JUDGMENT : His Honour Judge Peter Coulson QC: QBD. 14th July 2005

A. **Introduction**

1. By an arbitration claim form dated 5th May 2005 the Claimants, Mr. and Mrs. Duncan Sinclair, seek the removal of the arbitrator, Mr. Ronald Harrison, the Second Defendant in these proceedings, or the setting aside of his award dated 6th April 2005. The arbitrator had been appointed on 1st December 2003 by agreement to consider and decide the Claimants' claim against their former building contractors, Woods of Winchester (in voluntary liquidation), who are the First Defendants in these proceedings.

2. The arbitration arose out of a contract between the Claimants as employers, and Woods as contractors, for the construction of a swimming pool complex at the Claimants' property known as The Paddocks, Howe Green, Hertford. The contract was in writing and was agreed in February 1997. The contract sum was £307,334. The contract contained at, clause 10, an arbitration clause. The architect named in the contract was Mr. Nick Shipp.

3. Extensive defects manifested themselves at the complex in 2001-2002 and a report was commissioned by the Claimants from Robert Bloxham Jones Associates ('RBJA'). The report identified numerous defects which were rectified in 2002 at a cost of about £225,000. Importantly, the report, which was prepared before any arbitration proceedings were commenced, did not differentiate between design and construction defects.

4. The arbitration was commenced on 1st December 2003 and was concerned solely with the Claimants' allegations against Woods. It was conducted in accordance with the CIMAR Rules. Those rules which are of particular importance to the dispute that has now arisen are as follows:

   "12.2. Where the arbitrator directs or the parties agree to a hearing dealing with part of a dispute then whether or not there is any agreement between the parties as to such matters, the arbitrator may do any of the following:

   a) decide what are the issues or questions to be determined.

   b) decide whether or not to give an award on part of the claim submitted.

   c) make an order for provisional relief. ……

   12.9. The arbitrator has the powers set out in section 57(3) to (6) (Correction of award or additional award) which are to be exercised subject to the time limits stated.

   12.10. The arbitrator may notify an award or any part of an award to the parties as a draft or proposal. In such case unless the arbitrator otherwise directs no further evidence shall be admitted and the arbitrator shall consider only such comments of the parties as are notified to him within such time as he may specify and thereafter the arbitrator shall issue the award."

5. There was a substantive Hearing in the arbitration on 10th February 2005 in which certain liability issues were debated. An award dealing with those issues was published in draft form on 14th March 2005 and in final form on 6th April 2005. It is the events leading up to the hearing and the award itself which are at the heart of the applications now made by the Claimants.

B. Outline of the Issues

6. The Claimants contend that there have been a number of serious irregularities in the arbitrator's conduct of the arbitration which caused them substantial injustice. They contend that the arbitrator failed to conduct the arbitration properly both before and during the hearing on 10th February 2005 and failed in his award to address all the issues put to him or deal with the issues clearly and unambiguously. Accordingly the Claimants say that pursuant to section 68 of the Arbitration Act 1996 ('the 1996 Act') the award of 6th April 2005 should be set aside. Further they contend that, so serious are the irregularities and so substantial the injustice, I should order the removal of the arbitrator pursuant to section 24 of the 1996 Act.

7. The specific irregularities alleged against the arbitrator are as follows:

   (a) Conduct prior to the hearing on 10.2.05

   (i) He issued a peremptory order on 24th March 2004 against the Claimants for a Statement of Case which included quantum, having earlier ordered on 2nd January 2004 that the Statement of Case would be concerned solely with liability.

(ii) He failed between July 2004 and February 2005 to decide upon the true ambit of the Hearing, which took place on 10th February 2005.

(b) Conduct at the Hearing on 10.2.05

(i) He failed promptly to follow Counsel's submissions at the hearing and took so long to understand them that the scope of the Hearing had to be reduced further.

(ii) He agreed not to refer to the RBJA report during the Hearing or when he considered and published his award.

(c) The award: he failed to answer the issues that had been put to him either clearly or at all. In particular:

(1) He failed to understand and/or properly address Issue 1, the Defendant's liability for design.

(2) He failed to answer Issue 2, the First Defendant's general liability for patent defects.

(3) He failed to provide definitive results following the application of the general answer to Issue 2 to the individual items that had been identified in the Scott Schedule.

8. Mr. McCue, who appeared on behalf of the Claimants both at the hearing on 10th February 2005 and before me, did not pull any punches in his criticisms of the award. He submitted that the alleged irregularities were cumulative in their effect with the result that the award of 6th April was "confused and contradictory; it did not answer the right questions and answered the wrong questions, so that the entire award was one big ambiguity from beginning to end … It contained utterly fundamental faults." These were, on any view, very strong criticisms of the award.

9. The Defendants deny that there has been any serious irregularity on the part of the arbitrator and further deny that the Claimants can show any substantial injustice in any event. Further, although both Defendants have urged me to deal with and dismiss the applications on their merits, the First Defendants take three threshold points under the 1996 Act concerning late service of the claim form; a failure on the part of the Claimants to complain forthwith following the particular irregularity under consideration, so that the Claimants have lost their right to object; and a failure by the Claimants to exhaust their available recourse to the arbitrator before making these applications. Each of these threshold points is, the First Defendants say, enough on its own to defeat the Claimants' application.

C. The Relevant Parts of the 1996 Act

10. Section 24(1) of the 1996 Act provided: *"A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds--*

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed--

(i) properly to conduct the proceedings, or

(ii) to use all reasonable despatch in conducting the proceedings or making an award,

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

The Claimants rely only on section 24(1)(d)(i) in these applications.

11. Although the expression "failed properly to conduct the proceedings" is not defined in the Act, it seems clear that it will include a failure to comply with the arbitrator's duties under sections 33 and 68(2) of the 1996 Act: See p. 291 of the second edition of ***Mustill & Boyd's Commercial Arbitration*** 2001 Companion.

12. Section 33 of the 1996 Act provided:

(1) The tribunal shall--

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

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

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

13. The relevant parts of section 68 for the purposes of these applications are 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.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

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

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

(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."

14. I should also note that under the 1996 Act an aggrieved party is obliged, wherever possible, to seek clarification or further answers from the arbitrator before making an application to the court. I have already set out section 68(1). Other sections dealing with this obligation are as follows.

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

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

(b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. ……

70(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted --

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

15. Further, an aggrieved party in an arbitration has to make its complaints forthwith or risk losing its right to object. Section 73(1) provides: *"If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection--*

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

D. Authorities and Applicable Principles.

16. All three parties relied on a number of authorities. In addition, I provided them with a copy of my recent decision in ***Benhaim v. Davies Middleton Davies***, 15.6.05, EWHC 1370 TCC, simply because it summarised a number of other authorities relevant to the application. I therefore summarise the applicable principles for the purposes of these disputes in paragraphs 17 to 23 below.

