Matthew Hall Ortech Ltd v. Tarmac Roadstone Ltd [1997] APP.L.R. 12/11

JUDGMENT : His Honour Judge Thornton Q.C. High Court Of Justice Official Referees' Business 11th December 1997

1. Introduction

1.1 Background to the Appeal

1. This is an appeal, brought by Matthew Hall Ortech Ltd., ("Matthew Hall"), with leave granted by H.H. Judge Havery Q.C., from an interim award of a legally qualified arbitrator, Mr. Anthony Bingham, dated 18th March 1997. The respondent to this appeal is Tarmac Roadstone Ltd., ("Tarmac"). Leave to appeal was granted by an order dated 31st July 1997. I heard the appeal on 31st October 1997 and reserved judgment. I handed down a draft judgment to the parties on 11th December 1997 and, on that occasion, each party indicated, firstly, that it accepted my reasons for allowing the appeal on the first question of law and, secondly, that each also accepted that the second question of law I was concerned with, which was still outstanding, need no longer be argued. I therefore allowed the appeal and stated that I would hand down my perfected judgment allowing the appeal.

2. The parties to the arbitration are Tarmac as the claimant and Matthew Hall as the respondent. Tarmac was the Purchaser and Matthew Hall was the Contractor under a Contract whereby Matthew Hall was to design, provide, erect and commission a complete mineral processing plant for a sum of £14,139,223. The Contract incorporated the Standard Conditions of Contract published by the Institution of Chemical Engineers known as the Model Form of Conditions of Contract for Process Plants (1981 revision). This Form of Contract is popularly known as the "Red Book" and is in frequent use when large-scale process plants are to be provided on a "turn-key" or design-and-build arrangement between Purchaser and Contractor.

3. Tarmac instituted arbitration proceedings following the discovery that 22 steel bunkers had suffered from what appeared to be structural damage. This discovery was made in late 1994 and the damage has already cost about £125,000 to rectify with another approximately £92,000 in capital costs and additional running expenditure of about £21,000 per annum also being claimed. The damage is alleged to be the result of design and construction deficiencies resulting from Matthew Hall's breaches of contract.

4. There had already been a troubled history of the Plant before the notice to arbitrate was served. The Contract was entered into in 1986 and the interim award includes a finding that a Final Certificate should have been issued by Tarmac by no later than 5th June 1994. Prior to that date, as the award recites, there had been three series of disputes. Two were settled by agreement, by agreements dated 28th November 1989 and 28th April 1990. The third was referred to arbitration by a different arbitrator but was settled by a consent award dated 15th April 1993.

5. The claim is contested by Matthew Hall and the merits have yet to be considered by the arbitrator. This is because a number of jurisdictional and procedural defences were put forward to the claim. These fall into three distinct groups. All three were made the subject of preliminary issues which were determined in the interim award. Two of these groups of issues do not concern me, they deal with defences based on allegations that the earlier consent award precludes the present claim and that Tarmac had previously waived its rights to bring this claim by issuing an Acceptance Certificate following its agreement to do so which was recorded in the consent award. The third group of issues is concerned with the effect of the Final Certificate clause in the Conditions. The arbitrator's award on this issue was made the subject of leave to appeal by Judge Havery's order.

1.2 The Issues

6. I will first summarise the issues that give rise to this appeal. These arise out of the clause which provides both that the Engineer is to issue a Final Certificate and for the effect that is to be given to it. Prior to its issue, an Acceptance Certificate has to be issued and the Contractor has to complete the work of making good defects. In this case, the Engineer had ceased to act and the parties accept that the task of issuing the Final Certificate had passed to Tarmac. However, Tarmac never issued the Final Certificate. Matthew Hall put forward, as a defence to the claim, that that failure was a breach of contract whose consequence was that Matthew Hall was deprived of immunity from Tarmac's claim that the Final Certificate would have given. In those circumstances, Matthew Hall argued that Tarmac should be prevented from pursuing the claim since, if it was allowed to proceed and recover damages, Tarmac would be profiting from its own wrong. As part of its answer to this defence, Tarmac contended that its claim would not have been barred by the Final Certificate, even if it had been issued.

7. The arbitrator found, as I have already stated, that the Final Certificate should have been issued. His award contains a finding that that failure to issue the Final Certificate was a breach of contract by Tarmac, a finding he expressed as follows: *"It is tolerably clear that [Tarmac] is in breach of contract by failing to issue a Final Certificate at most by 5 June 1994."*

   The arbitrator, in consequence of that finding, had to answer another preliminary issue which was phrased as follows:

   "(b) ... [w]ould the issue by [Tarmac], alternatively the Engineer of a Final Certificate have prevented [Tarmac] from bringing the present claim in contract, alternatively in tort:-

   (i) On the assumption that [Tarmac's] claim is in respect of defects which were latent at the time of issue of the Final Certificate?

   (ii) On the assumption that [Tarmac's] claim is in respect of defects which were not latent at the time of issue of the Acceptance Certificate?

   (c) In any event, is [Tarmac] prevented from bringing its present claim in contract, alternatively in tort, by failure of [Tarmac], alternatively the Engineer, to issue a Final Certificate?"

8. The arbitrator answered these issues as follows: *"(b) No, but see the limitation explained above."*

   The limitation referred to read: *"The certificate bars a contractual claim against [Matthew Hall] for defects which he is accused of not having carried out. To avoid doubt, it does not prevent a contractual claim for defects allegedly put right, but discovered later to be badly done. The certificate does not bar a claim for latent defects."*

   The final part of the answer provided by the arbitrator was as follows: *"Yes, but only to the extent I have explained* [in the limitation set out above]."

9. The appeal is brought by Matthew Hall on the basis that the arbitrator has misconstrued the Final Certificate provisions of the Contract. On a proper construction of these provisions, so Matthew Hall contends, the claim would have been barred by the Final Certificate had it been issued. It was this question of law that gave rise to the application for, and grant of, leave to appeal. If Matthew Hall succeeds on this question, its rights would potentially be affected to a substantial extent because, so it contends, Tarmac would then be precluded from pursuing its claim.

10. Tarmac contends that the arbitrator's conclusion as to the effect of the Final Certificate provisions is correct. However, it supports that conclusion by a different construction of the relevant clause to that adopted by the arbitrator. Tarmac also contends that if the arbitrator was wrong in concluding that the Final Certificate would not have barred the claim, nonetheless it can still pursue its claim despite Matthew Hall invoking the principle that Tarmac should not be allowed to rely on its own wrong to bring its claim. Tarmac's reasons for this conclusion are:
    1. Tarmac would not be relying on its own wrong in bringing the claim since it does not have to rely on the absence of the Final Certificate to bring it. In truth, the Final Certificate provides Matthew Hall with an evidential defence, to the effect that it can shut out evidence that Tarmac could otherwise bring to prove Matthew Hall's breaches of contract. Thus, any wrong by Tarmac merely prevents Matthew Hall from being able to avoid the consequences of its own wrong.
    2. The principle relied on by Matthew Hall is an equitable one. Since a party seeking equity must come to the arbitrator "with clean hands", Matthew Hall cannot invoke the principle since it was itself in breach of contract in providing defective bunkers.

