liability and quantum and, in particular, what

they proposed should happen to issues of causation. I consider it much more helpful to concentrate on what the parties actually did in the run-up to and during the hearings in January and March 2004 in respect of the allegations of the delay which DMD said had been caused as a result of the changes to RBA's design.

36. The principal pleadings in the arbitration deal with DMD's allegations of delay and RBA's response to those allegations in their respective sections labelled ***'Liability'***, with quantification being dealt with separately. This was also true of RBA's Counterclaim for extra fees which turned in part on the delays in the design process. DMD's alleged liability for this Counterclaim was also part of the first hearing before the Arbitrator.

37. DMD's Opening Submissions for the first hearing, at para.64 onwards, dealt expressly with delay, including the delay to the design and manufacture of the moulds, which was itself dependant upon RBA's design for the concrete segments which would be manufactured in those moulds. RBA's Opening Submissions also dealt with delay, including, at para.26, an alternative case as to the reasons for the delay to the Final Design, and at para.106 a detailed explanation "that any delay in the design and manufacture of the moulds was not caused, either in whole or in part, by any delay on the part of RBA". Paragraph 107 of RBA's Opening Submissions promised that "the detailed factual circumstances concerning the relevance of design information by RBA and the arrangements between DMD and Nineve will be explored in cross-examination".

38. RBA's promise was fulfilled. Questions of delay were subsequently explored in the evidence, sometimes to a very detailed degree. For instance, on day 3 Mr. Davies was cross-examined by Mr. Sears Q.C. in respect of the delay in the production of moulds, and on day 4 Mr. Budds was also cross-examined on delay by Mr. Sears Q.C. On day 7 Mr. Stead, on behalf of DMD, cross-examined Mr. Bourne on similar matters, and on day 10 he also cross-examined Mr. Collings for about half a day on delay-related matters.

39. There was also a significant ruling on day 5, when Mr. Budds was being re-examined by Mr. Stead about various aspects of delay. Mr. Sears Q.C. objected, saying that some of the re-examination was going beyond the ambit of the first hearing. Mr. Stead disagreed (p.19, lines 15-16), saying that "Clearly the issue of design production in relation to these segments is relevant". The Arbitrator expressly agreed with that approach (line 17), saying, "Yes, I think it is. Please proceed." It seems to me that that was an important ruling by the Arbitrator because it made it plain that, as far as he was concerned, delay to the design of the segments, and therefore delay to the moulds (and thus the start of construction on site) was part of that first hearing.

40. RBA's Closing Submissions were served on the 11th May 2004. Paragraphs 527-551 of those submissions come under an unambiguous heading, ***"The Delayed Design".*** Whilst the first three paragraphs explain that planning and programming matters *"have been held over to be dealt with on the quantum hearing"*, the remaining paragraphs in this section make detailed points about the evidence, both factual and expert, relating to various aspects of the delay to the design.

41. In response, section 23 of DMD's Closing Submissions, also served on the 11th May, was entitled ***"Delay and Complexity",*** and ran for 17 closely typed pages and 91 paragraphs. It also made detailed points about the factual and expert evidence that touched on delay.

42. Finally, I have considered the transcript of the last day of the hearing on the 2nd August 2004. As I have said, this hearing was held at RBA's request. Had they wanted to, RBA could have submitted to the Arbitrator on that occasion that, despite his ruling on day 5 (para.39 above), it was their case that all issues of delay were irrelevant, and that he was not to address such issues in his Award. They did not do so. Instead at that hearing Mr. Sears Q.C. identified at the outset seven main elements of the case. The final element was delay, which he addressed in some detail at pp.100 to 111 of the transcript. Again there was a caveat as to the scope of the first hearing, but it seems to me that it was, at best, equivocal. Mr. Sears Q.C. said that it was unclear how far the Arbitrator could take delay questions, and at one point he asked, rhetorically, "How far actually can you take this in the course of a liability hearing?" He then went on to address various aspects of delay in some detail.

**The Arbitrator's Findings**

43. Having considering the pleadings, the openings, the transcripts and the closings, I conclude, without hesitation, that the hearing in January and March 2004 was intended to, and did, deal with certain issues relating to delay. In particular, there can be no debate but that the delays to the design and the reasons for that delay were to be considered and decided in the first hearing. That included specific matters like the delay caused by the need for anti-corrosion coating to the reinforcement, which was dealt with in the evidence and in the parties' respective submissions. Likewise, I consider that delays to the design of the segments, and thus delays to the mould manufacturer, Nineve, were also amongst the issues to be decided in the first hearing, a position, in my judgment, made clear by the Arbitrator's ruling to that effect on day 5.

44. Accordingly, going back to the five specific findings of which complaint is made, and which I have listed at para.29 above, it is clear beyond doubt that those at sub-para.(b) (the delay to Nineve); sub-para.(c) (the delay caused by the complexity of the design); sub-para.(d) (the delay due to the need for anti-erosion coating); and that part of sub-para.(e) concerned with delays to segment manufacture, were all wholly within the ambit of the first hearing. That leaves the reference noted at sub-para.(a) to the delay to the start of the construction, and the finding to which it refers at sub-para.(e), that the need to redesign was the supervening cause of that delay to the start of the construction.

45. The first point to make about this reference and this finding is that they are both referring only to the ***start*** of the construction. That is clear from the Award itself. In other words, this is not a finding about any events or causes of delay once DMD started construction; it is limited solely to a finding that the start of construction was delayed by the changes to the design, which changes themselves caused delay to the mould manufacturer, and therefore delay to the construction of the segments.

46. I have concluded that although the position is perhaps not quite as clear-cut as it is in respect of the other delay findings with which I have dealt at para.44 above, the Arbitrator was entitled to make the reference (at para. 29(a) above) and the finding (at para 29(e) above) in his Award. It seems to me that a finding that the start of construction was delayed by RBA flowed logically from his earlier conclusion that RBA's design (and, in particular, the design of the moulds necessary for the manufacture of the segments) had itself been delayed. DMD could not start construction until the design was provided and the segments had been manufactured, so delays to those activities would automatically delay the start of construction. I also consider that the effect of the Arbitrator's ruling on day 5 was to include this aspect of the dispute within the first hearing. Furthermore, I am confirmed in these views by the absence of any alternative case on the delay to the start of construction put forward by RBA in their Defence and Counterclaim, or elsewhere, aside of course from the contentions set out in para.106 of RBA's Opening Submissions, which the Arbitrator properly considered and, on his view of the evidence, rejected.

**The Arbitrator's Conduct**

47. Accordingly, it is my primary view that the Arbitrator was entitled to make all the references and findings noted at para 29 of this Judgment. But even if I were wrong about that and the Arbitrator did arguably stray beyond the strict confines of the liability hearing in reaching any of those findings, I do not consider that he can be properly criticised for so doing. I therefore do not find, even on that premise, that the Arbitrator was in breach of his duties under s.24 or s.33 of the 1996 Act.

48. The reason why I have concluded that no proper criticism can be made of the Arbitrator's conduct on this aspect of the proceedings is because, in my judgment, the ambit of the first hearing was, on the material presented to me, at best uncertain. Both parties agree, and always agreed, that certain questions of delay were definitely within the ambit of the first hearing. They disagree now solely as to the extent with which the first hearing was concerned with such matters. Since the parties did not clarify the position for the Arbitrator at any stage, and since the precise ambit of the hearing in respect of causation was left vague, perhaps deliberately, it is not now open to either party to turn round and criticise the Arbitrator for straying beyond the ill-defined boundary between liability and causation at the first hearing. In other words, the sort of clear-cut potential irregularity which I have identified in

para.31 above simply did not occur in this case, and RBA are not now able to make a legitimate complaint about the Arbitrator's conduct.

**Summary on Delay**

49. For all these reasons I dismiss RBA's principal ground for removing the Arbitrator under s.24 of the 1996 Act. As noted, I deal with the remaining grounds for removal in Section F below, since they are also the grounds for RBA's application to set aside the Award for serious irregularity under s.68 and could not, in my judgment, justify the removal of the Arbitrator in any event.

**F THE APPLICATION UNDER SECTION 68: SERIOUS IRREGULARITY**

**The Relevant Sections of the 1996 Act**

50. The relevant sections of the Act, namely ss.33 and 68(2), are set out in paras.22 and 23 above. Essentially, in order to set aside the Award under s.68 for serious irregularity, RBA must demonstrate in respect of each separate ground that they rely on (a) a serious irregularity, (b) which caused or will cause substantial injustice.

I deal shortly with these two elements below.

**Serious Irregularity**

51. The two types of serious irregularity relied on by RBA in grounds 1-9 of their section 68 application are:
(a) the Arbitrator's failure to act fairly and give each party an opportunity to present its case, and
(b) the Arbitrator's failure to deal with all the issues that were put to him.