17. Loss of Right to Object

a) An aggrieved party in an arbitration must raise its objections to the arbitration or the award forthwith or lose its right to object. '***Forthwith***' was defined by Coleman J. in ***Margulead Ltd. v. Exide Technologies*** [2004] EWHC 1019 (Comm) as follows: *"In this context 'forthwith' means as soon as reasonably possible. That clearly involves raising an objection immediately following the arbitrator's procedural ruling. In a case where there is knowledge or reasonable means of knowledge of the grounds for objection, the*

point must be raised at the hearing. To wait until after publication of the award or indeed until after continuing to participate in the hearing as in this case will be fatal to the right to mount a s 68 application."

b) *"If the Respondent can show that the Applicant took part in or continued to take part in the arbitration proceedings without objection after the grounds of objection arose, the burden passes to the Applicant to show that he did not know and could not with reasonable diligence have discovered those grounds at the time. Moreover, the expression* ***'continue to take part in the proceedings'*** *in section 73 is broadly worded and is designed to ensure that a party who believes he has grounds for objecting on the basis of serious irregularity should raise that objection as soon as he is or reasonably ought to be aware of it. He is not permitted to allow the proceedings to continue without alerting the tribunal and the other party to a serious irregularity, which in his view renders the whole arbitral process invalid. As Moore-Bick J. points out in* ***Rustal Trading Ltd. v. Gill & Duffus*** *[2000] 1 Lloyd's Rep 14, pp 20-21, this is not only to avoid a waste of time and expense but is based upon a more fundamental point of fairness and justice. It cannot be right for a party to participate in proceedings which he believes to be fundamentally irregular with the intention of taking advantage of any decision in his favour whilst keeping up his sleeve an objection to an irregularity which he will only produce in the event of an unfavourable decision":* Cooke J. in ***Thyssen Canada Ltd. v. Mariana Maritime SA and Anr***. [2005] EWHC 219 (Comm).

18. **Exhausting any available recourse :** The complainant must not make an application under section 68 unless he has exhausted any available arbitral process of appeal or review or any available recourse under section 57 as to the correction of ambiguities and the like. In ***Torch Offshore LLC v. Cable Shipping Inc***. [2004] 2 All ER (Comm) 365, at para 28, Cooke J. said: *"It seems to me that section 57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist. The policy which underlies the Act is one of enabling the arbitral process to correct itself where possible without the intervention of the court. Torch contended that it was clear that the arbitrator had not decided the issue and that therefore there was no ambiguity in the award which required clarification, but the very existence of a genuine dispute on this question militates against that argument. If there was unarguably a clear failure to deal with an issue, it could be said that there was no ambiguity in the award, but as set out in the* ***Al Hadha*** *case, an award which contains an inadequate rationale or incomplete reasons for a decision is likely to be ambiguous or need clarification. There was therefore room for an application by Torch under s 57, as an exchange of letters with the owners in relation to this part of the award would have revealed, so that the time limit of 28 days … applied. In these circumstances Torch had available recourse under s 57, which had not been exhausted and s 70(2) therefore presents an insurmountable bar to Torch's s 68 application. I none the less go on to determine the s 68 application, should I be wrong on the ambit of s 57."*

19. Removal of arbitrator

a) The removal of an arbitrator was described by His Honour Judge Bowsher QC in ***Groundshire v. VHE Construction*** [2001] BLR 395 as a *"****most serious step****"* which will only be ordered if the arbitrator's misconduct was so serious that, in the judge's words, he could not be trusted *"to complete the arbitration fairly and properly even with the benefit of an examination of his conduct by the parties and their representatives and guidance from the court … ."*

b) The mere fact that one party has lost confidence in an arbitrator will not without evidence of real and substantial injustice lead to an order removing the arbitrator under section 24: ***Conder Structures v. Kavaerner Construction Ltd.*** [1999] ADRLJ 305.

c) The best known example of a building case where the arbitrator was removed for misconduct is ***Damond Lock Grabowski v. Laing Investments (Bracknell) Ltd.*** 60 Build. LR, 112, a decision that predates the 1996 Act. Gatehouse J., after a detailed review of the conduct of an arbitrator who even the party resisting the application to remove him described as ***'eccentric, autocratic and obsessive'*** concluded: *"Looking at the whole sorry history of the matter, it seems to me clear that the arbitrator has unquestionably pointed the finger at the Applicants and repeatedly accused them, in my judgment unfairly, of deliberate delay. Above all, he has not paid proper heed to their objections and has insisted that the hearing must start on the day he ordered, when they cannot be in a position to conduct their case properly. In my judgment he must be removed. I therefore grant the order asked in paragraph 1 of the notice of motion."*

20. Serious Irregularity Generally

a) Perhaps the best summary of the applicable principles relating to section 68 generally, which lies at the heart of these applications is by His Honour Judge Humphrey Lloyd QC in ***Weldon Plant Ltd. v. The Commission for the New Towns*** [2000] BLR 496, approved by Colman J. in ***World Trade Corporation v. Czarnikow Sugar Ltd.*** [2004] 2 All E.R. Comm:

"28. I do not accept the proposition that simply because the award contains an error which is unfair to a party there must have been a failure to comply with s 33 of the 1996 Act on the part of the tribunal and thus a serious irregularity for the purposes of s 68(2)(a). First, there is nothing in the 1996 Act to suggest that it is intended to allow the court to intervene to put right mistakes of fact or of law which could not have been put right under earlier legislation. The 1996 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 had been some unfair treatment or result which warranted intervention, the grounds must remain limited. Secondly, such a proposition, if correct, would enable a dissatisfied party to challenge an award on the grounds of an error of fact or of law under s 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 s 69 of the 1996 Act (appeal on point of law). Whilst there will be occasions when there is an overlap between an appeal under s 69 and a challenge under s 68 of that Act the latter should not be used as an indirect method of appealing against a decision of fact, other than in an exceptional case. Thirdly, s 33 is primarily concerned with the tribunal's failure to conduct the proceedings fairly and impartially, and although a failure to comply with s 33 is placed first in s 68(2), it is in reality more in the nature of a general provision of which section 68(2) contains further examples …

29. Similarly, s 68(2)(d) of the 1996 Act 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, eg where a claim has been overlooked or where the decision cannot be justified as a particular key issue has not been decided which is crucial to the result. It is not concerned with a failure on the part of 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 a 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 issues but it will not have failed to deal with them."