2. Procedural Matters

11. Before turning to the question of law thrown up by the Final Certificate clause and its construction, I must first deal with a number of procedural matters.

2.1. The Reasons Provided by Judge Havery in Granting Leave to Appeal.

12. I was informed that Judge Havery delivered a short judgment explaining why he had granted Matthew Hall leave to appeal the question of construction arising out of the Final Certificate question. Mr. Goddard, counsel for Matthew Hall, at the outset of his argument, sought to persuade me that I should look at these reasons which had been transcribed but had not been placed before me. Because this application was strongly resisted by Miss Rosemary Jackson, counsel for Tarmac, I had to decide whether or not I should read Judge Havery's reasons.

13. In deciding that question, my starting point needs to be the speech of Lord Diplock in ***The "Antaios".*** In that decision, which confirmed and elaborated on the guidelines which should operate when applications for leave to appeal arbitrator's awards are being considered, Lord Diplock stated:

    "However, save in the exceptional case [when the judge has refused leave to appeal but has certified that that decision may itself be the subject of an appeal to the Court of Appeal] a judge ought not normally to give reasons for a grant or refusal under section 1(3)(b) of leave to appeal to the High Court from an arbitral award. He should follow the practice that has been adopted in your Lordship's House ever since a would-be appellant from a judgment of the Court of Appeal was required to petition this House for leave to appeal to it when leave to do so had not been granted by the Court of Appeal itself. It has been the practice of this House at the close of the short oral argument on the petition, to say no more than that the petition is allowed or refused as the case may be.

    Save in very exceptional circumstances which I find myself unable at present to foresee, I can see no good reason why a commercial judge in disposing of an application under section 1(3)(b) should do more than that, and several good reasons why he should not. In the first place, he is not himself deciding at this stage the question of law arising out of the award which usually involves a question of construction of a commercial contract. He is simply deciding whether the case is of a kind that is recognised, under the current guidelines laid down by appellate courts, as suitable to be admitted to appeal. In the second place, it adds to the already excessive volume of reported judicial semantic and syntactical analysis of particular words or phrases appearing in commercial contracts which judges are inveigled to indulge in by the detailed oral arguments which it appears to be current practice to allow on applications under section 1(3)(b); whereas all that the judge has to decide on the application is: first, is the dispute, on the one hand, about a one-off clause or event, or, on the other hand, about a standard term or an event which is a common occurrence in the trade or commercial activity concerned? If it is the former, he must then consider: whether the arbitrator was in the judge's view so obviously wrong as to preclude the possibility that he might be right; if it is the latter, he must then consider whether a strong prima facie cade has been made out that the arbitrator was wrong? Unless the answer he would give to the question appropriate to the type of case to which the application with which he is concerned is: "Yes," he should refuse leave to appeal."

14. Judge Havery did not give any indication that he regarded the application for leave to appeal as being in the exceptional category which Lord Diplock referred to as justifying the giving of reasons. It was, therefore, an application which was, or should have been, dealt with in a short, oral argument which Judge Havery must have

regarded as involving the construction of a standard term where there was a strong prima facie case that the arbitrator's decision was wrong. I would be ignoring my duty to apply the law in a consistent manner if I was to ignore or decline to follow the guidelines established by the House of Lords in *The "Antaios*". I, therefore, declined the invitation to look at Judge Havery's reasons.

2.2 The Question or Questions of Law Raised by the Appeal

15. Surprisingly, the order granting leave to appeal merely states that Matthew Hall's application for leave to appeal be granted without identifying the question or questions of law for which leave to appeal was being granted. In the originating motion, no question of law alleged to arise out of the award is set out. Instead, the pleading identifies the order which it is contended should be made so as to remit the award to the arbitrator and it also sets out Matthew Hall's grounds of appeal. From this pleading, two questions of law can be seen to arise. These are:

    1. What is the true construction of the words: *"shall constitute conclusive evidence for all purposes and in any proceedings whatsoever between [Tarmac] and [Matthew Hall that [Matthew Hall] has completed the Works and made good all defects therein in all respects in accordance with his obligations under the contract ..."* which appear in clause 38.5 of the Conditions of Contract which are incorporated into the Contract between the parties?

    2. [Does the final] sic Certificate prevent it from bringing its present claims both in contract and tort?

16. The first question of law is clearly raised by the originating motion. I have taken the wording of the question from the words in the Final Certificate provisions of the Contract. The second question of law arises out of the grounds of appeal and Tarmac's response to the allegation that the Final Certificate, on its true construction, would have prevented Tarmac from bringing the present claim. This response only clearly emerged in Tarmac's skeleton argument and at the hearing of the appeal. It had, of course, been referred to at the hearing before the arbitrator who had not needed to deal with it, given his finding concerned with the construction of the Final Certificate provisions of the Contract.

17. I propose first to deal with the first question of law. I will then consider the content of the second question of law and the difficult procedural questions that it throws up.

3. Relevant Contract Provisions

18. The Red Book is a form of Contract in wide use in process engineering projects. It consists of Conditions, Schedules, Guide Notes for the preparation of these Schedules, special conditions and introductory notes. The Red Book is usually used for the supply of a process Plant involving chemical or physical changes to materials in bulk. The Plant will normally consist of a number of items of process equipment with interlocking pipework, structures and instrumentation. It will usually be specially designed and the Purchaser's requirements will usually be specified in the Contract by two separate types of criteria, those defining the purpose for which the Plant is to be designed and supplied and those defining mechanical performance under operating conditions. Such criteria will include such factors as the quantity and quality of products, by-products and product yield and the efficiency of operation of the Plant for a given throughput or input of materials. It follows that this type of process engineering consists of the construction of a tailor-made product within a frequently used engineering and contractual framework.

19. The Conditions are intended to be supplemented by eight Schedules which have to be specially drafted for each project. These cover the necessary detail to make the Conditions applicable to the particular project in question, namely the description of the work, the drawings and other documents which are to form part of the Contract, the times and stages of completion, take-over procedures, performance tests, liquidated damages and payment. The Guide Notes provide guidance in the drafting of these Schedules and as to the level of detail which they should contain.

20. The stages of the Contract are all defined in some detail. The most important transition point in these stages is when the Purchaser takes over the Plant when its construction is completed, since this marks the change from virtually full control by the Contractor to operational control by the Purchaser. The relevant stages after construction are:
    1. completion of construction and start-up;
    2. take-over procedures and taking-over;
    3. performance tests and acceptance;
    4. correction of defects and final completion.