In my judgment the Arbitrator was obliged to resolve the disputes which had to be decided en route to his ultimate conclusion. However, he did not have to address or deal with subsidiary issues. In addition, the parties are not now entitled to use s.68(2) as a means of launching a detailed inquiry into the precise manner in which the Arbitrator considered the issues. The relevant authorities for these propositions are set out below.

52. In **English v. Emery Reimbold & Strick Ltd**. [2002] 1 W.L.R.249, the Court of Appeal held, by reference to **Knight v. Clifton** [1971] Ch 700 and **Egil Trust v. Piggott- Brown** [1985] 3 All ER 119, that there was no duty on a judge in giving any kind of judgment to deal with every argument presented by counsel in support of his case. It was said:

"It follows that if the appellate process is to work satisfactorily the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained, but the issues, the resolution of which were vital to the judge's conclusion, should be stated and the manner in which he resolved them explained… It does require the judge to identify and record those matters which were critical to his decision."

*53.* In **Checkpoint Ltd. v. Strathclyde Pension Fund** [2003] E.W.C.A.Civ.84 the Court of Appeal cited, with approval, this passage from **English**, and made it clear that it applied equally to arbitrators, and was therefore of direct relevance to an application under s.68(2). Ward LJ said: *"The first question that arises is what is meant by 'all the issues that were put to it' in section 68(2)(d), the failure to deal with which would constitute the procedural irregularity. The words must be construed purposively. In my judgment, it does not mean each and every point in dispute. That has never been part of the judicial or arbitral function … In my judgment, 'issues' certainly means the very disputes which the arbitration has to resolve. In this case the dispute was about the open market rent for this property. The arbitrator decided that. In order fairly to resolve that dispute the arbitrator may have subsidiary questions, issues if one likes, to decide en route. Some will be critical to his decision. Once some are decided, others may fade away."*

54. It is axiomatic that the mere fact that there may be an error in an award which is unfair to a party does not mean that there must have been a serious irregularity under s.68(2). In **Weldon Plant v. The Commission for New Towns** [2000] B.L.R.496, His Honour Judge Lloyd Q.C. said:

*"29. 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 law which could not have been put right under earlier legislation. The Act was intended to "restate and improve the law in relation to arbitration", and in view of the well established policy of the courts to intervene only in cases where there has 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 of 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 …*

*30. Similarly, section 68(2)(d) is not to be used as 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, e.g. 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 the 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."*

*55.* In **World Trade Corporation Ltd. v. C. Czarnikow Sugar Ltd.** [2004] 2 All E.R.Comm Colman J cited, with approval, those passages from **Weldon**, as well as the decision of Thomas J (as he then was) in **Hussman (Europe) Ltd. v. Al Ameen Development and Trade Co**. [200] 2 Ll.Rep.83. In that latter case the judge said: *"I do not consider that section 68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning but it is no more than that."*

56. Given that the present dispute centred on a number of complex engineering questions, I also consider that the decision of Colman J in **Bulfracht (Cyprus) Ltd. v. Boneset Shipping Co. Ltd. (The Pamphilios)** [2002] 2 Ll.Rep.681 is of assistance in demonstrating the correct approach to allegations of serious irregularity in this sort of case. In that case the arbitrators decided that the marine growth on the hull of the vessel was due to its lengthy anchorage in Brazilian waters rather than defects in the painting process prior to delivery. The judge held that arbitrators were not required to refer to the parties every inference drawn by them from the facts or every decision to give limited weight to expert evidence in the light of their own experience.

**Substantial Injustice**

*57.* In a well known passage in the DAC report of February 1996, at para.280 it was said: *"The test [of substantial injustice] is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration the parties cannot validly complain of substantial injustice unless what has happened simply cannot, on any view, be defended as an acceptable consequence of that choice. In short, section 68 is really designed as a long stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that injustice calls out for it to be corrected."*

58. Tuckey J (as he then was) cited this passage in his judgment in **Egmatra A.G. v. Marco Trading Corporation** [1999] 1 Ll.Rep.862 in support of his conclusion that an application under s.68 was "no

soft option clause as an alternative to a failed application for leave to appeal". Ward LJ made precisely the same point in **Checkpoint**.

59. If the result of the arbitration would most likely have been the same or very similar, despite the irregularity, there is no basis for overturning the award. Moreover, it is unnecessary for the court to identify precisely what the result would have been but for the irregularity because that would result in the court rehearing the dispute which the parties have referred to arbitration. If the court is satisfied that the application had not been deprived of his opportunity to present his case properly and that he would have conducted his case in a similar way with or without the irregularity, then the award will be upheld: see the judgment of Ward LJ in **Checkpoint**.

60. Finally on this point, it should be noted that many applications are brought under s.68 because the application has, for whatever reason, lost confidence in the arbitrator. The authorities are clear that in the absence of real and substantial injustice to the application due to a procedural irregularity such lost confidence cannot lead to an order removing the arbitrator or setting aside the award: see **Conder Structures v. Kavaerner Construction Ltd**. [1999] A.D.R.L.J.305.

61. I now deal in turn with each of the ten individual complaints said to amount to a serious irregularity pursuant to s.68(2) which, according to RBA, justify setting aside the award.

**Ground 1/ Buildability**

62. One of the most important issues in the arbitration was whether or not the TDP was buildable. The evidence apparently ranged over a variety of potential problems with the design. The Arbitrator concluded that the TDP was not buildable for reasons related both to the structural adequacy of the design and the practical difficulties inherent in building to such a design. I have summarised many of the important findings in this regard at para.19 above.

63. At para.127 of the Award, which I have set out in para.18(g) above, the Arbitrator provided a definition of buildability. RBA's complaint is that this definition was the Arbitrator's own, and was one on which they had had no opportunity to comment or make submissions. They also say that this definition was not part of DMD's case and ignored the evidence put before the Arbitrator. Accordingly, RBA say there has been a serious irregularity under s.68(2)(a) or (d). They also say that, although the Award does not expressly make findings on the basis of this definition, there has been a serious injustice as a result of the Arbitrator's presumed use of this definition in considering the TDP.

64. I am bound to say that I consider this criticism of the Arbitrator to be quite unfounded. It is clear that both parties spent a good deal of time and effort arguing about was meant by 'buildable' and how such a concept should be interpreted by reference to the TDP. Mr. Sears Q.C. tells me that DMD argued, at least by the end of the arbitration hearing, that 'buildable' meant 'realistically buildable', whilst RBA maintained that it meant 'practically buildable'. It is not easy to discern any meaningful difference between these definitions. I also note that from Mr. Lonsdale's second statement at para.59 there was a suggestion that what mattered was whether or not the design was 'theoretically buildable'. That of course introduces a yet further definition. The position was made even more complicated by DMD's note for the hearing on the 2nd August which maintained that RBA's definition actually meant 'structurally adequate'. In the face of all these differing and competing definitions, and the fine distinctions between them, it appears that the Arbitrator considered all the evidence and all those submissions and then, applying his own engineering experience, supplied his own definition of buildability. In my judgment, he was quite entitled to do that. Moreover, I am entirely satisfied that his definition was sufficiently close to the definitions being proffered by both parties to make any criticism of it misconceived. I am satisfied that his was a definition that was reached by reference to all the evidence presented to him.

65. I should also say, to the extent that it is relevant, that I do not accept the specific suggestion in para.59 of Mr. Lonsdale's second witness statement that Mr. Nicholson conceded that the reinforcement could be practically accommodated within the deviator block. Although this is only one part of the argument on buildability, it does seem to me to typify a tendency on the part of RBA in these proceedings to describe evidence from Mr. Nicholson as amounting to an agreement or a concession

when, on closer analysis, it is no such thing. On this particular point it is clear from Mr. Nicholson's cross-examination on day 13, at pp.34 and following, that he believed, at best, that the amount of reinforcement required by the design would not be practical because "a contractor would not be able to construct this on such a critical detail", and, at worst, that he "could see a situation where it could be impossible when one actually did all the numbers".

66. Furthermore, in relation to this first ground of the application under s.68, I consider that it is artificial to concentrate solely on the Arbitrator's definition of buildability without going on to consider the detailed findings that he made as to why the TDP was not buildable. I have summarised those findings at para.19 above. Those findings were based on the evidence and they represented the Arbitrator's considered conclusion on that evidence. Mr. Sears Q.C. does not say, because he cannot on the material available, that if the definition of buildability had been different any of the relevant findings at paras.128 to 143 of the Award would also have been different. Accordingly, I accept Mr. Furst Q.C's submission that even if, which I do not accept, the Arbitrator's definition of buildability somehow resulted from a serious irregularity, it has not and will not cause substantial injustice to DMD.

