Armstrong, R (on the application of) v Chartered Institute Of Arbitrators [1997] APP.L.R. 07/17

JUDGMENT : MR JUSTICE OWEN: Administrative Division. QBD. 17th June 1997

1. In 1984 or 1983 a Mr Davies, who lived in Wrexham, complained to the National Coal Board that mining subsidence had damaged his house. Repairs were carried out at the Coal Board's expense in 1985. In 1993 he experienced similar troubles. Naturally he assumed that the cause was again subsidence due directly, or indirectly, to mining operations.

2. Having received advice to this effect, he also queried the adequacy of the 1985 repair work. Eventually in July 1994 he applied to the Respondent Institute for Arbitration under the National Coal Board Scheme. His application is to be found at page 26 of a bundle of documents which is somewhat bizarrely compiled, not seeming to me to have any recognisable order. Certainly it is not in any chronological order.

3. By that document Mr Davies said the dispute had arisen in connection with the following:

   "SOME STRUCTURAL DEFECTS HAVE REAPPEARED IN MY PROPERTY AFTER REPAIRS WERE CARRIED OUT BY [NATIONAL COAL] BOARD IN 1985. I HAVE BEEN ADVISED THE REPAIR WAS NOT DONE PROPERLY."

4. Colonel Armstrong has been a distinguished soldier and he is an arbitrator. He has been a member of the Respondent Institute for 20 years or more. He is conscious of his reputation and the obligations of an arbitrator and considers that the Professional Conduct Committee have slurred that reputation.

5. He was appointed the arbitrator for Mr Davies' claim. He visited the property, he read the papers and he made his final award on 28th January 1995. His original reasons may be seen in respect of his findings at page 142 of the bundle. At page 141 he states:

   "NOW I THE SAID ARBITRATOR, HAVING STUDIED THE CONTENTIONS OF THE PARTIES THROUGH THE MEDIUM OF THE DOCUMENTS PLACED BEFORE ME AND HAVING MADE THE SITE VISIT ACCOMPANIED BY REPRESENTATIVES OF THE PARTIES, HEREBY FIND AS FOLLOWS:-

   The further cracking plus distortion and gable movement was not due to mining subsidence for which the respondent has any liability."

6. In accordance with the correct procedure Colonel Armstrong sent his award to the Institute. On 31st January 1995 Miss Agnew, as can be seen from page 146 of the bundle, writing on behalf of the Arbitration Department, returned the award to the Applicant stating: "as it has not been reasoned." She sent a copy of the 1993 Rules which required the arbitrator to give reasons. Indeed, as will be explained further, later the regulations required adequate reasons to be given.

7. The Applicant sent then the document which is copied at page 142B. ***"REASONS"*** it is headed:
   "1. The gable wall was moving eastwards at the top. This is not to be expected as a result of mining to the south. (up to 1977, when mining ceased).
   2. The direction of the cracks in the building supports the finding."

8. On 24th February 1995 the award was sent by the Respondent to Mr Davies. Mr Davies was not pleased with the award which had gone against him. He wrote a letter on 5th March 1995 to the Respondent Institute (copied at page 152) and he asks in that letter whether it would be possible for the Applicant to elaborate on his findings. In the second page he refers to the site visit and says: *"The majority of the cracking he witnessed in the property formed part of a Coal Board subsidence repair carried out in 1985, some 8 years after mining had supposedly ceased. The repair work has since reopened so I would like to know how they support his findings. I hope you will be able to assist in this matter."*

9. A copy of his letter was sent to the Applicant who replied on 9th March, as can be seen at page 153 of the bundle. He indicated: *"There has been no slip or omission in the award"* and he referred to various other matters including: *"My award and findings remain. No new evidence has been produced. I did not find that the reopening of any cracks was due to mining subsidence* (award last page top.) *I trust this gives you adequate information."*

10. This was communicated to Mr Davies who in his turn wrote to the Respondent on 26th March 1995, as appears at page 157 of the bundle.

11. That letter reveals that Miss Agnew had suggested that if he was not satisfied he could: *"put a letter of complaint against Colonel Armstrong, acting Arbiter... against British Coal stating... grievances."*

12. He sets out those grievances at some length. At the end, as appears from page 159, he says: *"To finish I would just like to add that British Coal carried out a subsidence repair on my property in 1985 which clearly admits that there is a problem with mining in the area sometime after mining supposedly ceased in 1977. I realise that the award has been made and it is probable that it cannot be changed but I would like some answers to the questions which I think is not an unreasonable request, having paid a fee for the Arbiter's involvement in this case. I hope you can be of assistance."*

13. A copy of this letter was sent to the Applicant. I should say, at this stage, that the reason for the correspondence taking place through the Respondent is due to the rule that arbitrators do not enter into correspondence with those who have come to them for arbitration, certainly under the scheme with which I am concerned.

14. The letter which came to the Applicant next is dated 21st April 1995 and is copied at page 156. It is in these terms, having been signed by the secretary:

"Dear Bill,

Davies v British Coal Corporation

Enclosed please find a copy of the letter of Mr Davies to Sara Agnew.