21. These stages are marked by the successive issue of the following certificates: the Completion of Construction of the Plant, Taking-Over, Acceptance and Final Certificates. In practice, the later phases of construction, the preparations for start-up and the early stages of operation proceed more or less continuously and are not separated by any very clear boundaries. Equally, after taking-over, performance testing may proceed over a range of conditions and since the performance conditions may differ from those set out in the design criteria, performance guarantees will often be provided which may cover such matters as plant capacity, consumption of raw materials and utilities and the quality of the finished product. Once the Plant has been proved, it is subject to being accepted by the Purchaser. Once that stage has been reached, the only remaining obligation of the Contractor is to finish the process of correcting defects.

22. It is against this background that the vital Contract Conditions need to be construed. The relevant contractual provision is clause 38.5. This, with the particular words in question underlined, reads as follows:

> *"38.5 The Contractor shall have no right or obligation, other than those arising from his liabilities under Clause 31 (Care of the Works) and 32 (Insurance), to do any further work to any party of the Plant after a Final Certificate has been issued in respect of such plant. The issue of the Final Certificate for the Plant as a whole or, where for any reason more than one Final Certificate is issued in accordance with this Clause, the issue of the last Final Certificate in respect of the Works, shall constitute conclusive evidence for all purposes and in any proceedings whatsoever between the Purchaser and the Contractor that the Contractor has completed the Works and made good all defects therein in all respects in accordance with his obligations under the Contract, provided always that no Final Certificate shall be conclusive as aforesaid if it is or any other Final Certificate was issued in reliance upon any fraudulent misrepresentation."*

23. Some of the particular words and phrases with which the appeal is concerned are defined in the Conditions:

1. "The Works" are defined in clause 1 to mean: "the Plant, the Contractor's equipment and the services to be provided and the work to be carried out in accordance with the Contract."

2. The only definition of "completed" or "complete" is found in clause 33. This definition is relied on by Tarmac as part of its argument that the stage referred to as "completed the Works" occurs at, or before, the taking-over of the Plant. The relevant part reads:

> "33.1 As soon as the Plant, or any appropriate part thereof, is in the opinion of the Contractor substantially complete and ready for inspection the Contractor shall so notify the Engineer by means of a Construction Completion Report. This Report shall state which parts of the Plant the Contractor proposes to demonstrate have been completed in accordance with the specification and have passed such tests as may have been included in the Specification. The Contractor shall propose a programme for such demonstrations ...
>
> 33.2 Upon satisfactory completion of any such demonstration the Contractor and the Engineer shall sign the Construction Completion Report ...
>
> 33.4 If the Contract includes a schedule of completion dates (Schedule 4) pursuant to Clause 33 (Progress of the Works and Suspension) that specifies a date for completion of construction, the Engineer shall, as soon as he has signed all the Construction Completion Reports in accordance with Sub-clause 33.2, issue a Certificate of Completion of Construction for the Plant."

3. "Defects" are defined in clause 36. The relevant part of clause 36 reads as follows:

> *"... any work done or materials supplied by the Contractor or any Sub-contractor are defective or not in accordance with the Contract or ... the Plant or any portion thereof is defective or does not fulfil the requirements of the Contract (all such matters being hereinafter called 'defects')"*

8. The Engineer has to decide whether there are any defects in the Plant and may specify these either before taking-over or within one year thereafter. The Contractor has to make good all defects that have been specified but has no other defined obligation so far as defects are concerned.

4. The Claim, the Reasons and the Parties' Arguments.

4.1 The Claim

24. The award does not set out the details of the claim being made. To give colour to the question of construction that arises, a colour the arbitrator would have had in mind when seeking to determine the true meaning and effect of clause 38.5, I will refer to some of the pleaded allegations in the points of claim which were included in the documents provided for the hearing of the appeal. These show that some of the structural members of some of the bunkers had become worn when they were inspected in the Christmas shutdown for 1994. The alleged principal cause of this wear was the wrong positioning of the chutes over the bunkers so that material that was discharged from them into the relevant bunkers was discharged onto the structure of the bunkers rather than into their centre. The necessary remedial work consisted of the provision of liners and the replacement of RSJ supports.

25. The defects were allegedly caused by breaches of the express terms of the Contract that all work would be carried out with sound workmanship and materials and that the Plant, as completed, would be suitable in every respect for the purposes for which it was intended.

4.2 The Award

26. The arbitrator concluded that the Final Certificate has only limited conclusive effect, namely that it is only conclusive of the fact that the Contractor has actually completed the making good of those defects that he was required to make good. The Final Certificate has no relevance so far as any latent defect is concerned and, equally, has no relevance where the making good was badly done and the defect subsequently reappears. The arbitrator concluded that: *"I find nothing which persuades me that clause 38.5 saves a contractor from anything but a challenge that he has not carried out the making good against an ordinary defects schedule."*

4.3 Matthew Hall's Contentions

27. Mr. Goddard for Matthew Hall contended that the conclusive nature of the Final Certificate covers all aspects of the Works so that it is to be taken that the Works have been completed in accordance with the Contractor's obligations under the Contract. This contention involved reading the relevant words in clause 38.5 as if the

relevant part of the clause was to read as follows: *"... the Contractor has completed the Works in accordance with his obligations under the Contract and made good all defects therein in all respects in accordance with his obligations under the Contract ...."* (The words underlined have been added to highlight Matthew Hall's contention.)

Another way of putting this contention is that the words "in accordance with his obligations under the Contract" govern both "the Works" as well as "made good all defects therein".

28. In support of this somewhat artificial construction of the clause, Matthew Hall prayed in aid the commercial purpose of the Final Certificate which was alleged to provide finality to the Contractor's obligations and liabilities. Matthew Hall also contended that its construction of the clause was supported by the fact that the arbitrator's rival construction had no commercial justification. This construction involved drawing a distinction between remedial works not carried out at all and those carried out defectively, which was a nonsensical distinction. It was also contended that the arbitrator's construction would reduce the effect of the clause virtually to vanishing point. This was because it rendered almost nugatory the provision which stated that the Final Certificate would lose its conclusive effect if it had been procured by fraudulent misrepresentation.

4.4 Tarmac's Contentions

29. Miss Jackson for Tarmac prayed in aid what she alleged was the natural meaning of clause 38.5. She submitted that the clause is solely concerned with the physical carrying out of the work by the Contractor. She also submitted that if the Final Certificate was to have the wide-ranging effect contended for by Matthew Hall, this would involve adding words to the clause if it was to have any sensible meaning. Furthermore, if Matthew Hall's contentions were correct, it was to be expected that there would be a reference to the Final Certificate in clause 44 which deals with limitation of liability. This clause provides that:

"44.1 The Contractor shall not be liable to the Purchaser by way if indemnity or by reason of any breach of the Contract for

(a) any loss of production or profits or of any contract that may be suffered by the Purchaser, or

(b) any loss of operation materials or catalysts, or

(c) any loss or damage arising from any design or information which the Purchaser has specifically instructed the Contractor to use,

except to the extent, if any, that recoveries in respect thereof are obtained under insurance effected pursuant to clause 32 (insurance).