67. Accordingly, I reject the first ground to set aside the serious irregularity under s.68(2)(a) or (d).

**Ground 2/ The Length of the Deviator Block**

68. The Arbitrator found that the length of the deviator block proposed by RBA as part of the TDP was 1200 mm and that such a block would have been structurally inadequate. The key paragraphs are 128 and 129 of the Award, and those are set out at para.18(h) above. RBA complain that it was their case that, whilst there were two sketches which erroneously showed a 1200 mm dimension, it was their intention to use blocks which were 1500 mm long, and this evidence was never challenged. Accordingly, they say that the Arbitrator made a finding which was not based on DMD's case (because DMD had not challenged the RBA witnesses) and/or upon which RBA had not been able to make submissions and that there has been a serious irregularity as a result. In my judgment, this ground of complaint under s.68(2)(a) or (d) fails at every level.

69. It is plain that RBA's evidence was **not** that the sketch showing a 1200 mm dimension, which they themselves had provided, was simply the product of a drafting error. Mr. Bourne was cross-examined by Mr. Stead on this very point (day 6, pp.70-76 in particular). Mr. Bourne maintained that the 1200 mm figure was a product of his own calculation (p.71, line 5), and that it was only "marginally inconsistent" with the 1500 mm dimension which it was agreed would have been sufficient (p.76, line 10). Mr. Bourne maintained that a dimension of 1200 mm was adequate and would have worked, the only difference being that, in his words, the 1500 mm dimension was "***more comfortable***" (p.71, line 24). He was therefore positively adopting the 1200 mm dimension and the design work which he said had deliberately led to its inclusion in the RBA sketches.

70. When considering what was included within the TDP, the Arbitrator would have considered the documents which, as we have seen, showed at 1200 mm dimension marked on the RBA sketches. He would also have considered Mr. Bourne's evidence, which I have set out above, which expressly supported the 1200 mm dimension. The Arbitrator obviously concluded, as a matter of fact, that in accordance with that evidence the TDP included a 1200 mm dimension for the deviator block. I can see no possible ground for criticising this finding of fact.

71. The suggestion that RBA's case as to their intention to use 1500 mm rather than 1200 mm deviator blocks was never challenged is patently incorrect. The passage of Mr. Bourne's cross-examination to which I have referred makes it quite clear that the alleged intention was the subject of investigation in cross-examination and resulted in clear evidence from Mr. Bourne.

72. RBA's real complaint, in my judgment, is that although they said that it was their intention to use deviator blocks of 1500 mm in the TDP the Arbitrator found that the TDP had in fact adopted a 1200 mm figure. As I have said, he was quite entitled to do that, but I should also say that, in my view, RBA's intention was ultimately irrelevant. It was what they provided by way of the TDP that matters and, on the Arbitrator's approach, that TDP was inadequate because, amongst other things, it

included a deviator block of insufficient length. The Arbitrator made no finding as to RBA's intention, nor was he required to do so. It was the TDP itself that mattered.

73. For these reasons I consider that no criticism can properly be made of the Arbitrator. He made a finding of fact as to what was included within the TDP and was entitled so to do. There was no injustice or unfairness to RBA. Not only did they advance evidence on the point but it was also some of their own evidence from Mr. Bourne that led the Arbitrator to reach the conclusion that he did. This ground for the application under s.68(2)(a) and (d) therefore fails.

**Ground 3/ Mr. Hambly's Inexperience**

74. RBA complain that the Arbitrator found that Mr. Hambly was inexperienced and not properly supervised and that, implicitly at any rate, the Arbitrator then linked these failings to the problems with the TDP. RBA submit that he did so despite the fact that RBA's witnesses of fact were not asked about this point and despite the lack of any evidence linking inexperience or lack of supervision to the deficiencies in the design.

75. I can deal with this ground of complaint shortly. It is clear from any fair reading of the Award that the Arbitrator's criticisms of the TDP were specific engineering criticisms of the TDP itself: what Mr. Furst Q.C. called the product of the RBA design process. When considering how the errors came about the Arbitrator obviously thought that one explanation was Mr. Hambly's inexperience and lack of supervision. It was for that reason that he properly debated the point with the experts from both sides. But the Arbitrator's comments about Mr. Hambly are clearly just that: they are general observations on the evidence, no more and no less. They are not part of any consideration of the design deficiencies themselves. Put another way, the Arbitrator could have found that Mr. Hambly was an experienced engineer who was fully supervised, but such a finding would not have affected the specific criticisms which he made of the TDP in his Award. Therefore not only are the Arbitrator's findings in respect of Mr. Hambly mere observations on the evidence but they were ultimately irrelevant to his decision-making process in any event, and therefore incapable of giving rise to a substantial injustice. This ground of complaint under s.68(2)(a) or (d) therefore fails.

**Ground 4/ The Reason for the Change in Design**

*76.* RBA make three separate criticisms of the Arbitrator in respect of his findings at para.135 of the Award as to the reason for the changes to the TDP. This finding specifically involves Mr. Brennan. The Arbitrator said: *"I have read with care the evidence given by Mr. Brennan, both written and oral, and where Mr. Brennan remained as loyal to his employers as he could his evidence indicates how he found it necessary to increase the number of anchorages and deviators from that shown on the TDP because he considered that the design prepared prior to his involvement was not buildable in the form shown, and certain critical issues had not been adequately addressed. He did what he had to do, and that was to redesign the viaduct such that it could be built and would comply with the contractual requirements. As every good engineer should he got the engineering right, and this had devastating consequences on the commercial and contractual situation of DMD."*

77. First, RBA say that it was not put to Mr. Brennan that the TDP was not buildable. Secondly, they say that there was evidence from Mr. Nicholson that he did not believe the design changed because RBA thought that it was unbuildable. They say that in consequence of these two criticisms the Arbitrator's findings were not based on DMD's case and/or had not been put to RBA's witnesses. Thirdly, they say that the Arbitrator provided no reasons for his conclusion that Mr. Brennan of RBA changed the design because he considered the TDP was not buildable. I deal with each point in turn.

**a) Point Not Put to Mr. Brennan**

78. Mr. Furst Q.C. argued that even if this ground was made out it could not trigger an application under s.68. He said that it was at most a criticism of Mr. Stead's conduct at the hearing rather than a criticism of the Arbitrator. There may be some force in that point but it is unnecessary for me to decide it because of my firm conclusion that the matter was in fact put, and very fairly, by Mr. Stead to Mr. Brennan during the latter's cross-examination on day 8, starting at p.86.

79. In this part of his cross-examination Mr. Brennan was taken in detail through his views of the TDP. Mr. Brennan confirmed that the design within the TDP led to a number of structural concerns on his part. It was, he said, "less practical" (p.89, line 19) than the Final Design for which he was largely responsible. He concluded that the TDP "was not viable" in respect of the particular design matters with which he had been asked to deal.

80. It is clear that the Arbitrator's finding at para.135, which I have just identified, is based fairly and squarely on this passage of evidence. I find, for these purposes, that there is no meaningful distinction between what is 'buildable' and what is 'viable', particularly given my comments about the fine distinctions between the different interpretations of buildability at para.65 above. Accordingly, I reject the suggestion that Mr. Brennan was not cross-examined on this point, and I find that the Arbitrator was entitled to reach the conclusion that he did on Mr. Brennan's evidence.

**b) Mr. Nicholson's evidence**

81. I do not consider that RBA's next point as to Mr. Nicholson's evidence has any bearing whatsoever on this part of the Award. RBA's changes to the design, and their reasons for making those changes, were matters of fact. It was therefore completely irrelevant whether Mr. Nicholson, as an expert, thought that RBA believed that the TDP was unbuildable. However, for the avoidance of doubt, I do not consider that Mr. Nicholson made the concession alleged by RBA. His evidence on day 14, starting at p.103, was to the effect that, as far as he could tell, Mr. Brennan was making the segments "easier to construct" (p.104, line 14), but that it was difficult for him to comment further given the absence of RBA's calculations relating to the TDP which would have revealed whether or not the TDP worked (p.103, lines 18 to 22). Of course the absence of such calculations and other records was a further ground for criticism of RBA. Accordingly, I do not believe that there was a concession in the terms relied on by RBA. Even if there had been, it was not evidence from an expert on which the Arbitrator was obliged to place any weight at all, particularly given the direct factual evidence of Mr. Brennan himself. Accordingly, this criticism of the Arbitrator is also unfounded.