The Chairman and I have looked at your Award and we believe that the reason for the letter is the lack of adequate explanation of the reason(s) for your decision.

Since a person's home is more often than not his/her major possession/investment, both of us believe that where a Claimant loses he/she must be given full reasons, reviewing the evidence and stating why the arbitrator has found as he has in sufficient detail to satisfy the Claimant that proper consideration has been given to all factors in reaching his decision.

Your comments would be very much appreciated."

15. It is argued, on behalf of the Applicant, that this letter cites a test which was not then relevant. That is to say *"an adequate explanation"* of the reasons. I do not have to consider this argument, certainly not at this stage, but as to the gist of that letter it must have been, and it must still be, a matter of proper concern for the institute that arbitrators, who are taking part in this scheme, under the general authority and aegis of the Institute, should provide reasons which are satisfactory to the proper interests of somebody such as Mr Davies'.

16. The Applicant replied to that letter, as appears from page 161 of the bundle, by a letter dated 28th April 1995. It deals with the comments made by Mr Davies. For some time the Applicant heard nothing more and rather naturally he believed that the matter was then all over. However, Mr Davies was still not satisfied and, as appears from page 196 of the bundle, he wrote the letter dated 29th May 1995. By that letter he said:

"My complaints letter dated 26th March 1995 still stands. I would like my grievance to go before the Professional Conduct Committee.

I do not accept the Arbitrator's answers to my questions regarding his findings in the case and would like an independent structural engineer to view the file."

17. It seems that Mr Canham, who was a member of the Committee, wrote a report for the Professional Conduct Committee, this being prepared from examination of the Institute files and records. That is copied at page 282 to 286 inclusive of the file. In this he criticised the Applicant: for instance, he said that the Applicant failed to give sufficient reasons in his award. That appears at page 284. In this respect he said: *"In particular the evidence from the papers is that the cracks complained of were repaired previously by the Coal Board and they have reopened. The reasoning of the Claimants and his advisers is that this is a repeat of the same movement with earlier admitted liability. Either the repairs were not effective to stop the coal mining subsidence hence they have reopened or further subsidence has caused further movement".*

18. In addition, having dealt with the whole general picture as to what might be alleged against the Applicant as an arbitrator, he said:

"That is the role of the Arbitrator and the Arbitrator cannot be legally criticised for his decision on the basis of his findings of fact.

I have no hesitation in criticising him however on his performance in giving reasons as is required by the particular scheme.

The Arbitrator initially gave no reasons.

The reasons subsequently given are inadequate to explain to a lay complainant how a decision was reached."

19. He then made various conclusions in his report for the Professional Conduct Committee:
"1. There is no evidence of culpable misconduct on the part of the Arbitrator.
2. There is evidence of a lack of willingness to discharge the scheme specific duty of giving reasons.
3. There is evidence of customer dissatisfaction due to the lack of willingness to discharge the specific duty."

20. He then made various recommendations, which included a report to the complainant that there was no evidence of professional misconduct; a report to the complainant that the lack of detailed reasoning falls below the expectation of the Professional Conduct Committee and that the matter has been referred to arbitrators: thirdly, consult action with the Panel Management Group and lastly advice to the *"Arbitrator of the decision of this committee and that of the Panel Management Group."*

21. At this stage it is necessary to ask the question: what was the evidence of a lack of willingness to discharge the scheme specific duty of giving reasons? I shall return to that at a later stage. This report was considered by the Professional Conduct Committee on 8th September 1995, as appears from pages 287 and 288 of the agreed bundle. It appears from those pages, which are copies of minutes, that the Committee considered Mr Canham's report and Mr Canham explained that the matter turned on a technical point: the arbitrator failed to provide reasons for the award. He then referred to the statutory requirement under the Coal Mining Subsidence (Arbitration Schemes) Regulations 1994 and went on: *"Upon being asked to provide reasons for the award, the arbitrator produced a page of reasons."*

22. That was at a later stage. *"The Committee concluded that there was no evidence of misconduct within the meaning of the Bye-Laws, however there is evidence of unwillingness to discharge the scheme specific duty of giving reasons. This resulted in customer dissatisfaction."*

23. There again the phrase appears which had originally appeared in Mr Canham's report.

24. The Committee recommended that the complainant ought to be informed that there is no evidence of professional misconduct, that there is "sufficient ground to refer the matter on, due to the breach of the above statutory regulations" and that the matter would be placed before the Panel Management Group.