44.2 The liability of the Contractor to the Purchaser, other than liability arising under Clauses 31 (Care of the Works) and 32 (Insurance), shall be limited to damages and reimbursements as prescribed in the Contract and for breach of the Contract."

This clause would, Miss Jackson argued, be largely unnecessary if Matthew Hall's construction was correct since the occasions on which it would be needed would be limited since they would be restricted to those occasions when claims had arisen, and were being adjudicated upon, before the Final Certificate had been issued.

5. Approach to Construction

30. Both parties submitted that I should adopt the principles to the interpretation of commercial contracts set out in the speech of Lord Hoffmann in Investors Compensation Scheme Limited v. West Bromwich Building Society and Others. These principles were taken from, and built upon, two earlier decisions of the House of Lords. The relevant principles for the process of construction involved in this case are these:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background ... includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. ...

(4) The meaning which a document ... would convey to a reasonable man in not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

31. Although Mr. Goddard sought to rely on these principles, he contended that the Guide Notes, which are found at the back of the Red Book, should not be referred to and should not be used as an aid to the construction of clause 38.5. I cannot accept that submission. The Guide Notes are clearly intended to identify the scope of the Schedules to the Contract that the parties have to prepare and they summarise and elaborate upon many of the clauses in the Conditions. The contents of the Schedules are, therefore, at the very least, part of the background known to both parties at the time of the Contract being entered into. Moreover, the Conditions do not state that the Guide Notes should not be used in interpreting the words of the Conditions and the Guide Notes are bound into the Red Book and form an integral part of the text. They may therefore be used as an aid to construction, falling four-square within the type of background material referred to in principle (2) of the principles formulated by Lord Hoffmann in the Investors Compensation Scheme Limited case. Moreover, they are themselves part of the Contract.

6. The Natural Meaning Of The Relevant Words

6.1 The Significance of the Question of Construction

32. The significance of the semantic debate about the meaning of the relevant phrase in clause 38.5 is that if the words "completed the Works" are governed by, or embrace, the words "in all respects in accordance with his obligations under the Contract" or similar words, Matthew Hall would have a complete defence to Tarmac's contractual claim, assuming the existence of the Final Certificate. This is because the Final Certificate would be conclusive evidence that the bunkers had been constructed so as to comply with the provisions of clause 3, which is relied on by Tarmac as providing the foundation for the claim that Matthew Hall was in breach of contract in designing, manufacturing, supplying and testing the bunkers.

33. It is to be observed that I have defined the relevant question as one concerned with the words "c*ompleted the Works"*. The arbitrator defined the relevant question as one concerned with the second phrase in the provision found in clause 38.5, *"made good all defects"*. Both counsel in argument accepted that the arbitrator was in error in focusing on the second of these two phrases. The arbitrator cannot be criticised for this error since the terms of the preliminary issue were drafted by the parties in this way. However, I cannot be bound by this erroneous wording of the issue since the question of construction with which I am concerned is one of law. The error arises because of a misconstruction of the provisions of the Conditions concerned with defects by those concerned with drafting the terms of this preliminary issue. The actual position is that the Conditions provide that the only obligation concerning defects is concerned with making them good. A defect need only be made good if a notice has been given under clause 36, during the defects liability period, requiring the Contractor to make it good. There is no additional obligation concerning defects and, therefore, where no notice has been given, as for the bunkers, no specific breach of contract relating to defects can arise at all. The only breaches of contract that could arise are ones concerned with breaches associated with the original design, with bad workmanship or with a failure to provide a merchantable or suitable Plant. It follows that if the Final Certificate precludes Tarmac's claim, it is because that Certificate is conclusive evidence that the Works have been completed in accordance with the terms of the Contract.

6.2 The Natural Meaning of the Relevant Contractual Provision

34. The first question of construction is whether the limitation *"in accordance with his obligations under the Contract"* governs not only the immediately preceding phrase "*all defects"* but also the preceding phrase *"the Works"*. If, to use Lord Hoffmann's graphic expression in his principle (2), one has recourse merely to dictionaries and grammars, the answer would be that this limitation does not govern the phrase "the Works" as well. This interpretative problem can be shown algebraically. If the two phrases are assigned the letters A and B and the limitation the letter X, should the provision be read as: (A + BX) or as: (A + B)X? The language used, and the order in which the words in clause 38.5 are set out, both suggest the first meaning and not the second.

35. In order to see whether the meaning of the provision has the same meaning as the meaning of the words used, to again borrow from Lord Hoffmann's principle (2), it is necessary to analyse the provision in its contractual context. I have already quoted the contract definitions of two of the critical phrases appearing in clause 38.5, namely "the Works" and "defects". It is worth rewriting the part of clause 38.5 with which I am concerned by replacing these phrases with their definitions. Clause 38.5, with the substituted definitions underlined, would then read as follows:

"The Final Certificate ... shall constitute conclusive evidence ... that the Contractor has completed the [Plant, the Contractor's equipment and the services to be provided and the work to be carried out by the Contractor in accordance with the Contract] and made good all [work done or Materials supplied by the Contractor (which) is or are defective or not in accordance with the Contract (and all) the Plant or any portion thereof (which) is defective or does not fulfil the requirements of the Contract] in all respects in accordance with his obligations under the Contract."

36. This exercise is very instructive for two reasons. Firstly, it shows that what has to have been completed is not only the physical construction of the Plant but also all other services and all other work additionally required. This would include the work involved in carrying out and completing the take-over tests and the performance tests. Thus, a vital part of Tarmac's argument is erroneous since its argument relies on the phrase "completed the Works" as referring only to the stage when physical completion of construction has occurred, prior to the taking-over of the Plant. This construction is based on clauses 33.2 and 33.4. However, these clauses are dealing with completion of "the Plant", not with completion of "the Works" which is a different, all-embracing concept.

37. This wider meaning of "the Works" is confirmed by Guide Note B which is concerned with the contents of Schedule 1 of the Conditions which deals with the "Description of the Works". This Guide Note makes it clear that:

"A very large number of activities concerning the provision of information and designs, the supply of materials and of construction services enters into the execution of any process plant, as outlined on the following check list."

The check list then summarises a long list of activities to be carried out before, during and after the supply and construction of the Plant. Following the completion of the Plant, the defined activities to be subsequently undertaken include those associated with preparations for start-up, the actual starting up itself, assistance with the operation of the Plant and the carrying out of Plant performance tests and performance studies. It follows that many of the services and some of the work that the Contractor is to provide have to be undertaken after completion of the Plant (or taking-over, which is the same thing). Clause 33 is concerned with completion of the Plant whereas the completion of the Works occurs, subsequently, right at the end of the Contractor's involvement in the project.