b) The most recent authority under section 68 is the decision of the House of Lords in ***Lesotho Highlands Development Authority v. Impregilo SPA and Ors*** [2005] UKHL 43. The proper operation of section 68 is summarised by Lord Steyn at paragraph 28 of his speech: *"First, unlike the position under the old law, intervention under s 68 is only permissible after an award has been made. Secondly, the requirement is a serious irregularity. It is a new concept in English arbitration law. Plainly a high threshold must be satisfied. Thirdly, it must be established that the irregularity caused or will cause substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges. It is also a new requirement in English arbitration law. Fourthly, the irregularity must fall within the closed list of categories set out in paragraphs (a) to (i)."*

21. **Definition of issues :** The arbitrator needs to ensure that the issues are reasonably defined by the parties or himself before he produces an award on those issues, and a failure so to do may be a breach of section 33: see ***R C Pillar v. Edwards***, 11th January 2001, a decision of His Honour Judge Thornton QC. However, the facts in that case may be regarded as extreme because at paragraph 79 the judge found that: *"The pleadings that were actually produced were prolix and diffuse and the schedules, which were not Scott Schedules, failed to consolidate and reduce into a composite pleading all aspects of each disputed work item. No agreed lists of items about which they agreed and disagreed were produced and they failed to agree any figures as figures. The result of these failures was a significant increase in the costs of each party and a failure to produce a coherent list of issues for resolution by the arbitrator in a form that would have enabled an award to be drafted which dealt with all remaining disputes without mistake, error or omission."*

22. Reasons

a) An arbitrator is obliged to decide only those matters which are relevant to his ultimate decision. He does not have to decide every issue put to him: ***English v. Emery Reimbold & Strick Ltd.*** [2002] 1 WLR 249; ***Checkpoint Ltd. v. Strathclyde Pension Fund*** [2003] EWCA Civ 84 and ***World Trade Corporation*** (supra).

b) In Margulead (supra) Colman J said*: "The meaning of 'failure to deal with all the issues' must therefore refer to a failure to deal with a claim or a distinct defence to a claim advanced before the tribunal and not merely to an omission to give reasons for the tribunal's conclusion in respect of such claim or defence. It is in those cases in which the award expresses no conclusion as to a specific claim or a specific defence that the award can be said to have failed to deal with an issue."*

23. Substantial Injustice

a) It is always necessary for an applicant in the position of the Claimants to show substantial injustice as a result of the alleged serious irregularity. Substantial injustice can only be demonstrated where what has happened simply cannot on any view be defined as an acceptable consequence of the choice that the parties made to arbitrate: see paragraph 280 of the DAC Report of February 1996; ***Egmatra A.G. v. Marco Trading Corporation*** [1999] 1 Lloyd's Rep 862; ***Petroships Pte Ltd. of Singapore v. Petec Trading and Investment Corp***. [2001] 2 Lloyd's Rep 348 and ***Checkpoint*** (supra).

b) In his speech in ***Lesotho*** (supra) Lord Steyn said on this point: *"Counsel observed that it must have been assumed that there was a substantial injustice. This is not good enough. The burden is squarely on the application who invokes the exceptional remedy under section 68 to secure if he can findings of fact which establish the precondition of substantial injustice. The employer did not satisfy this requirement. In these circumstances I would rule that the precondition of substantial injustice has not been established and that on this ground alone the challenge to pre-award interest should fail."*

24. With these various principles in mind I now turn firstly to deal with the Defendant's jurisdictional challenges to these applications. I then go on to deal with the Claimants' detailed complaints about the arbitrator as outlined in paragraph 7 above.

E. The Defendant's jurisdictional challenges

(a) The Claim Form

25. The first point taken by the Defendants is that pursuant to section 70(3) of the 1996 Act the application under section 68 should have been made no later than 4th May 2005, which was 28 days after the publication of the award. It is therefore said that the claim form was a day late and is therefore out of time. It is to be noted that pursuant to section 70(1) this point only applies to the application under section 68. There is no such time limit in respect of the application under section 24.

26. Mr. McCue argued that by reference to the Civil Procedure Rules the period actually expired on 5th May, but he did not push the point very hard and in my view it is incorrect. Section 70(3) clearly states that an application must be made within 28th days, which here meant by 4th May at the latest. Accordingly, Mr. McCue had to apply retrospectively for an extension of time of one day pursuant to section 80(5) of the 1996 Act. It is a matter within the court's discretion as to whether or not that extension is granted.

27. The matters which the court should take into account in an application of this kind were set out by Colman J. in ***Kalmneft v. Glencore International*** [2000] 1 All E.R.Comm 76 at paragraph 59: *"Accordingly, although each case turns on its own facts, the following considerations are in my judgment likely to be material: (1) the length of the delay; (2) whether in permitting the time limit to expire and the subsequent delay to occur the party was acting reasonably in all the circumstances; (3) whether the respondent to the application or the arbitrator caused or contributed to the delay; (4) whether the respondent to the application would by reason of the delay suffer irredeemable prejudice in addition to the mere loss of time if the application were permitted to proceed; (5) whether the arbitration is continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have; (6) the strength of the application; and (7) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."*

Mr. McCue argued that I should also have regard to the list at CPR r3.9. I have looked at that list and it does not seem to me that the list of items there is materially different to the matters noted by Colman J. in ***Kalmneft.***

28. Mr. Kennedy for the First Defendants identified the second point adumbrated by Colman J., namely the failure to justify the delay, as a matter which was fatal to Kalmneft's application in that case. He said that the Claimants' explanation in this case, namely that they had counted the 28 day period from 7th April 2005 because that was the date on which the award was received, rather than the date of the award itself, was not reasonable and that, as in *Kalmneft* I should not extend time.

29. Mr. McCue conceded that since the lateness was due to the mistake of counting from the wrong day he could offer no reasonable excuse. As he fairly put it, *"It is never reasonable for someone to make a mistake."*

30. I would ordinarily be very reluctant to conclude that the court should not extend time by one day in circumstances of this sort. But as I go on to explain in sections F, G and H of this judgment and summarise in paragraph 95 below, there have been serious delays in this arbitration which are wholly the responsibility of the Claimants and/or their advisers. In those circumstances, harsh though it may seem, I do not find any compelling reason to exercise my discretion in favour of the Claimants. They waited until the very last moment before launching this application. Without good reason they waited one day too long. I therefore find that the application under section 68 is out of time and I decline to extend time. However, since it is what all parties want, and since this ruling only affects the application under section 68 and not the application under section 24, I go on to consider the substantive criticisms of the arbitrator in any event.

(b) Have the Claimants lost their right to object?

31. Mr. Kennedy on behalf of the First Defendant submitted that the complaints now made by the Claimants were not made forthwith in accordance with section 73 of the 1996 Act (paragraph 15 above). He argued that, even if I extended time for the issue of the claim form, the Claimants could not make these applications because in accordance with the principles set out at paragraph 17 above they have lost their right to object.