25. The minute goes on to explain that:

26. The arbitrator was informed of the findings of the Committee which included: *"that there was sufficient ground to refer the matter to the Panel Management Group via the Arbitration Committee, due to the breach of the above statutory regulations as well as the breach of Rule 6(v) of the Chartered Institute of Arbitrators Coal Mining and Subsidence Damage Arbitration Scheme for the British Coal Corporation Rules."*

27. On 12th September 1995, as appears from page 162 of the bundle, the Respondents wrote to Colonel Armstrong indicating that the matter had been considered on 8th September and stating:
"After careful review and consideration the Committee concluded the following:
1. There is no evidence of culpable misconduct on the part of the arbitrator.
2. There is evidence of a lack of willingness to discharge the scheme specific duty of giving reasons.
3. There is evidence of customer dissatisfaction due to the lack of willingness to discharge the specific duty."

28. As a result the Professional Conduct Committee made the following recommendations, and it then sets out the recommendations which I have indicated.

29. The Applicant replied to this letter which must have come as a nasty shock to him, particularly as he had thought that the whole matter had been resolved some months before. In his letter he submitted at 3 on page 163: *"I submit my reasons were adequate under those rules then existing based on my finding on the award that 'further cracking plus distortion and gable movement was not due to mining subsidence for which the Respondent has any liability."*

30. He then raised the question of retrospective instructions because in August 1995 fresh guidelines had been issued by the Respondent and commented: *"This was nearly 7 months after the award and it is intolerable that an assessment should now be made based on these retrospective instructions."*

31. He also in this same letter mentioned the question of costs at paragraph 10. He stated: *"I mention in passing that since the Coal Authority has to pay for an Arbitrator's time, the Arbitrator has to be reasonable on that cost."*

32. At paragraph 12 he raises the question of evidence of unwillingness in these terms: *"The Committee have not shown any evidence of my lack of willingness to discharge the scheme's specific duty of giving reasons. I gave adequate reasons under the original scheme (if not under the new) and the Committee have not put forward any details of such lack of willingness nor have they put these matters to me for my comment before reaching their conclusions."*

33. Finally in paragraph 14 he states: *"I have to request, firstly, reconsideration of the matter, secondly, the withdrawal of both of the two items marked 2 and 3 in the Legal Adviser's letter of 12th September 1995..."*

34. That has been copied at page 162, the contents of which I have already read out. He finishes finally by saying: *"I consider the whole conduct of this affair is most objectionable, and await to hear of the withdrawal of the paras and to receive the apology requested."*

35. Pausing there for one moment, it does seem that the whole of this matter was getting out of hand and, as it seems to me, it is a pity that that was so.

36. The next part of the history is to be found indicated at pages 297 and 298 of the bundle. The matter was referred to the Panel Management Group. That group held a meeting on 3rd November 1995, the matter having been referred to the Group Scheme Convener, Mr Michael Joyce. It seems that Mr Joyce recorded his observations in the letter dated 15th November because we can see from page 290 in the bundle that that was, in fact, the case. He had written that letter, dated 15th November, to Dr Nael Bunni. Dr Bunni also, as I understand it, was a member of the Panel Management Group.

37. The matter when considered by the Panel Management Group was, at least in the argument stage, not unanimous. They were discussing the adequacy of reasons as appears from page 299 of this bundle: *"The Chairman felt that the arbitrator should have given more adequate reasons. Mr Green, although not an engineer himself, did not know himself what further reasoning could have been given, unless advanced, structural engineering or geo-physical explanations were given which would not have been understood by a lay claimant".*

38. Mr Joyce spoke, Mr Pleasance spoke, Mr Harverd spoke and finally it appears at page 300: *"The Group agreed that it was not their role to criticise the conclusions of the PCC, but to decide what action, if any, be taken against the arbitrator concerned. ... The Group recommended that the arbitrator should remain on the Coal Authority panel, but he would have to make sure that any further awards were reasoned and the convenor would ask to see his next award before publication. The Group also recommended that the PCC should consider stating in their new streamlined procedure that no further correspondence be entered into by the PCC with the complainant."*

39. The next part of the history, to which I refer, is to be seen from page 297 of this agreed bundle. It refers to a meeting of the Professional Conduct Committee on 24th November 1995. The Committee was referred to the fact that the Panel Management Group had been considering the matter, it having been referred to them on 3rd November 1995. Mr Joyce, the Group Scheme Convenor, had recorded, it is said in the minutes, his observations in the letter dated 15th November 1995. A copy of this letter was sent to the Secretary. Mr Joyce noted the following: *"The reference was conducted under the 1993 rules, which are clear about the requirement to give awards with reasons as indeed are the present statutory rules. Having now reviewed the full documentation I too do not consider the 5 lines of reasoning to be adequate and concur with Tony Canham's conclusions."*

40. Tony Canham being a member of both these groups: Panel Management and PCC. *"I am also in agreement with the Panel Management Group's recommendation that Col Armstrong be asked for an assurance that all future awards will contain full reasons and explanation, and that the next one should be submitted to me for review prior to publication..."*

41. End of the quotation from Mr Joyce. The minutes continued.

"The Committee noted the contents of Mr Michael Joyce's letter of the 15 November 1995 and accepts his recommendations. The Secretary is to inform the PMG of this fact.

It was agreed however, that the Committee needs to respond to Col. Armstrong's letter of complaint dated 30 September 1995, addressed to Mr Brian Green in his capacity as Chairman.