**c) Absence of Reasons**

82. The final criticism relevant to this part of the application is that the Arbitrator provided no reasons for concluding that Mr. Brennan changed the design because the TDP was not buildable. Again I am driven to conclude that this criticism is not made out on the face of the Award itself. Paragraphs 128 to 143 of the Award set out the Arbitrator's criticisms of the TDP. Paragraph 135 deals with the Arbitrator's findings that Mr. Brennan was aware of and obliged to act upon the deficiencies within the TDP and both strands of the evidence are combined at para.143, which I have set out earlier at para.18(a) of this Judgment. Thus the reasons for the changes, RBA's awareness of those reasons and their failure to inform DMD of them are all brought together by the Arbitrator in para.143 of the Award.

83. Accordingly, I reject the suggestion that the Arbitrator has given no reasons for his finding. On the contrary, he has given full reasons and has explained each step in his thinking. It was not necessary for him to deal with matters which were, on his approach, peripheral. Accordingly, this ground of the application under s.68(2)(a) or (d) must fail.

**Ground 5/ The Finite Element Analysis**

84. RBA criticise a number of the Arbitrator's findings in respect of the Finite Element Analysis, and these are set out in para.49 of the Grounds of Application. They stem mainly from para.134 of the Award.

85. RBA say that the findings in para.135 were not open to the Arbitrator and that RBA have not been given an opportunity to address the relevant points which are set out there. It seems to me that there are two insurmountable hurdles in RBA's path in seeking to persuade me that this is a legitimate criticism under s.68(2)(a) or (d).

86. First, it seems to me that the Arbitrator's findings precisely reflected the evidence. He found that the evidence about what Mr. Farooq's finite element analysis actually demonstrated was contradictory and it was therefore difficult to draw firm conclusions from it; that he remained doubtful whether a finite element analysis would show that a 1200 mm deviator block would have worked; and that, in all

the circumstances, he preferred to rely on the shear stress calculations. These findings reflected the clear disagreement between the experts as expressly noted at para.3.1 of the experts' agreement document dated the 28th January 2004. There was then oral evidence from both experts on this topic. These disagreements and further evidence were summarised by the Arbitrator in para.134 of his Award. So no submission can be made to the effect that these findings were not open to the Arbitrator, nor that the RBA witnesses, particularly Mr. Farooq, did not have a full opportunity to deal with them.

87. Secondly, I am not persuaded that even if, contrary to my view, the Arbitrator's findings in respect of the finite element analysis could be criticised, these findings are of any particular significance in the context of the Award overall. Therefore there has been or will be no substantial injustice to RBA as a result of these findings. The finite element analysis was just one way in which the design in the TDP was checked by Mr. Farooq. Further work on the finite element analysis was not done because, according to the experts' agreement of the 28th January, shear calculations on the 1200 mm deviator showed shear stresses in excess of those permitted by the British Standards, and the strut and tie calculations showed a density of reinforcement which Mr. Nicholson thought unreasonable. Thus, the finite element analysis was effectively overtaken by other evidence and was plainly not critical to the Arbitrator's decision. Accordingly, any findings by the Arbitrator on the finite element analysis (even if, which I do not believe, they were capable of criticism) have not led, and will not lead, to substantial injustice. This ground of the application under s.68(2)(a) and (d) therefore fails.

**Ground 6/ No Detailed Weight Calculation**

88. Although this ground of complaint featured in RBA's original application to set aside the award, at para.111 of his skeleton argument Mr. Sears Q.C. expressly abandoned it, conceding on behalf of RBA that even if it could be proved no substantial injustice could be shown to have resulted.

**Ground 7/ The Design of the Reinforcement**

89. This ground of complaint under s.68(2) is very similar to a number of the criticisms made of the arbitrator which are relied on for the appeal under s.69 of the 1996 Act, and it is itself repeated as ground 4 of that application. Accordingly, for convenience I deal with this ground in Section G of this Judgment at paras.149 to 153 below.

**Ground 8/ Delay**

90. This is the principal ground on which RBA relied in support of the Arbitrator's alleged failure to conduct the proceedings properly. I have considered and rejected this complaint in Section E, paras.22 to 49 of this Judgment. For the reasons set out there, I am entirely satisfied that there has been no serious irregularity as contended for by RBA and that therefore this ground of the application under s.68(2)(a) and (d), as well as that under s.24, must fail.

**Ground 9/ Miscellaneous Allegations**

91. There are two complaints under this head. The first concerns an incompatibility between the detail issued to TCL and the box-outs shown on the segment drawings issued to DMD. The second concerns the claim for additional regulatory material due to alignment data errors made by RBA. The criticism each time is that there was no evidence to support the adverse finding made by the Arbitrator. Although I go on and deal briefly with each of those criticisms, it seems to me that, in any event, no substantial injustice could have resulted from either of these two complaints and therefore neither could lead to a successful application under s.68(2) in any event.

92. As to the incompatibility point, it is clear to me that there was relevant evidence before the Arbitrator. That evidence is summarised at paras.25.3 to 25.7 of DMD's Closing Submissions which makes reference, amongst other things, to the documents and the comments of Mr. Farooq. There can therefore be no question but that RBA had a proper opportunity to deal with this point. Again I am bound to conclude that RBA's criticism of the Arbitrator is in respect of his adverse conclusion, not how he arrived at it. This criticism is therefore rejected.

93. As to the alignment point, I again conclude that there was evidence on this issue before the Arbitrator, and thus his finding cannot be criticised. Mr. Stafford's appendix 8 to the Amended Points of Claim at

section 8.4 sets out the criticism, and it was supported by his witness statement. More importantly, the complaint of misalignment was set out in the contemporaneous documents, and Mr. Hambly of RBA actually admitted that there had been alignment errors. In the circumstances, the Arbitrator cannot be criticised for coming to the conclusion that he did. Again this ground of application under s.68(2)(a) and (d) must fail.

**Ground 10/ Failure To Provide Any or Any Sufficient Reasons**

*94.* The final ground of the application under s.68(2) is different to the others. It is a complaint under sub-sections (f) and/or (h) that the Arbitrator failed to provide proper or sufficient reasons for his decision and that, accordingly, the Award should be set aside because it is uncertain or not in proper form. On the 18th March 2005 RBA sent the Arbitrator a detailed list of questions to which they sought answers. This letter referred to s.57(3)(a) of the Act, which provides that: *"The tribunal may, on its own initiative, or on the application of a party – (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award …"*

The Arbitrator declined to answer any of the questions by letter dated the 4th April 2005. The Arbitrator and DMD apparently thought that the application was being made under s.57(3)(b) of the Act (making an additional award on a claim within the arbitration but not in the award itself), although it is unclear why they made this error since RBA's letter plainly refers only to s.57(3)(a).

95. The obligation to provide reasons is an important part of the arbitrator's function. At para.21.16 of **Arbitration Law**, by Professor Robert Merkin (December 2004 update) the learned editors say that, "It is strongly arguable that unless a party knows the reasons for an award there is automatically substantial injustice to him", and the relevant footnote suggests that, "This is indeed the very rationale of the requirement that arbitrators are to give reasons". I respectfully agree with those comments. Accordingly, I reject Mr. Furst Q.C's submission that this ground of RBA's application under s.68 must fail because they have not been able to demonstrate any substantial injustice from the alleged absence of reasons. If there were no or insufficient reasons the substantial injustice would, in my judgment, be automatic.

96. Bearing in mind the guidance in the authorities set out in paras.52-56 of this judgment above, the question in this case becomes: are further reasons required to clarify or remove any ambiguity in the Award? In considering that issue I have found the following reasoning of Colman J in **World Trade** of particular assistance.

> *"8. I am not able to accept the submission that this kind of criticism falls within section 57(3). The omission to attach weight or sufficient weight to particular evidence in arriving at a conclusion on the question of fact is, in my judgment, not a basis for deploying section 57(3)(a). An award which determines a question of fact relevant to an issue to be decided, and in doing so gives weight to some evidence but fails to give weight to or even mention other evidence, cannot normally be treated as containing any ambiguity at all. It is not the case that the award or the findings are capable of more than one meaning. The need for clarification does not arise because the arbitrators have, by definition, arrived at a clear and unambiguous conclusion on the relevant question of fact. They are under no duty to deal with every possible argument on the facts and to explain why they attach more weight to some evidence than to other evidence. Unless the award is so opaque that it cannot be ascertained from reading it by what evidential route they arrived at their conclusion on the question of fact there is nothing to clarify. To arrive at a conclusion of fact expressly on the basis of evidence that was before them does not call for clarification for it is unambiguously clear that they have given more weight to that evidence than to other evidence.*
>
> *9. In this connection it is clear that arbitrators are not in general required to set out in their reasons an explanation for each step taken by them in arriving at their evaluation of the evidence and, in particular, for their attaching more weight to some evidence than to other evidence or for attaching no weight at all to such other evidence."*

97. Applying this reasoning to the present case, there are three reasons why I reject RBA's submission that the Arbitrator should provide reasons to clarify or remove any ambiguity in the Award or that his Award was somehow lacking in clarity.