38. The second reason why this interpretative exercise is instructive is that it shows that "the Works" constitute the carrying out of the relevant work and services "in accordance with the contract" without the need for that phrase to be expressly added. This arises because the definition of "the Works" in clause 1 includes this phrase within it. Moreover, the overall responsibility of the Contractor is defined in clause 3 of the Conditions, which is entitled "Contractor's Responsibilities", as being to: *"... carry out and complete the Works all in accordance with the provisions of the Contract ...*

    It follows that "the Works" is a concept which covers both the execution of work and the condition in which the work is to be left when executed.

39. A further conclusion arises from the interpretive exercise that I have carried out. This is that the wide definition of "the Works" does not extend to the obligation to make good defects that is defined in clause 36. This is because "the Works" embrace activities carried out to perform the original Contract obligations whereas "the making good of defects" embrace work needed to remedy, rectify or correct such work. It is, however, important to note that the definition of defects is very wide, extending to any failure of the Plant to meet any performance test and to any work or materials which are not in accordance with the Contract. A defect need not have arisen from a breach of contract at all. This is made clear in clause 36.2 which reads: *"If the defect is attributable to any breach of the Contract committed by the Contractor the Contractor shall bear his own Cost and Expense of making good the defect. In the case of any other defect made good by the Contractor in pursuance of this clause the work done by the Contractor shall be treated as if it were a Variation ordered by the Engineer and shall be valued accordingly."*

    The making good obligation extends to the repetition of take-over tests where appropriate and to the reimbursement of the costs of making good that have been incurred by the Purchaser in certain defined circumstances.

6.3 Commercial Matrix

40. The considerations I have summarised support the textual analysis of clause 38.5 that I have already referred to. The phrase *"completed the Works"* is not qualified by the later phrase *"in accordance with his obligations under the Contract"* since "the Works" already includes the Plant and all other services which are to be supplied in accordance with the requirements of the Contract. It would, therefore, be tautologous to couple these two phrases together in clause 38.5. However, the making good of defects is not included in the concept of *"the Works"* and the complex set of provisions associated with this activity makes it necessary to couple the phrase *"making good defects"* with the additional restriction "in all respects in accordance with his obligations under the Contract".

41. The conclusion to be drawn from these considerations is that once the Final Certificate has been issued, it is conclusive evidence that:

    1. All the Plant supplied and the tests, preparations and other work performed by the Contractor all conform the requirements of the Contract.
    2. All defects, including any defects which are not attributable to any breach of contract, have been made good such that the making good requirements of the Contract have all been complied with.

6.3 The Commercial Context of the Final Certificate Provisions

42. In order to test whether this interpretation of clause 38.5 is correct, it is necessary to consider the clause in its setting in this complex Contract which provides for the design, construction, commissioning and proving of large process Plants. The starting point is that the Contractor is to produce a Plant to a precisely defined performance specification. The Contractor is not only to design and construct the Plant but is to test and prove it under working conditions and is to have a potentially onerous obligation of making good defects, which might include extensive adaptation of the Plant whilst it is being used commercially, so as to enable the Plant to achieve its specified performance requirements. Finally, the Contractor retains, in appropriate cases, potential liability under performance guarantees, after the Plant has been taken over, proved and accepted.

43. In those circumstances, there would appear to be a commercial justification for the Contract to provide a defined cut-off point once the Plant has been constructed, tested, proved and made good in all respects in conformity with the Contract. This is particularly so since any longer-term liability arising out of the Plant's inability to maintain its performance criteria can be met by claims by the Purchaser on the Contractor's performance guarantees.

6.4 Detailed Provisions

44. There are a number of detailed provisions which confirm both that the Conditions provide a defined cut-off point for the continuing liability of the Contractor for defects in the Plant and that the Final Certificate is conclusive evidence that the Works have been completed by the Contractor in accordance with his obligations under the Contract.

1. Care of the Works.

45. The Contract contains provisions in clause 31 dealing with the Contractor's obligations with regard to the care of the Works. Guide note J explains these in some detail. The note includes this passage: *"Clause 31 imposes by contract on the Contractor a greater liability for loss and damage to the Plant and its materials than would necessarily be imposed by the general law or would naturally flow from the general scheme of the General Conditions as regards responsibility and liability for faults and defects."*

46. The Contractor's obligation to make good any loss or damage to the Plant only lasts until the issue of the Final Certificate. This can be seen from this provision in clause 31.3: *"The Contractor shall until the issue of the last Final*

Certificate pursuant to Sub-clause 38.5 in addition make good any loss or damage that may occur to the Plant (or any section) after it has been taken over by the Purchaser if such loss or damage results from any wrongful or negligent act or omission of the Contractor, his servants or agents."

This cut-off point for the obligation to make good is consistent with the Final Certificate bringing about a general termination of the Contractor's obligations and potential liability. Clause 31.3 also throws into question the arbitrator's interpretation of the Final Certificate provisions, namely that the Final Certificate does not cover latent defects. If that is so, the Contractor would be in the curious position of remaining liable, after its issue, for latent defects, if sued for damages, but would not be under a continuing obligation to make good those defects since the wording of clause 31.3 cannot be similarly limited to patent defects.

2. Testing and Proving the Plant

47. The testing regime that is envisaged falls into three distinct phases which merge into each other but which are intended to be distinct stages in the Plant's construction and development. These are (1) start-up tests and the Construction Completion Report, (2) testing before taking-over and (3) proving before acceptance. The making good of defects is undertaken in parallel with the third of these stages and is conducted under a separate set of contractual provisions. During these stages, the Purchaser can accept modifications to the performance criteria of the Plant, based on its performance in operation. Thus, by way of example:

(1) the Engineer can issue a Taking-over Certificate even if the Plant has not passed any or all of the take-over tests (clause 34.8). The Contractor remains liable to carry out these tests up to, but not beyond, the end of the defects liability period.

(2) the Purchaser can accept the Plant even if the Contractor has yet to become entitled to an Acceptance Certificate. If so: *"An Acceptance of the Plant ... shall constitute a waiver by the Purchaser of the remaining obligations of the Contractor to secure that the Plant or any specified section pass the performance tests and to complete the Plant or any specified section in every respect."* (clause 37.8)

(3) the Purchaser may accept the Plant even if it fails a performance test. This can happen by default if the Engineer fails to notify the Contractor to carry out necessary modifications or adjustments to the Plant within one year of the Acceptance of the Plant. In such a case: *"the Contractor shall be relieved of any such obligation and the Plant or specified section thereof shall be deemed to have passed such performance test."* (clause 35.10)

48. In the light of these complex provisions, it is to be expected that the Contract would provide a mechanism which defines the point in time when the Contractor has definitively completed his contractual obligations.

3. Acceptance

49. The Acceptance Certificate is to be issued "as soon as the Plant or specified section thereof has passed all the performance tests". The Conditions require Performance tests to be defined in the relevant Schedule and are these are intended to show that the Plant meets the performance requirements of the Contract. Thus, the Acceptance Certificate is clear evidence that the Plant has been completed in accordance with the requirements of the Contract. Once the last Acceptance Certificate has been issued, the only remaining obligation of the Contractor is to complete the making good of defects. The Acceptance Certificate is, therefore, a clear and defining event bringing to an end the Contractor's obligation to complete the Works.