32. I found it difficult to discern any substantive reply to that point by Mr. McCue. It appeared that he was saying that the complaints had a cumulative effect and it was not until after the publication of the award that it became reasonably apparent to the Claimants that there had been a number of serious irregularities which had caused them substantial injustice. He therefore relied on the proviso in the section that the Claimants *"did not know and could not with reasonable diligence have discovered the grounds"* for their objections until 6th April 2005 and so, on his analysis, they made their applications within a reasonable time thereafter.

33. It seems clear to me that such a submission is self-evidently bad in respect of the arbitrator's conduct prior to 10th February 2005 and his conduct at the Hearing on 10th February 2005. The Claimant's failure to challenge or to object to the arbitrator's conduct in any way, either before or at the Hearing, and their failure to raise any objection until 5th May means that in accordance with the decisions in ***Margulead*** and ***Thyssen*** they have lost their right to object to such conduct. Thus the criticisms outlined at paragraph 7(a) and 7(b) above are not open to these Claimants in any event.

34. That leaves the criticisms which I have outlined at paragraph 7(c) above and which are criticisms of the award itself. In my judgment the issue as to whether the Claimants have lost their right to make these criticisms is not so clear cut. In respect of the complaints at 7(c)(i), Issue 1, and 7(c)(ii), Issue 2 (General), I would be prepared to give the Claimants the benefit of the doubt and say that, in respect of those objections at any rate, they have not lost their right to object simply as a result of the effluxion of time. But it seems to me equally clear that they have lost their right to make the objection outlined at paragraph 7(c)(iii) above, namely the alleged failure on the part of the arbitrator to determine Issue 2 in respect of a number of the specific allegations. This is because that so-called failure was expressly made the subject of the arbitrator's letter of 14th March 2005 when he sent out the draft award. In that letter the arbitrator said: *"I do have reservations about several issues which require, but lacked, a factual input. I feel that it*

is probably in both parties' interests that I issue this particular award as a draft rather than as a formal award which confers finality to the issues.

The fact that I am proposing to decline to determine the issues set out under paragraphs 79, 85, 92, 93, 94, 96, 101, 102, 115, 125, 135 and 144 of my draft award is not as serious as it may appear. Many of the issues I am unable to determine relate to the date when an alleged defect was notified to the Respondent by the Claimant. I simply do not have that information and in the scheme of things it probably does not matter too much."

By this letter, the Claimants were expressly invited to address the point that the arbitrator had not dealt with particular issues in his award. The Claimants did not do so. It seems to me, therefore, that the Claimants cannot now object to the course of action taken by the arbitrator. They were given an opportunity to deal with the very point about which they now complain, and they did not take it. They have therefore lost their right to object and make complaint on that point.

35. Accordingly in my judgment the Defendants' second jurisdictional challenge operates as an entirely separate, but complete, bar to the Claimants' application under section 68 in respect of the criticisms of the arbitrator's conduct both before and at the Hearing on 10th February 2005 and to their criticism of the award that it failed to deal with the specific application of Issue 2 (patent defect) to the items in the Scott Schedule (paragraph 7 (c)(iii) above). They have not, however, on this ground, lost their right to make the objections in respect of Issues 1 and 2(General) in the award: paragraph 7(c)(i) and 7(c)(ii) above. This time this bar, with the two exceptions, would also apply to the Claimants' application under section 24.

(c) Should the Claimants Have Gone Back to the Arbitrator?

36. I have set out the relevant sections of the 1996 Act in paragraph 14 above and the applicable principles at paragraph 18 above. I should also add that rule 12.9 of the CIMAR Rules (paragraph 4 above) also requires the Claimants to exhaust any available recourse to the arbitrator before making their application.

37. Mr. Kennedy, whose submissions on this point on behalf of the First Defendants were clear and concise and were supported by Mr. Wilton for the Second Defendant, argued that the Claimants had two opportunities to go back to the arbitrator to make their complaints and to see if they could persuade the arbitrator to deal with these points in a different way. Those two opportunities were after the publication of the draft award on 14th March 2005 and after the publication of the final award on 6th April 2005. The Claimants took neither opportunity. Accordingly, Mr. Kennedy contended that the Claimants cannot now make their section 68 application by reason of the provisions of section 70(2). In particular, he argued, the Claimants' deliberate decision on 24th March 2005 to reply to the arbitrator's draft award by saying that they had no comments on it when, according to Mr. McCue, they had already decided to make a section 68 application, was precisely the sort of conduct which Cooke J in *Torch Offshore* concluded would be fatal to an application of this sort.

38. I accept Mr. Kennedy's submissions on this point. Indeed, Mr. McCue only had one answer to this submission. He said that the award was so bad that it was not susceptible of any clarification or further expansion. That point is, in my judgment, wrong on the facts. At Section H below I set out how and why I consider that the Claimants' criticisms of the award are wholly incorrect. However, even if Mr. McCue was right and the award was, in his word, "unsalvageable", it was still incumbent upon the Claimants as a party to an arbitration to do all that they could to keep the dispute within the confines of that arbitration and not to apply to this court at the first sign of trouble. They, on their own case, deliberately did not do so. It seems to me therefore self-evident that they failed to utilise any available recourse to the arbitrator and cannot make the section 68 application in consequence. Their section 24 application is again unaffected by this ruling.

(d) Summary on Jurisdictional Points

39. In summary therefore:
    (a) I decline to extend time for the issue of the claim form and thus the Claimants cannot pursue their section 68 application. This does not affect the section 24 application.

(b) I find that the Claimants have in any event lost their right to object to any of the alleged irregularities with the exception of their points about how the award dealt with issues 1 and 2 (paragraph 7(c)(i) and (ii) above). This rules out the bulk of the applications under both section 68 and section 24.

(c) I find that the Claimants cannot make their section 68 application for an entirely separate reason, namely their failure to exhaust any available recourse to the arbitrator before making their application. Again this does not affect their section 24 application.

40. However, because the parties are in agreement that I should deal with the substantive issues in any event, and because only one of the findings summarised at paragraph 39 above affects the section 24 application (and even then is not wholly determinative of it) I now go on to deal with the detail of the applications made by the Claimants.

F. The Arbitrator's Conduct Prior to the Hearing on 10th February 2005

(a) The Peremptory Order of 24th March 2004

41. The Claimants contend that the arbitrator was wrong to issue the peremptory order of 24th March 2004 requiring them to serve a statement of case incorporating "copies of all relevant documentation supporting both the claim for liability and quantum." Their complaint is that they understood that his original order of 2nd January 2004 meant that the Statement of Claim should be concerned with liability only. They therefore contend that the issue of the peremptory order was a serious irregularity.