Col. Armstrong will be informed that the PCC did not use retrospective instructions in reaching its conclusion. The reference was conducted under the 1993 rules, which are clear about the requirement to give awards with reasons as indeed are the present statutory rules. In the opinion of the Committee, adequate reasons were not given in this particular instance. In addition, the Scheme Convenor's recommendations will be put to Col. Armstrong.

Once Col. Armstrong has been so informed, the file is to be closed."

42. It seems a pity now that that was not the end of the matter but unhappily it was not.

43. On 30th November, in accordance with that which had been decided by that Committee, the legal adviser to the Institute wrote to Colonel Armstrong telling him of the meeting on 24th November indicating: *"The Professional Conduct Committee considered your letter dated 30 September 1995 and concluded that it did not use retrospective instructions in reaching its conclusion. The reference was conducted under the 1993 rules, which are clear about the requirement to give awards with reasons as indeed are the present statutory rules. The subsequent advice simply clarified the existing requirement. In the opinion of the Committee, adequate reasons were not given in this particular instance."*

44. The letter concluded by indicating the requirements which had been stated by the Professional Conduct Committee.

45. Colonel Armstrong replied to this on 2nd December as can be seen from page 181 of the bundle. At paragraph 1 he says: *"I note that my letter of complaint... to the Chairman of the Chartered Institute has been passed to the committees complained about to rule on their own judgment.*

2. This is totally unacceptable; and has resulted in further complaint I will wish to make..."

46. He asks for a meeting with the President of the Chartered Institute which, in the end, did not come about.

47. On 6th December a letter was written by the Secretary General of the Institute to Colonel Armstrong in emollient terms. It is copied at page 182 and it indicates the various comments:

"3. I fully appreciate that you did your duty with resolution and impartiality but it would appear that the reasons you gave were considered to be inadequate, both by the Professional Conduct Committee and by the Scheme Convenor.

4. The Institute has a duty under its Bye-law 15 to receive complaints and to deal with them expeditiously and even-handedly. This it certainly did in your case and there is no doubt that the complainant has a right to know the outcome of its deliberations on the complaint as laid.

I am very sorry that this matter has caused such a great upset but I hope that you will accept that it has been dealt with fairly."

48. Quite clearly the Applicant did not so consider the matter since he replied on 8th December 1995, as appears from page 184 of the bundle.

49. On 14th February 1996 the solicitors, who had been instructed by the Applicant, wrote to the Institute indicating that Colonel Armstrong was extremely aggrieved by the letter of 12th September which had been sent to him by the legal adviser and adding: *"After many years as a member of the Institute our client is horrified that he should find you consider that his work does not meet with standards which the Professional Conduct Committee expect. He is particularly aggrieved that the committee appear to have considered a complaint against him when he was not aware of the fact that the committee was involved."*

50. Two comments. The Committee, of course, was not saying that his work in making a decision did not meet with the standards which were required, what it was saying was that his explanation, or his reasons, were not sufficient.

That he was aggrieved by the Committee, having considered a complaint against him when he was not aware of the fact, seems to me to be wholly justifiable in the circumstances.

51. I will mention one other quotation from page 192:

"As is apparent from the chronology which is set out above there is no doubt that Mr Davies was dissatisfied with the decision given by our client. There is also no doubt that our client was asked to expand upon his reasons and answer points raised by Mr Davies. This last letter from the Institute prior to the meeting of the Professional Conduct Committee on the 8th September is a letter dated 21st April 1995. We would ask you to look again at that document. The letter states that the secretary, Mr Harding, and the chairman have looked at the award and have formed the view that Mr Davies' irritation stems from lack of adequate explanation...

Criticism is made as to that as will become apparent at a later stage.

On 12th April 1996 the Professional Conduct Committee met and considered what I may loosely call Colonel Armstrong's case. That appears on page 199 of the bundle.

On 7th June 1996 the Form 86A was filed. From that it is apparent that relief is sought in respect of the decision of 8th September 1995, of the decision of 24th November 1995 and also that of 12th April 1996.

This hearing has identified two factual issues which are central to the dispute: firstly, did the Applicant give adequate reasons in his award? Secondly, was there evidence of "an unwillingness to discharge the scheme of giving reasons?" As to the first of these questions there is room for different views. However, for my part, I see no reason why the Respondent, through its Professional Conduct Committee, in its duty to the public should not indicate when it considers reasons are not adequate. Indeed, I see every reason why it should do so. I have no hesitation in finding that the reasons which were given were inadequate. I find that for these reasons: first of all, I look at Schedule 1 of the Householders' Arbitration Scheme and in particular, paragraph 8 which requires:

"the arbitrator shall send to each party a statement in writing of his award with respect to the matters in dispute and of his reasons for making it."