4. Guarantees

50. The Conditions provide for guarantees, which are to be tailor-made for each project. Guide note S explains the ambit of Schedule 6 which deals with guarantees and their associated performance tests. The relevant part reads as follows:

"Clause 35 provides that if the Contractor guarantees the performance of the Plant there shall be a Schedule of Performance Tests ... [which] is probably the most difficult Schedule to prepare well, and commonly the most neglected. ...

A plant will usually be required to operate satisfactorily over a range of conditions, and it may be desirable to provide performance guarantees with corrections which can be applied if the performance test takes place under conditions differing from the basic design case. ...

Performance guarantees will usually include plant capacity, consumption of raw materials and essential criteria for the quality of the finished products. In some cases guarantees may also be required for reliability, the consumption of utilities (if these are a significant cost factor) and the quantity and quality of by-products (including steam) and polluting effluents."

51. The Contract provides in some detail for the carrying out of performance tests to verify the performance of the Plant. The intention of these provisions is to provide a contractual scheme whose purpose is to provide for an Acceptance by the Purchaser that the Plant is operating in accordance with the Contract. This Acceptance follows the identification and elimination of all defects or the Purchaser's acceptance of a reduced level of performance coupled, normally, with a payment of liquidated damages. Thus the Contract provides procedures to enable the Plant to be accepted once and for all after it has been proved or after reduced performance criteria have been accepted by the Purchaser. Once one or other has occurred, the Acceptance Certificate is to be issued (clauses 37.2 and 37.8). Thereafter, the intention of the Conditions seems clear: the only liability of the Contractor that is to arise is as a result of a claim on a performance guarantee which will already have been verified by the acceptance procedures of the Contract.

5. Liquidated Damages

52. The Conditions contain two quite distinct codes for liquidated damages. The first, linked to the completion of the construction of the Plant and taking-over, provides for damages for delayed completion. The second Code is of a different type of liquidated damages, whose purpose is to compensate the Purchaser for the fact that the Plant's capabilities are diminished compared to those specified. The Guide Notes explain this code in Note T as follows: *"If the Plant performance is guaranteed a Schedule of Liquidated Damages should be prepared stating clearly the sums payable by the Contractor for given departures from the guaranteed performance figures. Such liquidated damages are intended as agreed compensation for the Purchaser's increased operating costs as a result of the Plant's poorer performance."*

53. The time for the levying of these damages is once the Plant has failed to pass any relevant performance test. Once that happens: *"... the Contractor shall or may elect to pay any liquidated damages, then after such specified time and upon payment of such sum, the Contractor shall become entitled to the issue of an Acceptance Certificate in respect of the Plant or specified section thereof."* (clause 35.9)

54. The scheme for Acceptance Certificates is such that an Acceptance Certificate is to be issued once the performance tests have been satisfactorily completed, or the performance requirements have been waived or modified. This scheme, with the payment of a pre-estimate of loss for under-performance, is consistent with the Final Certificate bringing the Contractor's continuing liability to an end. It is not consistent with the Contractor's liability surviving, since this would undermine the code for the payment of liquidated damages when under-performance has occurred.

6. Wording of Guide Note U

55. The Guide Notes, in Note U, provides general guidance as to the concept of completion. The Note reads as follows:

"U. Definition of Completion and Taking-over

The concept of completion by the Contractor of the work he has undertaken to carry out under the Contract has several aspects of significance:

(a) completeness - nothing omitted;

(b) time - finishing particular tasks in accordance with a programme, or with reference to financial incentives;

(c) liability - being no longer responsible for either future activities or for property.

The General Conditions have been devised to cater for each of these by both procedure and documentation. A summary is given in the table [below].

Topic ... Record of completion

...

Final completion Final Certificate and correction of defects"

The part of the table that I have reproduced is concerned with liability. The topic that I have also reproduced is defined in a way that shows that the Final Certificate brings to an end the Contractor's continuing liability. This definition is inconsistent with there being a continuing liability for defects after the Final Certificate has been issued.

7. Limitation of Contractor's Liability

56. Tarmac suggests that the elaborate provisions which limit the Contractor's liability in clause 44 make no sense unless there is the potential for extensive liability after the issue of the Final Certificate. However, there is, in fact, considerable potential for liability before the issue of the Final Certificate both before taking-over and afterwards during acceptance tests. This is so, even when there is a stipulation written into the Contract for the payment of liquidated damages for any failure to achieve the performance requirements of the Contract. Thus, clause 44 has a considerable commercial purpose, even if the Final Certificate gives rise to a finality of the Contractor's obligations.

8. Fraudulent Misrepresentation

57. The suggested scope of the Final Certificate is supported by the words of the exception which rob the Final Certificate of finality if it has been issued in reliance upon any "fraudulent misrepresentation". There is considerable scope for a Contractor to misrepresent the results of take-over and acceptance tests. If the Final Certificate has wide scope, there is a clear need to ensure that it should not retain its effect if it has been procured by fraudulent misrepresentation. However, there would rarely be occasion for such fraudulent misrepresentation if the Final Certificate is only concerned with the construction of the Plant since, at that stage, there would be little for the Contractor to misrepresent. The fraudulent misrepresentation exception points to the Final Certificate having a wider scope than that contended for by Tarmac.

9. Performance Liability Generally

58. There is a final overall consideration which also points to the conclusive nature of the Final Certificate. It has been seen that the Conditions define the Contractor's obligations in terms of the performance requirements of the Contract and all testing and proving is geared to these. In other words, the Plant is acceptable, merchantable, fit for its purpose and completed when it is able to deliver its rated output, receive its rated input and produce finished products and waste of the defined quality using the defined amount of energy to do so. The acceptance of the Plant and the correction of defects are largely geared to these requirements. It would be difficult to give effect to this scheme if Plant, which had been accepted as meeting its performance requirements, could

nonetheless be subject to complaints that individual components had not conformed to the Contract. Thus, it makes commercial sense for the Conditions to stipulate that, once the Plant has been finally accepted and all liability for defects has been discharged, the Contractor is to be taken to have completed the Works in full compliance with the Conditions.

59. This consideration is highlighted by Tarmac's claim in the arbitration. It is based upon an alleged failure of part of the bunker structure. Such a failure can be expressed in physical terms by reference to the disintegration of part of the steelwork forming the bunker. It can, however, also be expressed in terms of the Plant having a reduced working life and a reduced capacity. It would appear that there is an absence of appropriate performance guarantees since none are relied on by Tarmac. Thus, a complaint about the working life of the Plant could not readily be sustained by Tarmac. Moreover, the Acceptance Certificate is clear evidence that a complaint about reduced capacity is unsustainable. In those circumstances, Tarmac's complaint to the effect that the design of the bunkers has left them unmerchantable and unfit for their purpose is not readily understandable since the requirements of merchantability and fitness are linked in the Contract to the Plant's ability to perform in accordance to the contractually specified performance requirements.

