Judgment : His Honour Judge Humphrey Lloyd QC Official Referees' Business. 7th April 1998.

1. This is an appeal pursuant to section 1 of the Arbitration Act 1979 from an Interim Award of Mr D.T. Simmonds. The contract between the parties incorporated the standard JCT conditions with Contractor's Design, 1981 edition, clause 39.5.1 of which provides for an appeal to the High Court by consent on any question of law arising out of an award. The contract was for the alteration, refurbishment and extension to the property of the respondents who own and operate a residential home known as "**The Alternative Care Centre**", The Lauders, 19 Ashby Road, Burton on Trent. The value of the contract was £544,000. The works had begun on 16 December 1991 (although the contract was not entered into until 8 June 1992). Practical completion of the works took place, it is said, on 7 May 1993. Disputes arose between the parties as to the amount payable under the contract, ie as to the adjusted contract sum or final account, and as to whether the work had been performed properly and on time. As a result on 31 May 1994 the appellant contractor wrote to the respondents as follows:
   *"**Alternative Care Centre, 19, Ashby Road, Burton on Trent.***
   I am in receipt of your letter dated 25th May 1994 and regret you are not wishing to settle this matter in a business like manner.
   Your attempts at limiting your liability by initiating counter claims are not accepted.
   Accordingly, under the terms of Article 5 of the contract, I request you to concur to the appointment of an arbitrator."

2. Thereafter agreement was reached on the appointment of Mr Arthur Goldstraw as the arbitrator. He held a preliminary meeting on 27 September 1994. A defence and counterclaim was served by the respondents on 5 February 1995. The appellant did not regard the defence and counterclaim as adequately setting out the respondents' case, nor was it satisfied with further and better particulars provided pursuant to a request. It therefore sought further directions from the arbitrator who on 5 May 1995 ordered the respondents to provide further and better particulars including specific references to invoices where applicable, and also required the parties to name its experts. The appellant was still unhappy with the particulars received, and went back to the arbitrator who on 5 June 1995 directed the respondents to serve a definitive Scott Schedule in respect of the defects and incomplete work by the end of that month. However, the Scott Schedule was still regarded by the appellant as insufficient and complaints were made about its lack of particularity and the inclusion in the Scott Schedule of new allegations for it had been expanded from 28 items of complaint to some 57 items and the sum claimed by the respondents had increased from £32,000 to £122,000.

3. The appellant wrote to the arbitrator on 14 July 1995 seeking an order that certain items in the Scott Schedule should be struck out including items A1, A5, A7, A14, A15 and B25. The upshot of the application was that the arbitrator permitted the respondents to serve an amended defence and an amended Scott Schedule. On 25 September 1995 the appellant asked the respondents for the original invoices relied on in support of the counterclaim.

4. On 9 October 1995 the hearing of the appellant's claim commenced before Mr Goldstraw. (It had been decided to deal with the claim before the items in the counterclaim.) At that hearing counsel instructed on behalf of the respondents confirmed that the invoices would be delivered by 13 October 1995. However, the hearing had to be adjourned (twice) and its resumption was fixed for June 1996. At that stage the invoices had still not been supplied by the respondents. Accordingly the appellant obtained an order from His Honour Judge Havery QC authorising the arbitrator to act under section 5(2) of the Arbitration Act 1979.

5) At a further meeting before the arbitrator on 2 April 1996 the respondents were ordered to make available at their solicitors' offices in the week commencing 15 April 1996 originals of the invoices for inspection and copying. However in that week their solicitors ceased to act for them. It then transpired that the respondents were in difficulty with obtaining papers from these solicitors. The respondents also indicated that a defect in the lift shaft had been discovered for which an application to amend would be made. On 30 May 1996 the parties came back before the arbitrator. It seems that the respondents did not obtain leave to amend in respect of the lift shaft (or other complaints in respect of floors, fire doors and roof) as the application had not been made in writing. Pursuant to section 5 of

the Arbitration Act 1979 the arbitrator made an order that the respondents should make available the original invoices by 7 June 1996 in default of which they would be debarred from adducing any evidence on the issues arising from the items in the Scott Schedule relating to the invoices.

6) The hearing of the appellant's claim resumed on 4 June 1996 and continued for most of that month. The respondents applied to bring in their complaints in respect of the lift shaft, fire doors on the second floor, and ceilings. The respondents also asked for more time to produce the invoices. The arbitrator granted them more time until 14 June 1996 to do so. On 13 June 1996 an application for yet further time was refused by the arbitrator.