52. As I read those words they certainly demand more than was originally given by the Applicant in this case.

53. I am asked to take into account the well-known quotation from ***Save Britains Heritage v No. 1 Poultry Limited*** [1991] 1 WLR 153 and, in particular, the impetus which was given to Megaw's J judgment in ***In re Poysore Mill's Arbitration*** [1964] 2 QB 467 by that decision of the House of Lords. There it is true that the Court was dealing with the Parliamentary requirement that reasons should be given but the principle seems to me to be similar. Megaw J had said In ***re Poyser and Mills' Arbitration*** : *"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."*

54. It is apparent, as I see it, that in this case the Applicant's reasons did not deal with all the matters which had been raised, in particular, they did not deal with the suggestion that the repairs which had been carried out by the Coal Board had not been properly done. Indeed, one can go further than that. If one looks at the original statement copied at 142A, to which I have already made a reference to two lines, it is clear that that was inadequate, so inadequate that an employee of the Respondent, sent the award back requesting reasons to be given. It is said, on behalf of the Institute, that that should not have been necessary. I certainly do not find that the Applicant was doing anything which he believed not to be right, but, as I have indicated, I have no hesitation in finding that the reasons were not adequate.

55. Mr Davies' complaint about the adequacy of the reasons was passed to the Applicant. That is the document which is copied at page 152. He refers there to the repair work which had, he said, reopened. Bearing that in mind, and bearing in mind the way in which the case was put on his behalf, it seems to me clear that he had not given adequate reasons.

56. For what it is worth, when the letter, which is copied to page 156, was sent by the Chairman and Secretary of the Institute, the Applicant replied on 28th April 1995 by the letter copied at page 161, but he did not, at that time, make the point about the adequacy of reasons. Indeed, for quite some time, as has been pointed out, his main contention was that a new standard had been introduced. A suggestion which I do not accept.

57. As to the adequacy of reasons, it is, in fact, the case, as I understand it, that the Applicant has not suggested any other arguments, or any other material, which could now be put forward on his behalf but was not put forward during the active history of this matter before the present proceedings were started.

58. It is suggested, on behalf of the Respondent Institute, that the Applicant's approach has been influenced or tainted by his incorrect belief that arbitrators are not supposed to spend more than eight hours on each case. In so far as that seems to be a possible conclusion, it does make it doubly sad that matters reached this stage. That eight hours was the maximum was never, as I understand it, the rule, although it is true that if more than eight hours was to be claimed then steps had to be taken by the arbitrator to indicate that that might be the case.

59. As to the way in which the Applicant deals with these matters, he has a number of points which he puts forward. He accepts that there was a statutory obligation to give reasons but says that at the time there were no guidelines such as were issued later. He points out that the detail of the reasons must be governed by the circumstances of the case - that could hardly be otherwise - but argues that in the present case that detail need only be limited because there is no appeal and because the arbitration, which the Respondent Institute recognises

is a public service without a profit to the arbitrator, cannot impose too far on the arbitrators and their time otherwise they would not do the work. It is also argued that the need for detail is counterbalanced in this case by the need for brevity. It is said that it would be impossible for an arbitrator, in these circumstances, to set out the various arguments of a technical nature which might be of importance to a claimant's advisers.

60. All of those arguments I take into account in so far as I can, as also I take into account the remark attributed to Mr Green, a member of the Panel Management Group, to be found at page 299, to which I have already made reference. Taking all those matters into account, I still cannot find that the reasons given were adequate. I was asked to take into account various analogous, or suggestedly analogous, situations such as Area Legal Aid Appeal Committees. That, in the circumstances, as has been explained, does not help me. That there will be occasions in other spheres when only a decision is required, undoubtedly must be the case. However, I am far from satisfied that that would ever be the case under the scheme with which I am concerned. I take the point that at one time the Chairman and the Secretary were asking for an explanation of the reasons, but terminology of this kind is not exact, it is not necessarily helpful in asking whether the reasons are adequate. I might ask adequate for whom, adequate for what? What was necessary for this scheme was that reasons should be given. What was behind the scheme was that a claimant would want to know what the decision was and why. The claimant was not to be equated with any professional person who was advising. The claimant was likely to be a householder whose house had been damaged, for example, by subsidence. Therefore the more I consider this matter the more sure I am that these reasons were not adequate within the meaning of the scheme.

61. I turn now to the second question to which I have made reference: *"Was there evidence of an unwillingness to discharge the scheme of giving reasons?"* It is a phrase, as I have indicated, used by Mr Canham and adopted by the Professional Conduct Committee. As it seems to me it was an inappropriate phrase because, although there is plenty of evidence to show that the Applicant did not comply with that scheme, unwillingness to comply as a phrase implies a realisation of the proper standard but a reluctance to abide by that standard. There was, as I see it, no discernible reluctance or unwillingness. There was a failure to recognise what the standard was and the final position of the Institute seems to be that they are saying to the Applicant in this case "*You have failed",* which I suppose is as near as any public body can be to saying that even Homer can nod and on this occasion he did.

62. If it had been possible to accept that in this case adequate reasons were not given, perhaps much distress, much time and much money could have been saved. However, that is now all water under the bridge.