42. I am bound to say that, as part of an application under sections 24 or 68 of the 1996 Act, this complaint can fairly be categorised as risible. First, it is clear from the arbitrator's letter of 2nd January 2004 that from the outset he expected the Claimants "to quantify their claim concurrently with the preparation of their Statement of Case." The arbitrator's understanding was based on the fact that the Claimants had promised to do just that. Secondly, that process of quantification is what the Statement of Claim that was served on 20th February 2004 began to do, because it contained some figures and some references to other documents, which were not in the event provided. The point was that the quantification process in that document did not go far enough. Thirdly, it is plain that the Claimants were in delay, even at this early stage, in complying with the arbitrator's orders because they had not provided all the documentation they relied on to accompany the pleading.

43. In those circumstances it was entirely appropriate for the arbitrator on 24th March 2004 to issue an order in peremptory terms to get the Claimants to do in April what they had promised to do by early February, namely to provide a quantified claim document together with all documents relied on. There was therefore not only no serious irregularity, there was instead an entirely appropriate order.

44. Even if I was wrong about that, there was no, and could not be any, substantial injustice arising from the order of 24th March. A properly quantified claim document is a prerequisite for any successful arbitration. No injustice can possibly be said to flow from the arbitrator's decision to require the Claimants to produce such a document.

45. Perhaps because he was aware of the weakness of his first criticism, Mr. McCue said that he really relied on the order as "evidence of the arbitrator's inability to control the course of the arbitration". In my judgment the order demonstrates precisely the opposite: an arbitrator having to come to grips, not for the last time, with Claimants who were not prepared to do what they said they would do.

46. This purported criticism of the arbitrator is therefore rejected. Not only was it a hopeless point, but it also revealed another all-pervasive feature of the Claimants' application before me, namely a tendency to attack the arbitrator for an underlying situation, in this case delay, for which, on analysis, they themselves were responsible.

(b) The Hearing and Order of 1st July 2004

47. The Claimants' primary criticism of the arbitrator's conduct before the Hearing on 10th February concerned what they regarded as the chaos and confusion over precisely what was going to be the subject matter of the first substantive hearing in the arbitration. This in turn necessitated a careful analysis of the meeting and the order of 1st July 2004. This was the directions meeting at which the subject matter of the first substantive Hearing was discussed and agreed. The Claimants now say that the arbitrator ordered that the first substantive Hearing would deal with all liability issues. Both

Defendants contend that the arbitrator ordered that the first substantive Hearing would be confined to the consideration of certain preliminary issues only.

48. The consent order itself at paragraph 2 referred to the preparation of bundles in three categories:
"The Respondent shall provide the Claimant with a list of documents in their possession relating to:
1. The design of the swimming pool works;
2. The defect liability period;
3. Correspondence relating to the contract
by not later than 13th August 2004."

At paragraph 4 of the same order the parties were required to agree a bundle *"relating solely to the Preliminary Issues"*. Those Preliminary Issues were not identified further in the order.

49. There are no less than three attendance notes of the meeting on 1st July 2004. The clearest is that of Mr. David Oliver ("D.O.") of the First Defendant's solicitors. Paragraph 2 is of particular relevance: *"It was at this stage I drew to the arbitrator's attention that I would be looking to deal with a number of the pleaded matters by way of preliminary issues. I summarised these as follows:*
a) Whether or not the alleged defects were patent or latent;
b) Whether the alleged defects arose from design or simply bad workmanship.
c) Whether one of the matters complained of was within the contract.

After discussion it was agreed that there should be a hearing to try and decide these issues."

50. There was a brief note by the arbitrator which referred to a ***"date for hearing of Preliminary Issues".*** The note also listed, by reference to a marginal note that said ***"Headings of Documents***", these three points: *"1. Design 2. Defects Liability 3. In or out of the Contract."*

51. Just before I heard these applications, Mr. Ring, the Claimants' solicitor, disclosed a lengthy note of the hearing on 1st July 2004 made by a trainee. A passage of particular relevance is at page 2 of that note:
"D.O. One of my applications today will be to fix hearing in September/October to deal with preliminary issues One of which whether allegations fall within design defect or building defects. Another, one of defects discoverable within a six month period and therefore down to the architect.
A.R. [Mr. Ring] Probably won't be resisted.
D.O. Two areas where we say the issues will probably have to go to arbitration, about 8-9 areas where one or other applies. One item does not fall within contract at all: ozonator. We close pleadings and try and knock out issues at short hearing in autumn. Then, if you are with me, it will reduce the issues. If not, will go to full hearing.
R.H.[Arbitrator] Do you agree?
A.R. Similar. This document insurers of architect will want to see. Agreed to the appointment of arbitrator. In terms of timing don't see why what your suggestion won't work. Majority of things will be one thing or the other. Only caveat is for something to fall between two stools.
R.H. Design liability could be subcontracted.
A.R. Still Woods.
D.O. Still an issue to be dealt with at preliminary issue."

52. On the basis of all three notes, the Defendants submit that it was clear beyond doubt that, on 1st July, it was agreed that the first substantive Hearing would be concerned with three preliminary issues. Issue 1 would concern whether a particular defect was a matter of design or workmanship. Issue 2 would be whether a particular defect was patent or latent (because if patent the First Defendant maintained a defence to the claim). Issue 3 would be whether a particular item was part of the First Defendant's contractual work scope in the first place.

53. The Claimants maintain that the meeting and order of 1st July 2004 changed nothing and that the arbitrator was still intent on ensuring that the first substantive Hearing would deal with all liability issues. Mr. McCue submitted that the evidence from the arbitrator and the First Defendant's solicitor, suggesting that the agenda was going to be limited to the Preliminary Issues, was "unconvincing".

54. I reject Mr. McCue's submission and find as a fact that the parties and the arbitrator had all agreed on 1st July 2004 that the first substantive Hearing would be limited to the three preliminary issues identified

above. The principal reason for such a finding is that that is what the arbitrator's order clearly said. In addition, the division of the bundle into the three related categories only made sense if there was going to be a Hearing on those three Preliminary Issues. In any event, as I have demonstrated, all three contemporaneous notes of the meeting said that, in terms, the first substantive arbitration Hearing would be devoted to the three Preliminary Issues. The contrary, in my opinion, is not even arguable.

55. It is common ground that the Hearing on 10th February 2005 was in fact limited to those three Preliminary Issues. Accordingly, the Hearing in February eventually went ahead in accordance with the arbitrator's consent order of 1st July 2004. Cogent criticism of such a result is, in my judgment, therefore impossible. It is, however, worth looking at what actually happened in the run-up to the Hearing because it is a further demonstration of the muddle into which the Claimants got themselves in this arbitration.