**a) The Detail of the Award**

98. The Award contains specific reasons for the Arbitrator's findings, as I have summarised above. He has concluded that the design changed because the TDP was unbuildable, and he made detailed criticisms of RBA by reference to the evidence. Whilst the findings are often expressed very shortly, none are unexplained or unclear. Since he was not obliged to deal with every peripheral issue the Arbitrator cannot therefore be criticised if he has not done so. There is, in short, nothing which requires clarification and nothing which remains ambiguous in the Award.

**b) The Caveat in the Award**

*99.* I have, at para.18(a) of this Judgment, set out para.108 of the Award, in which the arbitrator expressly said that he would not deal with peripheral matters. This confirmed an approach which is also indicated in para.106, where the Arbitrator said: *"I have omitted from this award narrative that I consider as superfluous to the actual issues in dispute – that is professional negligence on the part of RBA."*

Para. 107 of the Award is also of relevance, because there the Arbitrator gives his view that much of the factual witness testimony was irrelevant to the issues to be decided. He was careful to note that: *"The parties should rest assured that I have been through all the evidence and the transcripts carefully, and taken due account of this material in formulating this award."*

100. In the circumstances it seems to me that the Arbitrator has properly explained, within his Award, that it would be limited to the evidence and issues which he considered significant and necessary in order to reach his conclusion as to the TDP and any other criticisms of RBA's performance. I consider that the Award achieves that function. It would therefore be illegitimate to criticise the Arbitrator for taking the course outlined in these parts of his Award, particularly given that that is the approach expressly encouraged in the authorities to which I have referred.

**c) The Nature of the Questions**

*101.* Mr. Furst Q.C. spent some time criticising the questions that were asked of the arbitrator on the 18th March, saying that they amounted to a misconceived attempt to interrogate the Arbitrator. Whilst I consider that that submission does not properly apply to each of the questions asked, I do believe that many of the questions raised by RBA were inappropriate and in some instances unfair. Taking simply one or two by way of example, I consider that these questions were inappropriate: *"Please state:*

*7.1. Which part or parts of the factual witness testimony you consider to be irrelevant to the issues to be decided and your reasons for reaching that conclusion.*

*7.2. Which issues that were raised and argued that you consider do not bear directly on the principal issue and your reasons for reaching that conclusion."*

Another example is perhaps the question at 8.1 in which, in respect of the meeting on the 7th November, RBA asked the arbitrator why he preferred the account of Mr. Davies over the account of Mr. Bourne. I consider that these questions and others like them were designed, not to obtain clarification, but to cross-examine the arbitrator on the fine detail of his decision-making process.

102. In my judgment, these questions were specific, and often loaded, because many of the Arbitrator's findings were not only against but RBA but were explained in clear language. As a result, RBA's questions had to approach the issues from a slightly different angle to try and tease out, for instance, a potential incompatibility between one finding and another. The vast bulk of the questions were not the sort of questions permitted under s.57(3)(a) because they did not and could not address any ambiguity or absence of clarity.

103. Accordingly, for these reasons, the application to set aside for lack of reasons under s.68(2)(f) and (h) must fail.

**Summary in Respect of Serious Irregularity**

104. For the reasons set out in paras.50 to 103 above, I am entirely satisfied that no serious irregularity on the part of the Arbitrator has been demonstrated. In addition, where noted, I do not consider that any substantial injustice has resulted or will result from the matters complained of. Accordingly, the application to set aside all or part of the award under s.68(2) must fail.

**G THE APPLICATION UNDER SECTIN 69: APPEAL**

**The Relevant Section of the 1996 Act**

105. The relevant parts of s.69 of the 1996 Act relied on by RBA are as follows:

*"(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings …*

*(2) An appeal shall not be brought under this section except …*

*(b) with the leave of the court.*

*(3) Leave to appeal shall be given only if the court is satisfied –*

*(a) that the determination of the question will substantially affect the rights of one or more of the parties,*

*(b) that the question is one which the tribunal was asked to determine,*

*(c) that on the basis of the findings of fact in the award –*

*(i) the decision of the tribunal on the question is obviously wrong …*

*(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."*

106. In essence therefore in respect of each of the five grounds set out in this part of their application RBA must demonstrate:

(a) a question of law;

(b) which will substantially affect the rights of one or more of the parties;

(c) which the Arbitrator was asked to determine;

(d) on which the Arbitrator was obviously wrong (it being common ground that none of the points raised by RBA are of general public importance); and

(e) which it is just and proper for the court to determine.

I deal shortly with a number of these elements below.

**Question of Law**

107. At para.29(1) of **Arbitration Law** the learned editors express the view that, for the purpose of the 1996 Act, an error of law arises where the arbitrator errs in ascertaining the legal principle which is to be applied to the factual issues in the dispute, and does not arise if the arbitrator, having identified the correct legal principle, goes on to apply it incorrectly. The decision in **Northern Elevator Manufacturing v. United Engineers (Singapore)** [2004] 2 S.L.R.494 is cited in support of that proposition. I respectfully agree with and adopt that analysis.

*108.* Furthermore, there can be no error of law if the arbitrator reached a decision which was within the permissible range of solutions open to him. In **The Matthew** [1992] Ll.Rep.323 Steyn J (as he then was) said: *"The arbitrators plainly erred in their approach on this aspect, yet it must be borne in mind that their decision was not one of pure law, it was a question of mixed law and fact. In such a situation their error in approach is not by itself decisive. It is still necessary to consider whether their actual decision in all the circumstances falls outside the permissible range of solutions open to arbitrators."*

As the passage makes quite clear, that reasoning applies specifically to findings of mixed fact and law. However, I consider it to be of some assistance in the present case.

109. A number of the alleged errors of law relied on by RBA arise out of findings by the arbitrator which they say are not based on any evidence. **Moran v. Lloyd** [1983] Q.B.542 is authority for the proposition that whether or not there is a sufficient evidential basis for a finding of fact is undoubtedly a question of law, and it is cited in support of that proposition at para. 21.10 of **Arbitration Law**. However, it is clear that s.34(2)(f) of the 1996 Act, which allows an arbitrator to determine the weight of any evidence, makes a challenge on this basis under s.69 very difficult and likely to succeed only in the most exceptional cases, a point also made at para.21.10 of **Arbitration Law**, and para.170 of the DAC report previously referred to. In **Fencegate v. NEL Construction** [2001] 82 Con.L.R.41 His Honour Judge Thornton QC drew a distinction between a finding based on very little evidence which he said could not be an error of law, and one based on no evidence at all, which the judge found could be an error of law. I agree with that broad distinction, and note that Eady J made a similar distinction in **Guardcliffe Properties v. City & St. James** [2003] EWHC.215. I should add that in this connection Mr.

Sears Q.C. relied on my own judgment in **Newfield v. Tomlinson** [2004] 97 Con.L.R.148, in which I follow the reasoning in **Fencegate**, albeit on a different point and in respect of a different kind of dispute.

**Obviously Wrong**

110. Since RBA do not suggest that any of the five points relied on under s.69 raise a point of public importance they must demonstrate that on each issue the arbitrator was obviously wrong. On an application for permission to appeal under s.69(3)(c)(i) the obvious error must normally be demonstrable on the face of the award itself, and whilst I have allowed both parties to refer to some other material in this case because it has been convenient to deal with the applications for permission and the substantive appeal together, I have kept in mind at all times the principle that unless the error of law relied on is clear and obvious the application under s.69 must automatically fail.

**Just and Proper for the Court to Determine**

111. Paragraph 21.44 of **Arbitration Law** suggests that in considering whether it is just and proper for the court to determine the question of law, the qualifications of the arbitrator may be of some relevance. In **Gold & Resource Developments (New Zealand) Ltd. v. Doug Hood Ltd**. [2000] N.Z.C.A.131, the New Zealand Court of Appeal held that the qualifications of the arbitrator were a relevant factor because if the arbitrator was a lawyer there was less justification for permission to appeal as the parties can be assumed to have wanted to rely upon his expertise. It seems to me that this criteria is perhaps of limited relevance in the UK, although, as Mr. Furst Q.C. put it, it might be of some significant in marginal cases. I note that Aikens J in **Reliance Industries v. Enron Oil & Gas India Ltd**. [2002] 1 All E.R.Com.59 decided that if he had had the necessary jurisdiction he would have refused permission to appeal because, amongst other things, the arbitrators were highly distinguished, and their view on the construction of a one-off contract ought not to be interfered with. Similarly, in **Keydon Estates v. Western Power Distribution (South Wales) Ltd**. [2004] E.W.H.C.996 permission to appeal was refused because, amongst other things, the parties had appointed an experienced Chancery Q.C. to act as arbitrator in order to resolve the dispute about the proper interpretation of a lease.