7 The Arguments and Contentions to the Contrary

7.1 The Arbitrator's Reasons

60. The arbitrator concluded that: *"The Final Certificate is mere evidence that on a particular day the contractor has built the edifice and secondly he has made good whatever was required to be made good. The Final Certificate is conclusive evidence that the Contractor has physically done the defects (sic) he was supposed to do and no one can challenge him otherwise ... [Tarmac] is not prevented from bringing his claim for latent defects in contract."*

61. The arbitrator's reasons are based on three errors. These are:

1. The words "completed the Works" are referring only to "building the edifice".

   In fact, "the Works", as I have tried to show already, refer not only to "building the edifice" but also to all services that have to be performed subsequently by the Contractor in relation to the testing and proving of the Plant.

2. The word "defect" refers only to a physical shortcoming in a specific part of the Plant.

   In fact, it also refers to any failure to meet a performance criterion or to any failure to meet a requirement of the Contract.

3. The Conditions distinguish between latent and patent defects.

   However, there is no such distinction found in the words of the Contract. Furthermore, the wide definition of "defects" in the Contract makes the distinction between latent and patent defects a difficult if not impossible one to make. Any failure to meet performance criteria or requirements is a defect but it is not clear whether such a defect is, until its presence is appreciated, latent or patent. It would, in truth, be a patent defect which had yet to be discovered.

62. These errors led the arbitrator to these erroneous conclusions:

1. Tarmac's claim is essentially one based on allegations that the bunkers were defective and that the relevant defect had not been remedied.

   However, the claim could not have been of this kind since a defect, as defined in the Contract, is a shortcoming which has been brought to the Contractor's notice by the Engineer during the defects liability period. So far as Tarmac's claim is concerned, if it gives rise to an actionable breach of contract, the breach is one that arises out of Matthew Hall's failure to complete the Works in accordance with the requirements of the Contract, since the relevant defect was never notified to Matthew Hall before the defects liability period ended.

2. The "defect" is latent and constitutes structural damage to the bunker.

   However, the relevant defect was, in fact, either a shortcoming in the design of the bunker, which led to the misalignment of the chutes, or a piece of bad workmanship to the same effect. The structural damage was a consequence of the defect and was not the defect itself. Thus, in so far as the distinction between latent and patent defects has meaning or contractual significance, the defect was patent.

3. There is no need to consider whether the claim is barred by the words "conclusive evidence that [Matthew Hall] has completed the Works" because these words only refer to completion of the work of constructing the edifice and because the claim is based upon the non-remedying of a defect and not upon a failure to complete the Works.

   However, as I have already sought to show, the claim is based on a failure to complete the Works and the conclusive evidence provision in clause 38.5 extends to a presumption that all work and services provided have been completed in accordance with the Tarmac's obligations under the Contract.

7.2 Tarmac's Contentions

63. Tarmac puts forward a different suggested meaning of the phrase "completed the Works". This is that the Contractor has completed all his obligations that involve physical involvement with the site. The Final Certificate is, on this construction, merely conclusive evidence that the Contractor can remove his site establishment and its issue marks the point at which Tarmac's obligations under the Contract can only sound in damages.

64. These contentions are based on the same error as one of those adopted by the arbitrator, namely that "the Works" is a phrase which is confined to the physical construction of work on site. In fact, the phrase extends to all

services that are to be performed on or off site and also extends to the carrying out of such services in accordance with the provisions of the Contract.

65. A further difficulty for Tarmac's argument that clause 38.5 is seeking to draw a line between the Contractor's obligations to perform work and any obligation to pay damages is that it overlooks the incorporation into the definition of "completing the Works" the additional requirement that the Works must conform to the requirements of the Contract. It follows, contrary to Tarmac's contentions, that no breach of contract can be taken to have occurred once the conclusive effect of the Final Certificate arises.

7.3 Tarmac's Contentions about Matthew Hall's Contentions

66. Tarmac seeks to knock down Matthew Hall's contentions by three arguments:

1. If the effect of the Final Certificate clause is as wide as Matthew Hall contends, it is necessary to add an extensive number of additional words into the clause if the words in the clause are to have any sensible meaning.

   This argument presupposes that "the Works" only refers to the state of the Plant at, or even before, taking-over. However, "the Works" includes everything required of the Contractor up to the issue of the Acceptance Certificate. On this basis, no words are needed to supplement the words of clause 38.5 to give them sense or meaning.

2. If the Contractor's liability to remedy defects is limited to what is required by clause 36 and if the liability to pay damages is limited once the Final Certificate has been issued, it is to be expected that these limitations would be written into clauses 36 and 44 respectively.

   However, the limited liability to remedy defects that Tarmac suggests arises on Matthew Hall's submissions is not as limited as is suggested since the liability to remedy defects extends to any failure of the Plant to meet the performance requirements of the contract. As to clause 44, it is to be expected that there would be no reference to this clause in the wording of clause 38 since the true meaning of clause 38 is that the Contractor cannot be held to be in breach of contract at all once the Final Certificate has been issued whereas clause 44 is concerned with limiting damages once a breach of contract has been proved, a situation that only occurs prior to the issue of the Final Certificate. Tarmac's argument, in other words, overlooks the wide definition of "defects" and the linking of completion of "the Works" with the need for there to be compliance with the obligations of the Contract.

3. Clause 38.5 should only be construed so as to deprive Tarmac of a remedy in damages if clear words are found in the Conditions providing for this conclusion.

   However, if clause 38.5 is construed using the lexicon provided by the express words found in clauses 1 and 36, which define "the Works" and "defects", the clear words required by Tarmac are actually found in the Conditions.

7.4 The Anomalies of Tarmac's Construction

67. As a final test of the suggested meaning of the words of clause 38.5, it is worth considering the effect of Tarmac's suggested meaning of those words. If, as suggested, they signify the end of any requirement for a continuing site presence by the Contractor, the Final Certificate would have little or no practical effect. This is because the Contractor's physical presence is no longer required once the Acceptance Certificate has been issued, save to complete the remedying of the few remaining defects. It is therefore hard to see what the practical effect of a Final Certificate would be. Any remaining defects would be minor in scope, since the Plant would be in use at the time of the issue of the Final Certificate. The Contractor clearly has no continuing obligation to retain a site presence at this stage and there would be little need for a Final Certificate since its only conclusive effect would be in relation to something which was already self-evident.

7.5 Matthew Hall's Contentions

68. It follows that Matthew Hall's contention that the Final Certificate is conclusive evidence that all work has been completed in accordance with the requirements of the Contract is correct, albeit for the wrong reason. *"The Works"* are not, as Matthew Hall contended, qualified by the words that occur later in clause 38.5. However, these words are defined in such a way in clause 1 that they have the same meaning as if they were expressly qualified in clause 38.5.