(c) Later Events

56. The first substantive Hearing was originally fixed for 22/23 November 2004. In accordance with the arbitrator's order, the First Defendant served a skeleton argument on 5th November 2004, which dealt with the three Preliminary Issues. The Claimants seem to have done little or nothing to prepare for the Hearing until they instructed Mr. McCue on 12th November 2004, a week **after** the skeleton argument should have been provided. His skeleton was submitted and served on 19th November 2004, necessitating an adjournment of the first substantive Hearing, which was eventually refixed for 10th and 11th February 2005.

57. On receipt of the Claimants' late skeleton the First Defendants immediately pointed out on 19th November 2004 that it went beyond the preliminary issues and made the same point to the arbitrator on 30th November 2004. It was therefore clear that at this stage there was a disagreement about the scope of the first Hearing. In view of my unequivocal finding at paragraph 54 above, that dispute only arose because the Claimants had apparently failed to appreciate the effect of the consent order made by the arbitrator on 1st July 2004.

58. I should say in passing that it appeared from Mr. McCue's submissions that the Claimants may have thought that the first substantive Hearing was dealing with all liability issues because they were of the view that, apart from the three Preliminary Issues, there were no other liability issues between the parties. Indeed, Mr. McCue made that same submission to me based, he said, on the First Defendants' Defence. I pointed out to him that that was patently incorrect and that the First Defendants' Defence took a large number of other points in answer to the alleged defects. This misapprehension, which seems to have lasted until the applications before me, may explain why the Claimants wrongly believed in late 2004 that the First Defendants were somehow trying to change the scope of that first Hearing.

59. The arbitrator did not rule definitively on the debate between the solicitors, which rumbled on until January 2005. In one sense he did not have to because he had already decided back in July 2004 that the first substantive Hearing was going to be limited to the three Preliminary Issues. In any event after 6th January 2005 there was nothing for him to rule on because on that date the Claimants expressly agreed that the forthcoming Hearing would be limited to the three Preliminary Issues.

60. I asked Mr. McCue if he would criticise the arbitrator's conduct between November 20004 and February 2005 if, as I have done, I found that on 1st July 2004 he had ordered that the first substantive Hearing would be limited to the three Preliminary Issues. Mr. McCue realistically accepted that in those circumstances "quite a lot of force goes out of the criticisms before the February Hearing." He then went on to submit that even if the order of 1st July 2004 meant what it said as to Preliminary Issues, the arbitrator "should have disabused the Claimants' lawyers of their mistake" and that he should have held a further meeting at which the point could have been argued out. He said that the Claimants had "lost the chance" of making representations to the arbitrator that the first substantive Hearing should deal with all issues of liability.

61. I reject the suggestion that the arbitrator should have had a meeting to allow the Claimants to try and argue for a result that was different to the one to which they had agreed on 1st July 2004. In any event there is nothing to suggest that, had the Claimants been given this 'chance', the arbitrator would or

should have changed his mind as to the scope of the first Hearing. There is therefore no serious irregularity and no substantial injustice arising out of the arbitrator's conduct between November 2004 and February 2005.

62. I must also comment that the suggestion that the arbitrator should have been firmer in disabusing the Claimants of their own mistake is again symptomatic of the Claimants' whole approach, that their own errors and misunderstandings should somehow be visited on the arbitrator.

(d) Summary

63. For these reasons I reject the criticisms of the arbitrator's conduct prior to 10th February 2005. The arbitrator's conduct is not capable of proper criticism whatsoever. The complaints are, to use one of Mr. McCue's favourite words, misconceived. Even if I were wrong about that, no substantial injustice has been demonstrated as arising out of any of these criticisms. Therefore, applying the principles summarised in section B of this Judgment, the applications under sections 68 and 24 of the 1996 Act which rely on the arbitrator's conduct prior to 10th February 2005 must fail.

G. The Hearing on 10th February 2005

(a) Expenditure of Time

64. The first criticism of the arbitrator's conduct at the first substantive Hearing on 10th February 2005 was that he spent so long listening to and understanding counsels' submissions that time ran out and the scope of the preliminary issues had to be reduced to fewer Scott Schedule items.

65. I regard the suggestion that it was a serious irregularity on the part of the arbitrator to spend a lot of time listening to counsel as absurd, and I was surprised, despite my invitation to abandon it, that the criticism was pursued at all. As Mr. Wilton on behalf of the arbitrator asked rhetorically, how could it be anything other than reasonable for the arbitrator to do anything other than listen to counsel? I regard his question as unanswerable, and it means that this criticism must fail. In my view it should never have been made.

66. For completeness I should say that in any event there could be no substantial injustice flowing from this criticism. There was a second day on 11th February 2005 which was available but which, by consent, neither party chose to utilise. Accordingly, the reduction in the list of specific Scott Schedule items to be dealt with at the Hearing, which reduction was agreed, was not the fault of the arbitrator but due to the parties' wish to keep the first substantive hearing to one day only.

(b) The RBJA Report

67. The only other criticism of the arbitrator's conduct at the Hearing on 10th February 2005 was that he agreed not to refer to the RBJA Report, which then hamstrung his ability to deal with some of the matters being debated. I again regard this allegation as fundamentally flawed. Again, its roots lie in a misapprehension on the part of the Claimants, rather than any errors on the part of the arbitrator.

68. The RBJA Report had been prepared before the arbitration and did not differentiate between design and construction defects. It was not a report prepared in or for the purposes of the particular disputes in this arbitration. Its maker was not called (and was not due to be called) on 10th February 2005, either as a witness of fact or as an expert, to speak to the report. The First Defendants did not accept it. For these reasons on 10th February 2005 Mr. Kennedy on behalf of the First Defendants objected to the Claimants referring to and using the report as if it was somehow agreed evidence. This was consistent with the First Defendant's unequivocal objection to the report, which they first made in writing on 21st December 2004.

69. Mr. McCue frankly told me that he did not resist Mr. Kennedy's objection on 10th February 2005, and nor did he make any submissions to the arbitrator that the report should in fact be referred to or relied on. On the contrary, he agreed that the report would not be referred to by the arbitrator. The agreement to this effect is referred to in the Claimants' solicitor's statement at paragraph 48. Nevertheless in these proceedings Mr. McCue submitted to me that, despite the agreement to this course of action, the arbitrator should somehow have ruled that he could and should refer to the RBJA Report.

70. Again, I am bound to say that I consider such a submission to be plainly wrong and almost grotesquely unfair to the arbitrator. He is not a practising lawyer. He was therefore entitled to the assistance of

counsel. It was not for him to disregard the agreement reached between counsel and to make contrary orders or rulings. It is quite wrong in principle to suggest otherwise. Indeed, the arbitrator could have been criticised if he had ignored the agreement which counsel told him they had reached. That is a ground for an application under section 68; but it is not a ground under section 68 to criticise an arbitrator for doing that which he was told had been agreed.