112. I now turn to deal with the five grounds which are relied on by RBA in support of their application to appeal.

**Ground 1/ Schedule of Principal Quantities**

113. In reality this topic raises a number of different errors of law, five in all alleged by RBA, and therefore each must be considered in turn. They are:
    (a) whether or not the obligation to produce the SPQ was owed to TCL only or, as the Arbitrator found, to DMD as well;
    (b) whether the obligation was an absolute obligation to produce an SPQ that was precisely accurate in every particular, or an obligation qualified by RBA's general obligation to exercise reasonable skill and care;
    (c) whether the Arbitrator erred in comparing the SPQ with the final design;
    (d) whether the Arbitrator erred in criticising the SPQ solely by reference to the increased quantities that were necessary;
    (e) whether the Arbitrator erred in considering the lack of modification to the SPQ between the time of the production of the ADP and the time of the TDP.

**a) To Whom Was The Obligation Owed?**

114. It was RBA's case in the arbitraton that the contractual obligation to produce the SPQ was owed to TCL only and that any duty to DMD in tort could not have included this obligation since it was not included in the express words of the Design Agreement. DMD contended that, as a matter of construction of the Design Agreement, the obligation to produce the SPQ was owed to DMD as well as to TCL, and that, in the alternative, there was a like duty at common law. The arbitrator agreed with DMD, finding the obligation was owed to DMD as well as TCL, both as matter of contract construction and common law.

115. The finding that the contractual obligation to produce the SPQ was owed to DMD is said by RBA in these proceedings to be a matter of law on which the Arbitrator was obviously wrong. DMD accept that it is a matter of law but say that not only was the Arbitrator not obviously wrong, he was manifestly right to reach the conclusion that he did.

116. In order properly to consider this point it is, I am afraid, necessary to set out one or two parts of the Design Agreement of the 17th June 1997. Under that agreement TCL and DMD are jointly referred to as "the Contractors" and RBA are referred to as "the Designer".

*"**Clause 1(a)** The Designer will carry out the services (as more particularly detailed in Appendix 2) required in connection with the project (hereinafter called the 'services') in accordance with the terms and conditions set out in this Agreement and shall provide such design to allow TCL to fulfil its obligations to the Employer subject to the acceptance of the Designer's appointment by the Employer.*

*(c) Unless otherwise jointly agreed the detailed programme for the performance of the Services at Contract stage will conform with the Outline Design Programme set out in Appendix 8.*

*(f) The Designer acknowledges that he has been or will be involved with TCL in the submission of the commercial tender to the Employer. The Designer further confirms that it is not aware at the date of this Agreement of any reason why a design cannot be produced which can be constructed in accordance with the Tender proposals … Further the Designer undertakes at all times to design and to perform his obligations under this Agreement taking account of the best commercial interests of the Contractors and so as not to interfere with the commercial opportunity of the Contractors.*

*(g) The terms and conditions of this Agreement shall apply retrospectively to any work carried out prior to the date hereof in relation to the project …*

***Clause 2 (c)** The Designer hereby acknowledges that any breach by it of this Agreement may result in DMD committing breaches of the JVA and becoming liable in damages to TCL under the JVA, and that it may also result in TCL committing breaches of and becoming liable in damages under the Contract … and all such damages loss and expense I hereby agree to be within the contemplation of the parties as being probable results of any such breach by the Designer.*

***Clause 4** The Designer hereby acknowledges that the Contractors shall be deemed to have relied and will continue to rely upon the Designer's reasonable skill, care and diligence in respect of the Services.*

***Clause 18** The Designer hereby undertakes to the Contractors that it has since the beginning of its involved in the project prior to the submission of the Design 2 tender and will continue to*

*(i) carry out its duties and responsibilities professionally …*

*(iii) use all the reasonable skill, care and diligence of a Consultant Engineer experienced in carrying out projects of the size and scope of the project in undertaking the Services …*

***Appendix 2***

***Services Required of the Designer***

*(i) Pre-Bid Design State.*

*(a) Alternative Design. … The Designer shall prepare a Schedule of Principal Quantities in a form to be agreed with TCL. The Schedule must comprehensively identify and quantify the works to be constructed in accordance with the Contract with the Employer."*

117. The contractual matrix was as I have indicated above, namely that there was a Joint Venture between TCL and DMD, with TCL acting as main contractor and DMD effectively fulfilling the role of subcontractor in respect of the superstructure. It was TCL's bid for the main contract that had to be accepted by the Secretary of State for Transport, but that bid relied upon RBA's TDP and SPQ. DMD's tender for the superstructure, which was incorporated by TCL into their bid, also relied upon RBA's TDP and SPQ.

118. In those circumstances it seems to me clear that, as a matter of construction of the Design Agreement as a whole, RBA owed an obligation to both the contractors, namely TCL and DMD, to produce a proper SPQ. It would be entirely artificial to say that this obligation was owed only to the main contractor, and not to the other contractor who was going to be carrying out the actual construction of the superstructure. The specific reference to TCL in Appendix 2(i)(a) is explained because it was they

who were providing the bid to the Secretary of State. Furthermore, the reference in the Appendix to TCL is to TCL simply 'agreeing the content' of the SPQ. That does not prevent the preceeding obligation on the part of RBA, namely to produce the SPQ in the first place, being owed to both contractors. Accordingly, in my judgment, the Arbitrator was quite right to reach the conclusion that he did. Furthermore, on any view it is simply not possible to find that the Arbitrator was, on the face of the Award, obviously wrong in concluding that the obligation to produce the SPQ was owed to DMD as well as TCL. Accordingly that ground of appeal must fail.

119. For completeness, however, I should say that I also accept Mr. Furst Q.C's other argument on this point, namely that even if the Arbitrator was obviously wrong in contract it ultimately makes no difference because he found a like obligation at common law.

120. On this topic, Mr. Furst Q.C's starting-point was that there is no application to appeal the Arbitrator's finding of a duty in tort. RBA's grounds of application only seek to attack the finding in contract. That may well be right, although I would be reluctant to decide that issue on what is effectively a pleading point. But I consider that Mr. Furst Q.C. is correct to say that there can be no suggestion in substance that the Arbitrator's finding of an obligation at common law was obviously wrong, because there has been no attempt to raise before me questions of reliance, assumption of responsibility and the like. It would, in my judgment, be quite impossible for me to hold that, although he heard the witnesses and considered all the evidence, the Arbitrator was obviously wrong in coming to the conclusion that the duty owed to DMD in tort included the duty to produce an SPQ.

121. Mr. Sears Q.C. relies on **Henderson v. Merrettt** as somehow demonstrating that, if RBA owed no obligation to produce an SPQ in contract, the omission could not be made good by a finding in tort. I do not accept that submission. Indeed, in **Henderson v. Merrett** a duty at common law was found despite the exclusion clauses in the underlying contract. In any event, in this case the existence of such a duty to produce an SPQ depended on the facts and, in particular, whether there had been an assumption of responsibility by RBA to DMD in that regard. As I have said, it is not suggested that the Arbitrator was obviously wrong to find a duty of care on the facts, and so Mr. Furst Q.C. is right to say that the Arbitrator's construction of the Design Agreement does not ultimately matter in any event, given the unchallengeable finding of a duty of care in tort.

**b) Absolute Obligation or Skill and Care**

*122.* RBA complained that the Arbitrator effectively found that their obligation to produce an SPQ was an absolute obligation to produce an SPQ that was accurate in every respect. In support of that contention they rely upon para.156 of the Award and the Arbitrator's finding that: *"The obligation to provide an SPQ for a bridge that can be built to the Contract requirements stands alone. There were numerous inadequacies in the SPQ in that it did not reflect what was, in the event, the design necessary to comply with the Contract requirements, namely the Final Design, and consequently there was a breach of the contractual obligations imposed upon RBA."*

123. RBA say that this finding amounted to an error of law because, on any view, their obligation in respect of the SPQ must have been tempered by clause 18 of the Design Agreement and the reference there to the exercise of care and skill.

*124.* DMD accept that RBA's obligation was to produce an SPQ exercising reasonable skill and care. However, they say that that is precisely what the Arbitrator found. They rely in particular upon the very next section of para.156 of the Award, which I have set out at para.18(m) above, in which, amongst other things, the Arbitrator says clearly that: *"It would be taking contractual compliance too far to expect the SPQ to be absolutely correct in every aspect."*

125. In further support of their contention that the Arbitrator was measuring the SPQ obligation by reference to reasonable skill and care and not any more onerous duty, DMD rely on:
(a) Paragraph 64 of the Award which sets out DMD's complaint by reference to a failure to use reasonable skill and care;
(b) Paragraph 93 of the Award with its reference to RBA's negligence in assessing the material quantities;

(c) Paragraph 96 of the Award with its express reference to the quantities in the SPQ in the context of negligence; and

(d) Paragraph 160 of the Award which says that RBA *"did not fully appreciate the importance of the contractual obligation to prepare the SPQ with reasonable skill and care"*.