63. The Form 86A seeks relief in respect of the decisions evidenced at pages 287 and 288, that is the decision of 8th September 1995 in respect of the decision on 24th November 1995 evidenced in page 297 and the decision of 12th April 1996 evidenced at page 199. As this last decision is wholly dependent on the arguments in respect of the first two, there is no need to consider this decision any further.

64. I turn to the decision of 8th September 1995, a decision of the Professional Conduct Committee.

65. The Applicant was not told of the allegation or of the impending proceedings. He should have been. The Institute's bye-laws in respect of this are set out at page 244. It is the schedule dealing with professional conduct and disciplinary matters. At 2(C)(i) it provides: *"Any allegation or information that a member has or may have been guilty of professional misconduct shall be investigated by the Committee who shall invite the member concerned to comment thereon unless it be impracticable or undesirable to do so:"*

66. It is not, in any way, being suggested that to have issued that invitation would have been either impracticable or undesirable, and I should not have accepted it had that suggestion be made. It is quite clear that there was an error and a regrettable error, and it is right that in presenting the case for the Respondent it has not been suggested in any way that that could be justified.

67. Next it is said by Mr Edis, on behalf of the Applicant, and I quote from his skeleton argument: *"It is obvious that disciplinary proceedings which have been convened and held without informing the 'accused' of their very existence are offensive to natural justice and that <u>any</u> decision which has been made as a result cannot stand."*

68. In support of that he quotes from ***Calvin v Carr*** [1980] AC and, in particular, from the speech of Lord Wilberforce which is copied at page 596H. It is dealing, of course, with a different factual background, but the factual background is nevertheless similar: *"In addition to these formal requirements, a reviewing court must take account of the reality behind them. Races are run at short intervals; bets must be disposed of according to the result. Stewards are there in order to take rapid decisions as to such matters as the running of horses, being entitled to use the evidence of their eyes and their experience. As well as acting inquisitorially at the stage of deciding the result of a race, they may have to consider disciplinary action: at this point rules of natural justice become relevant. These require, at the least, that persons should be formally charged, heard in their own defence, and know the evidence against them. These essentials must always be observed but it is inevitable, and must be taken to be accepted, that there may not be time for procedural refinements."*

69. The last part of that last sentence can have no relevance here.

70. However, say the Respondents, and this is the counter argument which has to be considered, a failure to give the opportunity to make representations to a party affected by a procedure does not, of itself, amount to unfairness. There is, says Mr Holgate, no such thing as a technical breach of the rules of natural justice. There is no breach unless the procedural error has caused substantial prejudice to the Applicant and he cites ***George v Secretary of State for the Environment*** [1979] 77 LGR 689. In particular, he quotes from pages 695 and 696 of the judgment

of the Master of the Rolls, as he then was: *"Accepting that a breach of natural justice (which results in unfairness to the applicant) is a ground for challenging the order, it is necessary to consider the meaning of 'a breach of natural justice' in this regard."*

71. Further down on that page he quotes, with approval, from the judgment of Kerr J in ***Lake District Special Planning Board v Secretary of State for the Environment*** (unreported) in February 1975: (^^Quote unchecked) *"I also accept the submission that there can be no such thing as a 'technical' breach of the rules of natural justice, since the concept of natural justice is not concerned with the observance of technicalities but with matters of substance."*

72. The Master of the Rolls went on: (^^Quote unchecked) *"The question is whether as a result of any failure in procedure or the like there was a breach of natural justice. On this approach the position under the first limb is almost indistinguishable from that under the second limb. You should not find a breach of natural justice unless there has been a substantial prejudice to the Applicant as a result of the mistake or error which has been made."*

73. In this case he went on to say there was no substantial prejudice.

74. Mr Holgate also quoted from the other judgments of Roskill LJ and Cumming-Bruce LJ. It is not necessary for me to refer to them both, suffice it to say, that Cumming-Bruce LJ, that is at page 699, does indicate something a little wider: *"A breach of natural justice means that because of what has happened - something that has been done or has failed to be done - somebody has either actually suffered injustice or there is a real risk that somebody has suffered injustice."*

75. Nevertheless it seems to me that that is a matter which I must take into account.

76. The next case which I am asked to consider, and this time it is by the Respondent, again it is ***Moran v Lloyd's LLR*** [1981] 1 423, in particular, there is a quotation again from the Master of the Rolls and this time from Ackner LJ. They are, without going to them in any detail, to the same effect. I was also asked to take into account that which appears in deSmith, Woolf and Jowell Judicial Review and Administrative Actions, Fifth Edition of 1995 at page 492. Under the paragraph 10/027: *"The degree of proximity between the investigation in question and an act or decision directly adverse to the interests of the person claiming entitlement to be heard may be important. Thus, a person empowered or required to conduct a preliminary investigation with a view to recommending or deciding whether a formal inquiry or hearing (which may lead to a binding and adverse decision) should take place is not normally under any obligation to comply with the rules of fairness."*