(c) Summary

71. Accordingly, the criticisms of the arbitrator's conduct in the hearing on 10th February 2005 are wrong in principle and must fail. Not only has no serious irregularity been made out, but there is also no evidence of any substantial injustice. I consider it a great pity that these two allegations were ever made.

H. The Criticisms of the Award

(a) Particular Parts of the Award

72. Under the heading "Preliminary Issues to be Determined" the arbitrator said this:

"15. The parties have instructed me via some protracted correspondence relating to the skeleton arguments and by clarification at the hearing to determine the following preliminary issues in an attempt to shorten proceedings as well as to reduce costs.

16. The agreed questions that I am required to decide upon are those set out in the Respondent's solicitor's letter to the Claimants' solicitor dated 30th November 2004, acknowledged on 6th January 2005.

17. The preliminary issues to be determined are as follows:
Statement of Claim, item 6, sets out the claim as breach of contract by the Respondent. I have subdivided question 2 into parts (a) and (b) for the purpose of answer.
Question 1. That the alleged defect is a design defect which the Respondent has no liability for.
Question 2. That the alleged defect is:
(a) latent, not patent, and
(b) was not notified until after the expiry of the contractual defects liability period.
Question 3. That the alleged defect relates to work which was not within the scope of the contract works."

At paragraph 18 the arbitrator identified the items in respect of which these questions arose and at paragraph 19 identified the particular items where there was a debate as to whether the item was part of the First Defendant's contractual works scope in the first place.

73. The arbitrator made clear, at paragraph 24 of the award, that he was deciding these issues *"following the representation and consent of counsel on both sides at the hearing without reference to or any evidence being adduced to me from an expert report prepared by RBJA served with the Statement of Claim."*

74. At paragraph 25-30 of the award the arbitrator dealt with the express terms of the contract and at paragraphs 31-35 he dealt with implied terms. In this latter section he found, in principle, a duty on the part of the First Defendants to warn in respect of design defects, although he also added some qualifications to that duty. At paragraphs 36-38 he dealt generally with Woods' liability for defects, saying:

"36. I find that, under the FAS Building Contract there is a basic principle that, where defective construction occurs, the contractor is prima facie responsible for those defects up to the statutory time limit set out by the Limitation Act 1980 as amended by the Latent Damages Act 1986.

37. The contractor is responsible for instituting mechanisms which ensure the building is completed according to contract and failure to do so is the principal recourse for a client complaining of a defect.

38. Prima facie, contractors should be, and remain, liable for their own breaches of contract and should not have a general release from liability in respect of all breaches which the architect should have reasonably detected but failed to detect. It is unreasonable and too favourable to contractors to let them shelter behind the architect's failure to detect faults in the course of his visits during the progress of the works: See clauses 2.21, 2.22 and 6.36 of the FAS Building Contract, advising the contractor that the architect has no liability to the contractor for supervision."

75. At paragraph 39 of the award the arbitrator summarised some of the many authorities cited to him at the Hearing on 10th February. At paragraphs 40-49 he dealt with what he called 'definitions', which was a section largely concerned with the differences between patent and latent defects.

76. The remainder of the award, namely paragraphs 50 to 148 inclusive, was concerned with the particular items which had been extracted from the Scott Schedule to be dealt with by the arbitrator on this occasion. In respect of each such item the arbitrator considered whether the allegation was a design defect, and if so, why; whether the defect was latent or patent; and whether or not the defect related to an item which was within or outside the scope of the First Defendant's contract.

77. In undertaking this exercise it seems to me that the arbitrator was doing precisely what he was asked by the parties to do, and what they had agreed he would do on 10th February 2005. The specific agreement between them, which I consider the arbitrator followed to the letter, was recorded in counsel's notebook and was referred to at paragraph 36 of the Claimant's solicitor's witness statement. True it is that there are particular elements of particular items which the arbitrator declined to answer in the absence of evidence. That of course was the subject matter of the letter that enclosed the draft award on 14th March 2005. It might be thought that the arbitrator's inability to deal with all the matters put to him was unsurprising, given that he was offered no factual or expert evidence by either party, and that it was agreed that the RBJA Report would not be referred to. As a general comment, therefore, I am bound to conclude that the lavish criticism of the award made by the Claimants, and summarised at paragraph 8 above, is wholly unwarranted.

(b) Criticism on Issue 1: Design

78. Mr. McCue submitted that although the arbitrator identified which of the items were matters of design, he did not go on to say whether such an item was the First Defendant's contractual responsibility, having apparently assumed, without reference to the Claimants' submissions to the contrary, that the First Defendants were not liable for design items.

79. I reject that criticism. The arbitrator sets out in paragraph 25-35 of his award his findings on the contract terms. Aside from the implied duty to warn in respect of design defects, the arbitrator found no other liabilities on the part of the First Defendant in respect of matters of design. Accordingly, the arbitrator did not ignore the Claimants' submission that the First Defendants had express contractual liabilities in respect of design. On the contrary, he considered those contentions and he rejected them. Moreover, he then goes on with some care to apply his general answer to the individual items which are in the Scott Schedule.

80. Therefore it seems clear to me that there has been no serious irregularity. The arbitrator has addressed the Issue and decided it. He has explained sufficient steps in his reasoning to make any criticism wholly unfounded: see the principles in paragraph 22 above.

81. If I was wrong about that, I reject the suggestion that the alleged irregularity gets anywhere near Lord Steyn's "***high threshold***" or fulfilled the other criteria referred to in paragraph 20 above.

82. In addition, no substantial injustice can flow from this criticism. Only two of the items which he considered were found by the arbitrator to be design matters and therefore outside the First Defendant's contractual responsibility. Any injustice therefore would be limited to the consequences of the Claimants' defeat on those two items. One of them is Scott Schedule item 1(a). It is interesting to note that during the course of his submissions Mr. Kennedy said that this was a significant item as far as the First Defendants were concerned and that it meant that a number of the other criticisms, even if later proved, would be effectively of no account. Mr. McCue expressly disagreed with that in his submissions in reply. Accordingly, not only did the Claimants offer no evidence of substantial injustice in respect of these two items, but before me they expressly disavowed the significance of at least one of them.

83. One subsidiary complaint on Issue 1 was that the arbitrator had slightly reworded the design issue and thus ended up deciding the wrong issue. Again I reject that criticism. His paraphrase of Issue 1 was more than sufficient to comply with the principles set out at paragraph 21 above. He defined the substantive issue in his own terms and he decided it. He complied with his duty under section 33 of the 1996 Act in so doing.

(c) The Failure to Answer Issue 2: Patent/Latent

84. Mr. Kennedy submitted that, just as he had done in dealing with Issue 1, the arbitrator came to a general conclusion of principle on Issue 2 and then applied that to the particular items in the Scott Schedule and that that was a perfectly proper approach for the arbitrator to adopt. The general answer, which was provided in paragraphs 36-38 of the award, was in the Claimants' favour, and I have set it out in paragraph 73 above.