126. It seems clear to me that, having regard to all the passages in the Award dealing with the SPQ, the Arbitrator dealt with RBA's duty to produce an SPQ as a duty in respect of which they had to exercise reasonable skill and care rather than some sort of absolute duty which obliged them to guarantee accuracy in every respect. That is the clear approach of the Arbitrator in the paragraphs of the Award set out in paras.124 and 125 above. Indeed, in my judgment, there is nothing in the Award that suggests that the Arbitrator considered the duty to be more onerous than the duty to exercise reasonable skill and care. I do not believe that the passage relied on by RBA in para.156 of the Award says that. Even if it did, it is immediately corrected by the very next sentence, as well as all the other references to the duty to exercise skill and care in the Award.

127. Accordingly, for these reasons I consider that this criticism of the Arbitrator is wholly unjustified. He did not make the finding which RBA said he did and there was therefore no error of law.

**c) Comparison with The Final Design**

128. RBA's next complaint is that the arbitrator erred in seeking to compare the work in the SPQ with the Final Design. They again rely on para.156 of the Award. They say that the Arbitrator was imposing on RBA an obligation to guarantee that the SPQ would contain the actual quantities necessitated by the Final Design.

129. DMD have two points in answer to this criticism. First they say that it is not formulated as, and is not capable of being, a point of law. Secondly they say that, again, the Arbitrator has not done what RBA say that he has done. DMD contend that the Arbitrator has properly compared the SPQ with what, in para.156 of the Award, the Arbitrator called "the design necessary to comply with the contract requirements".

130. As to DMD's first point, I agree that it is very difficult to see what the point of law is on which RBA say that the Arbitrator was obviously wrong, but the point may be academic since I am of the firm conclusion that the Arbitrator did not judge the SPQ by reference to the Final Design in any event. I consider that on any fair reading of para.156 of the Award, the Arbitrator was judging the SPQ by reference to those quantities produced by a design "necessary to comply with the contract requirements". It seems to me that that was a perfectly proper yardstick to use. I expand on the Arbitrator's reasoning at para.135 below in respect of the next (related) error of law of which he is accused. On this particular ground it is sufficient to say that I do not consider that the Arbitrator made the error of which he is accused.

131. I should add that on this point there is a slight air of artificiality about RBA's complaints. After all, the principal issue concerned the TDP and the changes from the TDP which led to the large increases in materials and the like, which form the basis of DMD's claim. The SPQ was based, or supposed to be based, on the TDP. Thus if the TDP was inadequate it is inevitable that the SPQ was also going to be inadequate. It therefore does not seem to me to matter very much how the Arbitrator categorised the nature of the inadequacy.

**d) Criticism Based on Increased Quantities**

132. This point is linked to the last. RBA contend that the Arbitrator erred in finding that the SPQ was inadequate simply because it did not reflect the increased quantities that eventually became necessary. They maintain that this was an error of law. Mr. Sears Q.C. said that it was similar to the case where a claimant erroneously maintained that an increase in price between an original estimate and a detailed tender bid must automatically indicate that the estimate was inadequate. In this respect, he relied on the decision of His Honour Judge Hicks Q.C. in **Copthorne Hotel (Newcastle) v. Arup** [1996] 58 Con.L.R.105 where the judge said:

*"67. … I hope and believe that I am not over-simplifying if I record the impression that the plaintiffs' main hope was that I would be persuaded to find in their favour simply by the size of the gap, absolutely and proportionately, between the cost estimate and the successful tender.*

*68. The gap was indeed enormous. It astonished and appalled the parties at the time and it astonishes me. I do not see, however, how that alone can carry the plaintiff home. There is no plea or argument that the maxim 'res ipsa loquitur' applies. Culpable underestimation is of course one obvious explanation of such a discrepancy, but far from the only one. The successful tender was not the lowest. The contractor may have over-specified from an excess of caution, or to obtain a greater profit, or suit the drilling equipment available or for some other reason. Market conditions may have changed or may have been subject to some distortion outside the knowledge and foresight of a reasonably competent professional adviser. These possibilities are not mutually exclusive amongst themselves or as between them and Arrup's negligence, but without evidence on which I can make a finding as to the sum which Arrup acting with due care and skill should have advised … I am not in a position to find that negligence was even one of the causes."*

133. DMD take two points in response to this criticism. First they say that this is not a matter of law; that there is no rule of law that an increase in quantities between an original design and a final design is not in itself enough to demonstrate negligence. Secondly they again contend that the Arbitrator did not in fact base his criticism of the SPQ on the actual increase in quantities between the SPQ and the final design. They say that the criticism was on a different basis.

134. I agree with the proposition that there is no rule of law that increased quantities are not of themselves enough to show negligence in the original design. **Copthorne** is a decision on its own facts. Indeed the judge was at pains to point out that his conclusion derived from the fact that the reasons for the increase had not been explored in detail. He also observed that in that case there had been no plea of ***'res ipsa loquitur'***, and the position might have been different if there had been. It is therefore impossible to categorise the criticism made by RBA in this respect, even if it were right, as an error of law.

135. However, much more importantly, I do not consider that the Arbitrator's criticisms of the SPQ were based solely or even principally on the increase in quantities that actually occurred. The following paragraphs of the Award contain some of the important criticisms of the SPQ:
(a) The derivation of the SPQ was in doubt due to RBA's failure to keep "decent records" (para.157);
(b) The SPQ should have been (but was not) modified between the time of the ADP and the TDP (para.160);
(c) The SPQ would in practice be inevitably linked to the TDP (para.156);
(d) The TDP as inadequate for the reasons which I have summarised in this judgment at para.19 above;
(e) Accordingly, the SPQ did not "reflect … the design necessary to comply with the contract requirements" (para.156).

136. Accordingly, on the basis of those findings, I have no hesitation in deciding that the Arbitrator was criticising the SPQ because it did not reflect the design required to build a viaduct in accordance with the contract; because there was a complete absence of documents from RBA setting out or explaining how and why the quantities in the SPQ had been arrived at; and because although the design had changed between the ADP and the TDP the SPQ had not. Each of those factors were matters which the Arbitrator was entitled to take into account and it is simply not open now to RBA to criticise him for so doing.

**e) The Lack of Modifications Between ADP and TDP**

137. RBA's final complaint under this head is that the lack of modifications to the SPQ between the ADP and the TDP was not pleaded, and therefore should not have been relied upon by the Arbitrator.

138. I summarily reject that complaint. It is clear that, during the course of the evidence, the Arbitrator became surprised at the absence of documents explaining the SPQ. The fact that the design changed between the time of the ADP and the TDP, but the SPQ did not, raised in his mind a clear concern that insufficient attention was being paid to the preparation of a proper SPQ. It was therefore a factor

which he was entitled to take into account on the evidence in support of his conclusion that, in accordance with the pleaded case, the SPQ was not prepared with reasonable skill and care. It was quite unnecessary for this point to be pleaded: it was evidence in support of a pleaded allegation. Moreover, RBA cannot complain that the Arbitrator did not take into account their evidence. Indeed it was RBA's evidence that there were no such modifications between ADP and TDP.

139. Accordingly, whilst the first ground of the appeal raises five different errors of law, I have no hesitation, for the reasons which I have given, in rejecting that ground of appeal on all five points.

**Ground 2/ Failure to Carry Out a Strut and Tie Calculation**

*140.* At para.136 of the Award, the Arbitrator said that: *"RBA was remiss and negligent in not having carried out strut and tie calculations at the time the ADP and TDP were being considered."*

RBA complained that this finding resulted from two errors of law. First, they complain that the Arbitrator made this finding even though the allegation was not pleaded. Secondly, they say that he made this finding in the face of agreed expert evidence that a strut and tie calculation would have shown that the superstructure had the structural capacity to cater for the applied forces.

141. As a matter of principle, I am prepared to accept that, if an arbitrator makes a significant finding of professional negligence in circumstances where that allegation was not pleaded at all, and where the experts' agreement effectively made it impossible for the arbitrator, in undertaking his obligation to act fairly, to make such a finding, then his failure may well be capable of being characterised as an error of law. It may, I suppose, be better expressed as a serious irregularity under s.68. But however the complaint is put, each alleged failure must be considered on its own facts. I have no doubt at all on the material that I have seen that, here, the Arbitrator's finding at para.140 of his Award was open to him both on the pleadings and on the evidence, and therefore no error of law can arise.