77. Under the footnote from ***John Moran v Lloyd's (A Statutory Body)*** it is said the inquiry by Lloyd's which recommended that Lloyd's should exercise its disciplinary powers against the member under section 20 of the Lloyd's Act 1871 was not subject to the rules of natural justice. Lord Denning Master of the Rolls stated that the rules of natural justice: *"have no application to a preliminary inquiry of this kind... It does not decide anything in the least. It does not do anything which adversely affects the man concerned or prejudices him in any way."*

78. As it seems to me from these, and also from ***Malloch v the Aberdeen Corporation*** [1971] 1 WLR 1578, what I must be looking for is what prejudice may have been caused. Again it does not seem to me that it is necessary to go into any more detail so far as the decided cases are concerned.

79. Here there was a finding that the Applicant was unwilling to give reasons, and I use that as a form of shorthand. It is said that has never been withdrawn. Secondly, it is said that the Applicant was never heard and he should have been heard at that time. Next it is said he was taken off the list of arbitrators until the Panel Management Group had considered the matter and as he has never accepted what they said, he remains off it. Taken off in this sense, not in the sense that his name was struck from the list, but that he was not to be offered any work under the scheme until this matter had been resolved.

80. That is the one side, but it is necessary to bear in mind that there was here a finding of no professional misconduct. Of course, if there had been a finding of professional misconduct the Respondent Institute would have been in a very tricky situation indeed. It is right to add that I do not know what they might have done had they been minded to say that there was some evidence of professional misconduct. It is not necessary for me to consider that any further. What I do consider is that, in my judgment, these proceedings must be seen in two parts. Firstly, there was the disciplinary part, the part which alleged professional misconduct. Doubtless badly handled, but in the end no harm done because it was rejected. Secondly, the second part was the referral to the Panel Management Group via the Arbitration Committee. This was an administrative act clearly, as I see it, in accordance with Regulation 11 of the Institute's Regulations to be found at page 268. This states: *"The Professional Conduct Committee shall consist of a Chairman and four other members. In addition to its duties pursuant to Bye-Law 15 and the Schedule to the Bye-laws, it shall be responsible for informing the Arbitration Committee where complaints of malpractice and/or inadequate performance by arbitrators are found to have substance."*

81. Again it may be said that here there was a prejudice to the Applicant. Indeed, if one looks at what happened one can go further. The prima facie view that there was prejudice would seem to be confirmed by what took place at the PMG shown at page 300 of the bundle. This was on 3rd November 1995. It can be seen that there: *"The Group agreed that it was not their role to criticise the conclusions of the PCC, but to decide what action, if any, be taken against the arbitrator concerned."*

82. In other words, they accepted that the arbitrator had given insufficient reasons and sought to say what action, if any, should be taken. This was considered on 24th November, as I have already said, and as can be seen from page 297 of the bundle.

83. However, I look at the essential finding which is no more than that to Mr Davies, the colonel did not give adequate reasons, as I accept that he did not, and that the Professional Conduct Committee's recommendations were appropriate. I fail to see any prejudice to the Applicant. I had, and I still have, concern about the finding of unwillingness for the reasons which I have indicated, and I have some reservations about the suggestion of a consequence of consumer dissatisfaction. If these were to be, as it were, on his record I would require some amendment, but I am assured that that is not the way in which the Institute proceed. So looking at this matter as well I asked, "Was there any prejudice?" and I came to the conclusion that there was not and I came to the further conclusion that there is no case here for quashing that decision of September 1995.

84. I turn now to the decision of 24th November 1995 as evidenced at page 297 of the bundle. The Applicant complains as to this that: *"Having conducted a hearing which it ought in common justice to have regarded as a nullity [the Respondent] compounded the error by merely conducting a 'review' of that hearing and not a rehearing with a differently constituted committee. The committee considered irrelevant factors and did not (according to the evidence) consider the procedural unfairness to [the Applicant]. If there is no appreciation of earlier unfairness it is bound to be the case that the committee would incline towards merely reinforcing its earlier decision. No further information was before the committee, it did, however, see a report from Mr Joyce, which was not shown to [the Applicant], nor was he told of its existence."*

85. As to the first part of that complaint, as I have already indicated, I do not accept it, certainly not in total, though it is not necessary for me to explain that part in my reasoning any further.

86. The next suggestion is that there should have been a rehearing with a differently constituted Committee. As appears at page 244 of the agreed bundle, which is a quotation from the schedule to the bye-laws, the Committee shall consist of five members as appears from paragraph 2(c)(iii): *"No decision shall be taken by the Committee except at a meeting at which at least three members are present."*

87. In those circumstances it would appear that it would not have been possible, unless there are parts of the regulations to which I have not been referred, to have had a new Committee of those who have not been involved at all. That is not the end of the matter.