8. The Second Question of Law

8.1 The Question of Law Analysed

69. The second question of law sought to be argued by Matthew Hall can be seen, when carefully analysed, to fall into a number of distinct parts. This is because Tarmac raises at least three separate counter-arguments to Matthew Hall's Final Certificate arguments put forward as a defence to Tarmac's claim. These discrete counter-arguments are as follows:

1. The claim is not dependent, as Matthew Hall alleges, upon Tarmac having to rely on its own breach of contract. Therefore, Tarmac is not profiting from its own wrong. The correct analysis is that it is Matthew Hall who needs to benefit from the Final Certificate to avoid the consequences of its own breach of contract.

2. Even if the principle that a party may not profit from its own wrong is applicable, it is an equitable principle. It is not an absolute rule and depends on the exercise of discretion. In this case, it would not be appropriate to apply the principle since Matthew Hall is in pari delicto, being itself in breach of contract. Moreover, the circumstances in which Tarmac's breach occurred, in not issuing the Final Certificate, would have to be

considered. The Engineer had ceased to act and Tarmac had taken over his certifying role. The circumstances in which this happened and as to why there was a subsequent non-issue of the Final Certificate have not been investigated by the arbitrator.

3. Finally, if the failure to issue a Final Certificate gives rise to any basis for Matthew Hall to resist the claim, that could only be done by way of reliance on an estoppel or a cross-claim for damages for breach of contract. In the latter case, the damages would be measured by the loss incurred in meeting a liability to Tarmac which would otherwise have been avoided by the Final Certificate. Neither of these two lines of defence have been pleaded nor relied upon by Matthew Hall, they may now be outside the jurisdiction of the arbitrator and, in any case, it is arguable that they could not, at this late stage of the arbitration, be introduced by way of amendment.

8.2 Further Questions

70. Four further questions arise out of this second question of law. The first such question is whether or not the arbitrator would have had the power to issue the Final Certificate himself if there has been a failure to issue this. If the arbitrator has this power, it is arguable that Matthew Hall should have claimed this relief from the arbitrator and that any liability it might now have, which it would have been saved by the Final Certificate, has arisen as a result to Matthew Hall's failure to claim a Final Certificate in the arbitration. Whether or not the arbitrator has the power to issue one depends on the meaning of these words in clause 47.1: *"... [the]arbitrator shall have the power to revise or overrule any decision or certificate of the Engineer and the existence of a certificate shall not be a condition precedent to the award by him of any sum or other remedy which would otherwise be appropriate."*

71. The second and third further questions arise out of the arbitrator's finding that the parties had agreed that Tarmac would take over the role of the Engineer, who had previously dropped out, and the additional finding that Tarmac was in breach of contract in failing to issue the Final Certificate. These findings give rise to two possible questions. One is whether the arbitrator could, by an order of specific performance or by a declaration, make an award whose effect would be that he would then be dealing with Tarmac's claim with a Final Certificate in existence with an effective date which preceded the appointment of the arbitrator. The other is whether the arbitrator could and should give effect to the equitable maxim that equity regards as having been done that which should have been done.

72. The fourth further question that arises is whether the claim for damages for negligence brought as an action in tort would be barred by the Final Certificate, had it been issued. This gives rise to a consideration of whether the claim in tort is one which is mirrored by a claim based on breaches of contract. If it is, would it be subject to the conclusive evidence provision of clause 38.5 and, if it is not, would clause 38.5 nonetheless bar the claim? Clause 44 would also have to be considered since, in a situation where there was no contractual claim available to Tarmac, the words in that clause limiting the Purchaser to: *"damages and reimbursements as prescribed in the Contract and for breach of the Contract."* might bar any surviving claim in tort.

8.3 Procedural Questions

73. None of the questions that I have referred to as arising in connection with the second question of law were considered by the arbitrator nor were referred to by him in his interim award because his finding on the issue of construction precluded them from arising. Thus, I must first determine, in addressing the second question of law arising on this appeal, whether there is any need for me to do anything more than vary the award by making a final award in favour of Matthew Hall, on the grounds that the arbitrator would be bound to treat Tarmac's claim as if the Final Certificate had actually been issued. If that was the appropriate approach that the arbitrator should adopt, there would be no need to determine the other questions and no useful purpose would be served in remitting the award since the arbitrator would be bound to make an award in favour of Matthew Hall. Alternatively, I would need to consider how best to deal with the questions I have summarised. Firstly, I would need to consider whether they arise out of the award at all and, if they do, whether, in reality, they give rise to questions of law or only to questions of fact. Moreover, I would also need to consider whether Judge Havery's grant of leave extended to these further questions and, even if it did not, whether Tarmac needed leave to appeal or whether it could raise these responsive questions of law as a concomitant of the leave granted to Matthew Hall to argue its appeal. Finally, I would need to consider whether I was able to deal with such questions without first remitting the award to the arbitrator for further reasons, given the absence of any reasons directed to these questions in the award. This might require a further hearing by the arbitrator to hear evidence.

74. These potential procedural problems were not dealt with fully in argument at the hearing on 31st October 1997 at my suggestion, since I took the view that it was appropriate to determine the first question of law on its own and only to turn to any part of the second question of law, if it became necessary to do so, on a later occasion were I to allow Matthew Hall's appeal on the first question of law. I originally concluded that I should restore the appeal for further argument as to the course I should take, if any, in relation to the various questions raised by Matthew Hall's second question of law and by Tarmac's responses to that second question. However, this has proved to be unnecessary.

75. I handed down this judgment in draft to the parties who considered it before the judgment was discussed in open court. When the appeal was listed for judgment, both parties informed me that each accepted that the second question of law no longer had to be argued and that, in the light of my answer to the first question of law and my analysis of the contents of the second question of law, an order could be made in these terms:

"The interim award should be varied so as to provide:

(i) that Tarmac is prevented from bringing its present claims in contract alternatively tort by reason of the failure of Tarmac to issue a Final Certificate.

(ii) that clause 38.5 of the Institution of Chemical Engineers Model Form of Conditions of Contract for Process Plants (Revised 1981) which states that:-

'The issue of the Final Certificate for the Plant as a whole or, where for any reason more than one Final Certificate is issued in accordance with this clause, the issue of the last Final Certificate in respect of the Works, shall constitute conclusive evidence for all purposes and in any proceedings whatsoever between the Purchaser and the Contractor that the Contractor has completed the Works and made good all defects therein in all respects in accordance with his obligations under the Contract ...'

provides a conclusive evidential bar to Tarmac's present claims in contract and/or tort."

9. Conclusion

76. Matthew Hall's appeal will be allowed in the terms set out in paragraph 75. The award will be remitted to the arbitrator in that varied form to enable the arbitrator to consider what costs award is appropriate.

Mr. Andrew Goddard, counsel, appeared for the appellant instructed by Taylor Joynson Garratt.
Miss Rosemary Jackson, counsel, appeared for the respondent instructed by Warner Cranston.