142. I consider that the point in relation to the structural capacity of the viaduct was covered by para.44.0.1.1 of the Amended Points of Claim which criticised RBA for failing to give adequate consideration to "the capacity of the buttresses in the segments to bear the applied load of the pre-stressed cables". One of the ways in which they could have considered the structural capacity of the buttresses was by carrying out a strut and tie calculation. The pleading is therefore sufficient. It was unnecessary (unless they were asked to, and they were not) for DMD to particularise each and every way in which such consideration could have been given by RBA.

143. Furthermore, it is quite clear that this was a topic that was the subject of disputed expert evidence, and the arbitrator was therefore entitled to consider such evidence and reach the finding that he did. I note that Mr. Nicholson at para.2.1 of the experts' agreement document of the 28th January 2004 states that, in his view, a strut and tie calculation should have been carried out, and that if carried out it would have required 42 reinforcing bars in the 400 mm zone, which was a density which Mr. Nicholson regarded as "unreasonable for a designer to specify". The Arbitrator accepted Mr. Nicholson's view. He cannot possibly be criticised for so doing.

144. Accordingly, this ground of the application to appeal must fail.

**Ground 3/ Failure to Check the Layout of the Pre-Stress**

145. The complaint here is that, again in the absence of any pleading, and in the face of an expert's agreement to the contrary, the Arbitrator found at para.137 of the Award that RBA were in breach of the Design Agreement because they failed to undertake checks on the layout of the pre-stress in designing spans of over 60 metres. Accordingly, this could only arguably be an error of law if both the criteria identified in para.141 above were made out.

146. I reject RBA's contention that this point was not pleaded by DMD. Paragraph 44.7.2 of the Amended Points of Claim makes a clear allegation of breach of the Design Agreement on the part of RBA for failing properly to develop and detail the pre-stressing design.

147. In addition, I consider that the experts did not reach any agreement that precluded the Arbitrator from coming to the conclusion that he did. On the contrary, it is quite clear from para.137 of the Award that this was a criticism of RBA's performance which was explained in the evidence and was,

in some respects at least, actually supported by the evidence of RBA's expert, Mr. Farooq. It became apparent that the high watermark of RBA's case on this point turned on one drawing produced by Mr. Farooq during his re-examination on the very last day of oral evidence in March 2004, and upon which he was cross-examined by Mr. Stead for DMD. That drawing expressly related to spans of 60 metres, not those in excess of 60 metres, although Mr. Farooq indicated orally that it might also demonstrate viability beyond 60 metres.

148. In short, the evidence did not, as RBA now suggest, reveal any sort of agreement between the experts. On the contrary, there was a dispute which was still ongoing when the oral evidence came to an end. Again therefore the Arbitrator was entitled, indeed obliged, to resolve that dispute, and RBA cannot now complain because they do not like the Arbitrator's answer.

**Ground 4/ The Negligent Design of the Reinforcement**

149. As set out in para.89 above, this ground of appeal is also ground 7 in support of the application under s.68. Since it is very similar in nature to grounds 2 and 3 above, it is convenient to deal with it in this part of the judgment.

150. Once again the first criticism made by RBA is that the Arbitrator made a finding against them which was not pleaded. The relevant finding of the Arbitrator at para.148 of the Award was that "upon review of the reinforcement detailing, and based on my experience", the design of the reinforcement "left much to be desired", and constituted a further breach of contract on the part of RBA. This time the criticism is that Arbitrator made his finding when there was no expert evidence to support it. Unlike the previous two grounds, it is not suggested that his finding was contrary to the agreement between the experts.

*151.* Once again I reject the submission that this allegation was not pleaded. Paragraph 44.11.3 of the Amended Points of Claim alleges that: *"The buttressed segments contained reinforcement which was of such complexity and volume that the segments were not capable of being manufactured in an economically viable manner. During the course of segment manufacture RBA revised the reinforcement design of the anchor deviator blocks, thereby improving the buildability of the buttress segments."*

This was therefore more than sufficient to put the reinforcement in issue before the Arbitrator.

152. It is accepted that this was not an aspect of the case upon which Mr. Nicholson commented. However, there was other evidence on this topic, much of which was contained in the contemporaneous documents. That evidence is summarised at paras.23.57 to 23.91 of DMD's Closing Submissions. That part of DMD's Submissions expressly set out to demonstrate the complexity of the reinforcement and the errors in the reinforcement detailing.

153. Accordingly, pursuant to his duties under s.34 of the 1996 Act, the Arbitrator was obliged to consider all this material, and he obviously did so, when reaching his conclusions at para.148 of the Award. He also expressly took into account his own experience on this point, something which again he was plainly entitled to do. I reject the suggestion that there was no evidence at all on which the Arbitrator could base his finding, and I therefore reject this ground of appeal.

**Ground 5/ Delay**

154. I have, at Section E above, paras.22 to 49, dealt with what I regarded as the most significant matter raised by RBA's applications, namely their criticism of the Arbitrator's findings as to the delay caused by their acts and omissions in respect of the design. This ground of RBA's application to appeal, although also concerned with delay topics, is on a different point and I therefore deal with it here.

155. RBA maintain that the Arbitrator made an error of law when construing the Design Agreement in that he appeared to make RBA absolutely liable for any failure to comply with the design programme, even if such a failure did not arise from any want of skill and care on their part. In other words, RBA say that the Arbitrator wrongly construed the programming obligation within the Design Agreement by imposing an absolutely duty on RBA rather than one qualified by a duty to take reasonable skill and care. To that extent at least, this ground is similar to ground 1(b), which I dealt with at paras.122-127 above.

156. It seems to me that, if it could be demonstrated that the Arbitrator had taken this view, there may in principle be an error of law. It would then ordinarily be for RBA to go on to show that the Arbitrator was obviously wrong. However, on this particular point, it is unnecessary to consider that second part of the test under s.69 because, in my judgment, the Arbitrator did not make the finding for which he is now criticised. Thus this ground appeal falls at its first hurdle.

157. RBA accept that they cannot point to a particular finding by the Arbitrator that said, in terms, that he concluded that their obligation to comply with the design programme was an absolute obligation. They infer it from a number of references, set out at para.19 of their Grounds of Application document. However, it is clear to me that the Arbitrator did not say or even imply that the obligation was an absolute one. The entire thrust of this part of the Award was that RBA had failed to exercise reasonable skill and care in respect of the design programme. I have already referred earlier in this Judgment to criticisms made by the Arbitrator which were all put on the basis of a breach of skill and care. By way of further example in respect of the design programme I rely on para.144 of the Award, which refers to RBA's failure to meet the concept design freeze date of the 13th October 1996; para.145 of the Award, which said that "The evidence points directly to the conclusion that RBA was not able to complete the design and issue corresponding drawings any earlier than it did as a result of its own failures"; and paras.177 and 178, which confirm that, throughout, the Arbitrator was framing his criticisms of RBA by reference to their obligation to exercise reasonable skill and care. For the avoidance of doubt, I also accept Mr. Furst Q.C's submission that the reference to "failures" in para.145 of the Award must, in the context of all of the rest of the Award, be read as failures to exercise reasonable skill and care.

158. In my judgment, the Arbitrator found no absolute obligation to comply with the design programme, but an obligation to exercise reasonable skill and care in so doing. In the circumstances, I reject this ground of appeal. As with many of the other grounds of appeal, I find that, on analysis, the Arbitrator did not make the finding for which he is criticised by RBA and, as with all the other grounds of appeal, I find that his actual finding was probably right, and certainly far from capable of being categorised as obviously wrong.

**H CONCLUSIONS**

159. It is clear that before, during and after the hearing in January and March 2004 RBA believed that they had a strong case to the effect that their work on the design process for the A13 viaduct was not performed negligently and in breach of contract. It is also clear that Mr. Sears Q.C. and the rest of RBA's legal team put a huge amount of effort into endeavouring to persuade the Arbitrator that RBA should not and could not be criticised because the Final Design was different to the TDP. Accordingly, RBA doubtless consider that the relatively brief contents of the Award, and the Arbitrator's rather terse record of his findings against them, has failed to do justice to that case.

160. For the detailed reasons that I have given, I believe that the Arbitrator was entitled to come to the conclusions that he did, in the way that he did. If the Award was rather short, and sometimes rather sharp, then that was, in reality, no more than a reflection of the parties' agreement to arbitrate, rather than litigate, their disputes. I am in no doubt that there were no serious irregularities and no points of law on which the Arbitrator was obviously wrong. In addition, no relevant instance of substantial injustice has been identified by RBA. For these reasons their applications are dismissed.

MR. DAVID SEARS Q.C. (instructed by Berrymans Lace Mawer) appeared on behalf of the Applicant/Claimant.

MR. STEPHEN FURST Q.C. (instructed by Burges Salmon, Bristol) appeared on behalf of the Respondent/Defendant.