88. It has been said that there is no reason to suggest, or suspect, any bias of the kind which is alleged. First of all, I should say bias has not been alleged. What, as I understand it, is suggested is that those who sat on that Committee might well have had closed minds. Minds closed to the possibility of a finding that the colonel had given adequate reasons. My immediate reaction to that is to ask: but why? The persons who were elected to, or appointed, I know not which, to this Committee would not be appointed on the grounds that they are there merely to support the Institute at all stages. I see no reason whatsoever for suggesting that there was any defect among those who consider the matter on 24th May as is suggested by the Applicant.

89. I do not have to rely on ***R v Gough*** [1993] AC and, in particular, that which was said in the speech of Lord Goff at page 654F. I do, however, rely to some extent, on the history of what happened leading up to this meeting of the Professional Conduct Committee. It is set out in convenient form in the Respondent's skeleton argument. Firstly, in his letter of 30th September 1995, which is at page 165 of the bundle. The Applicant asked the Professional Conduct Committee itself to reconsider the matter and to withdraw the recommendations 2 and 3, to which I have already made reference. Secondly, the Applicant was told that the matter would be put before the Committee as the Applicant requested (see page 177) and he did not object. The Applicant repeated his request on 25th November 1995 (see pages 178 and 179 of the bundle).

90. The Committee's response was given by a letter of 30th November at page 180. It was only then that the Applicant suggested some bias. Of course, that does not necessarily mean that there was not bias, nor does it necessarily mean that I must reject a suggestion of closed minds, but it is of some interest to note what was the attitude of the Applicant being a member for 20 years, or more, of the Institute at that time. The history of this matter does not make me see unfairness or bias in the activities of this Committee.

91. As to the meeting, the Applicant was given an opportunity to make any representations which he wished to make and he did make representations. The whole matter was considered by the Professional Conduct Committee and also by the PMG. The decision was no more than that whilst he should remain on the panel the recommendations as to requiring assurance that he would give reasons, and that for the first award he should submit it to a Committee member before it went out, indicate that here was a Committee which was not doing any more than properly it could consider necessary in the circumstances for the benefit of the status of the Institute and for the benefit of the public. It has been said that the real matter which was to be considered at this time is the adequacy of the reasons. That was the real problem. With that I agree.

92. I come now to the next part of that which is said by the Applicant. He makes complaint that Mr Joyce's report went before the Committee. That it did is abundantly clear. He makes no complaint about Mr Canham being present. Mr Canham had been on the PMG and was also on the PCC. It is of significance that the only passage quoted was that which I read out. It is said that they, the Committee, should not have proceeded without informing the Colonel that they were to consider it. Certainly if they had sought to reverse their original decision that there was no professional misconduct there would have been great cause for concern since the report of Mr Joyce made some such suggestions, but those were irrelevant to the matter which the Committee had to consider at this time and, as I see it, they can have had no bearing, no influence and, of course, no prejudice of any kind to the

Applicant. Accordingly, whilst the Institute might receive few marks for presentation, again I ask what prejudice was there of any kind by what is alleged. I can see none.

93. I ask myself the question: what else would, or could, the Colonel have said on this question as to whether there had been adequate reasons? As I see it the answer is nothing. What would, or could, he have said as to the requirement in the circumstances for there to be a request that he should give an assurance as to the feature and that he should submit his next award for a form of monitoring? Again, as it seems to me, there is nothing more that he could have said to add to that which was already before the Committee.

94. In the upshot I see no reason to quash any decision by the Institute and this application must be dismissed.

95. MR HOLGATE: In addition to that might I ask for costs, please?

96. MR EDES: I cannot say anything on the question of costs. I do, however, raise one matter: your Lordship has indicated that you are not satisfied with the original findings, if I can call them that, and might have required amendments to those if they were to play a part in the colonel's future. That was raised yesterday, as I understood it. My learned friend was taking instructions.

97. MR JUSTICE OWEN: I understood him to say it would not make any difference if I am wrong.

98. MR EDES: If there is an assurance that those will not be relied on in the future we are content with that.

99. MR HOLGATE: Our position remains, as it has always been, that we ask for assurance.

100. MR JUSTICE OWEN: I have already said that I regard that as perfectly proper. It is the unwillingness which I do think has unfortunate overtones.

101. MR EDES: As regards that, that will certainly not be held against the Applicant.

102. MR JUSTICE OWEN: As long as that is removed if there is anywhere from which it can be removed it may not be necessary. It would be, as I see it, fairer all around if it was said that, if you have to say anything at all on this occasion, the arbitrator did not give adequate reasons and no more.

103. MR EDES: My Lord, I am sure this matter will be reported back to the relevant committees. I am sure what your Lord has said will be reflected in the note of the matter.

104. MR JUSTICE OWEN: I will make the order which you seek. Thank you very much. I am not persuaded that the normal rules will not apply here.

MR D HOLGATE QC (instructed by Lees Lloyd and Whitley, London EC1N 6TD) appeared on behalf of the Applicant.
MR W EDES (instructed by Rowe and Maw, London EC4V 6HD) appeared on behalf of the Respondent.