85. Mr. McCue said that the general answer was wholly unclear, largely because of the use of the words "prima facie". I reject that submission. Instead I agree with Mr. Kennedy. This was a clear conclusion on a general question. There is no ambiguity about it and there is no need for clarification. The Issue is answered and the answer was favourable to the Claimants. No legitimate criticism can therefore be made of the award on this ground.

86. Furthermore, because the general answer was in the Claimants' favour, there can be no question of substantial injustice to them arising from this part of the Award. Indeed, the Claimants do not identify any. Thus, this criticism must fail on that ground too.

(d) The Alleged Lack of Answers on Particular Scott Schedule Items

87. The final criticism of the award is that the arbitrator failed to give definitive answers to the related question under Issue 2 as to whether particular items in the Scott Schedule were patent or latent defects. It seems to me that this criticism fails at every level.

88. First, the arbitrator clearly considered this issue in respect of each item, but almost invariably concluded that, without evidence, he could not definitively decide the point. He cannot be criticised for that. If he had concluded that he required evidence before reaching a conclusion he was entitled, both under the 1996 Act and Rule 12.2(b) of the CIMAR Rules, to say so. Indeed, he might have been getting into trouble had he not done so. It cannot be a serious irregularity if an arbitrator concludes on the material that he has been given that he cannot reach a definitive answer on a particular issue.

89. Secondly, the arbitrator's inability to resolve the individual items arose because of the absence of evidence and is therefore explained, at least in part, by the agreement that the RBJA Report would not be referred to. That of course was what had been agreed at the Hearing. Since the arbitrator cannot be criticised for failing to upset that agreement, he cannot be criticised for the consequences of that agreement either. I make it clear that I do not criticise counsel for reaching that agreement on 10th February 2005. I simply say that the Claimants cannot now criticise the arbitrator because one of the consequences of it, whether foreseeable or not, was that the arbitrator declined to answer some of the matters put to him.

90. Thirdly, the arbitrator's decision on the general question, that construction defects, whether patent or latent, were generally the First Defendant's responsibility, is likely to render quite otiose a plod through each item to decide whether the defect was patent or latent. Accordingly, that which the arbitrator was not able to do may never in fact be necessary.

91. Fourthly, there can again be no question of any substantial injustice arising out of this criticism. The criticism is that the arbitrator has not dealt with particular matters. If that is right those matters remain to be decided. Accordingly, there can be no substantial injustice to the Claimants because those matters have not yet been dealt with. The only possible exception to this would be if the Claimants' real complaint was as to the delay in the determination of these matters. To the extent that that is their real complaint, I deal with it at paragraph 95 below.

92. I should add that there were a number of other minor points about the award raised by the Claimants in the documents. However, in his oral submissions Mr. McCue helpfully confirmed to me that he did not rely on any of the other criticisms of the award, other than those three with which I have dealt above.

(e) Summary

93. For the reasons set out above I reject the suggestion that the arbitrator has done anything wrong, much less that his award contains or is the result of any serious irregularity. In addition, no substantial injustice has been demonstrated by the Claimants as resulting from any of their criticisms of the award.

In one important respect any such injustice has been expressly disavowed. Accordingly, this third and final ground for the applications under section 24 and 68 of the 1996 Act must also fail.

I. Conclusions

94. For the reasons which I have given I reject these applications on a number of different grounds. I generally regard the criticisms of the arbitrator as very unfair and the applications relying on those criticisms as misconceived.

95. Underlying all of the Claimants' arguments was the concern that what should have been a relatively straightforward building dispute has taken 18 months and, as Mr. McCue put it, *"**got nowhere***". I agree with the broad thrust of that submission and I have considerable sympathy for the Claimants' predicament. This is a relatively straightforward building case of the kind which, in this Court, we like to think we could resolve entirely in about nine months. However, like so many of the arguments deployed by Mr. McCue, the delay in the arbitration ultimately rebounds on the Claimants themselves, because so much of what has gone wrong here must be laid fairly and squarely at their door. In particular:

(a) There was a delay of two and a half months from 6th February 2004 to 23rd April 2004 due to the Claimants' inability to serve a fully documented statement of case, despite their promise to do so.

(b) There was a failure by the Claimants to appreciate the effect on the hearing and order of 1st July 2004 and a failure to understand that the First Defendant's Defence involved much more than just the points about design and patent defects.

(c) There was very little, if any, preparation on the Claimants' side from 1st July 2004 to 12th November 2004 which led to the late instruction of Mr. McCue and a late skeleton, both of which then led to the inevitable adjournment of the hearing fixed for 22nd November. That plainly was not Mr. McCue's fault, since he was not instructed until 12th November, but it was symptomatic of the delays for which the Claimants are responsible. The adjournment, of course, accounted for another three months' delay.

(d) There was endless debate in correspondence in November 2004 to January 2005 about the scope of the hearing, which had in fact been fixed as long ago as 1st July 2005. This was an expensive waste of time.

(e) There was a failure to grasp what was necessary for the Claimants to prove their case on liability. The Claimants had prepared no evidence of fact and had a report which was not produced for the arbitration and did not deal with the issues in the arbitration. There was simply not sufficient material on the Claimants' side to deal properly with the Preliminary Issues, let alone liability as a whole.

(f) To cap it all, there was a deliberate decision by the Claimants, on receipt of the draft award on 14th March 2005, to make these applications to this Court without going back to the arbitrator on any point at all. This was contrary to the 1996 Act for the reasons which I have explained. The Claimants, due to a further mistake, then waited for one day longer than the absolute maximum period that they were allowed in which to make their application.

It is for these reasons, to bring the wheel full circle, that, in the exercise of my discretion, I declined to extend the 28 day period under section 70(3).

96. Accordingly, it seems to me that, whilst the Claimants' unhappiness is entirely understandable, that unhappiness cannot be properly directed at the arbitrator. In my judgment the Claimants need promptly to get together their factual and expert evidence on the remaining issues of liability, causation and quantum so that they can be ready to address those points at a final hearing to deal with all outstanding matters, which I fervently hope can take place some time in the autumn. There is, in my view, no reason to slice up the issues any further, so that all the remaining issues between the parties can be dealt with at one further and final hearing.

97. For all these reasons I dismiss these applications.

MR. DONALD McCUE (instructed by Messrs. Ross & Craig, London, W1H 7PE) appeared for the Claimant.
MR. STUART KENNEDY (instructed by Messrs. Blake Lapthorn Linnel, Southampton) appeared for the First Defendant
MR. SIMON WILTON (instructed by Plexus Law, London, EC3) appeared for the Second Defendant