7) The application to amend was heard initially on Friday 7 June 1996. In the course of his submissions on that day counsel for the appellant said to the arbitrator: *"Sir, the upshot of all that is this. As we sit here today it is my contention and submission that the respondents do not have a cause of action in relation to the cracks in the lift shaft. A cause of action requires a breach of contract or duty which leads through a chain of causation to some loss or damage. Sir, even if they had a cause of action at this stage, it is a new cause of action, because it raises new facts and matters not previously encompassed in this reference. ... Sir, whilst one doesn't want to get over technical, it is questionable, to say the least, whether you actually have jurisdiction to deal with this matter, but the purpose of mentioning that, sir, is really this one. Given that these cracks have just arisen, nobody is able to say what the cause of it was, nobody is going to be able to say, possibly for a year, what if any remedial works need to be done, and it obviously follows that nobody can put a figure on any of this and it would simply be pointless to bring this into the arbitration at this stage. If it transpires that by the passage of time the respondents can point to some loss caused by some breach on the part of the claimants, then it is plainly open to them - because they won't have any limitation problems - to bring a separate reference or separate court proceedings, as they see fit. ....*

Sir, in my submission you should disallow all of these amendments. No prejudice will be occasioned to the respondents by you doing that and certainly not on 21, 22, 38, 38, 39 and 40 and, as far as the lift shaft is concerned, no prejudice will eventuate to the respondents, because they will just have to bide their time and take proceedings in the future, knowing that they don't have a limitation problem.

Sir, if you let them in, then obviously the consequences that I have outlined, or some of them, will follow in terms of the inconvenience and disruption that is going to be caused to the further progress of this hearing, and the potential for simply leaving a number of matters hanging in the air. A final award is what we are striving to achieve in the next few weeks and that is what we would wish to have. Sir, for those reasons we oppose this application to amend the defence and the Scott Schedule."

8) The matter came back before the arbitrator on 13 June. By that time the respondents had put in further drafts of proposed amendments. Counsel for the appellant continued his opposition to the amendments, but he did not apparently reiterate the point that there would be no prejudice to the respondents other than to say at the conclusion of these submissions:- *"Sir, we submit that there is ample material upon which you can safely conclude in the exercise of your discretion that the claimant would be prejudiced and treated unjustly if these amendments are permitted at this very late stage.*

Sir, the paramount consideration, in our submission, is you reaching a final award on the matters that are before you at the moment. That finality will be taken away, undoubtedly, if all or any of these amendments are let in, particularly, of course, the lift shaft in that regard. I would ask you, sir, therefore to disallow these amendments on both levels."

9) On 14 June 1996 the arbitrator refused leave to the respondents to allow them to amend by bringing in their new items. His reason was:- *"The amendment application is late. Indeed, it is very late. I consider that to allow them to be admitted at this late stage would be prejudicial to the claimant. Accordingly, I am not going to allow the respondent leave to amend the pleadings in so far as the Scott Schedule."*

10) On 24 June 1996 the arbitrator required security to be given for the appellant's costs in defending the counterclaim, and in respect of his own costs, and stayed the proceedings until security was provided. (This was because the hearing of the counterclaim was due to start on 8 July 1996.) Although the appellant provided security for the arbitrator's fees, the respondents did not do so.

11) The respondents then indicated that they intended to apply for the removal of the arbitrator. Accordingly on 9 July 1996 the arbitrator made orders: unless the respondents took steps by 19 July 1996 to commence proceedings for his removal, the stay of the proceedings would be lifted so as to allow the appellant to obtain an award on its claim, and, secondly, the respondents would be debarred from adducing evidence on the counterclaim which would be struck out. If on the other hand the respondents went ahead with their application, the arbitration would remain stayed until the conclusion of the Court proceedings. In this way the respondents would have had their counterclaim heard and any consequential effect would be reflected in the arbitrator's decision on the claim. The respondents issued proceedings in the High Court, but not within the time required by the arbitrator's order, so that on 30 July 1996 he indicated that since they had not complied with the terms of the order he would be making an interim award on the appellant's claim. This the arbitrator did on 6 September 1996.

12) The respondents appealed against that interim award. That application and the respondents' earlier application was listed before me on 4 October 1996, but it was not heard since agreement was reached between counsel for the parties. Its terms were set out in a Consent Order agreed between counsel for the parties on 7 November 1996 and sealed by the Court on 16 January 1997. It included the following [the respondent is the present appellant]:- *"AND BY CONSENT it is ordered that:*

(i) The Debarring Order dated 7 June 1996 and/or the arbitrator's refusal to extend time for compliance with that Order on 13 June 1996 be remitted to the arbitrator for the sole purpose of the arbitrator determining (in the absence of agreement between the parties) which items in the Scott Schedules (parts A and B) are excluded (wholly or in part) by the said Order the total value of such items not to exceed £19,000.

(ii) The Unless Order in relation to Security for Costs dated 24 June 1996 be set aside. The costs of the Security for Costs application in the arbitration to be borne by the respondent (the Claimant in the arbitration) in any event.

(iii) The Unless Order dated 9 July 1996 as amended by the arbitrator's letter dated 12 July 1996 be set aside.

(iv) Save for paragraph 4 therein the Order dated 30 July 1996 be set aside.

(v) In the premises of paragraphs (i) to (iv) above, the subject matter of the applicant's counterclaim and/or set-off as pleaded in the pleadings in the Reference, subject to the effect of paragraph (i) herein be remitted to the arbitrator for hearing following which the arbitrator is directed:
(a) to make and publish an Amended First Interim Award
(b) to make and publish a Final Award dealing with all issues of costs including those arising out of the Orders referred to above.

(vi) Paragraph (v) above is without prejudice to the Respondent's rights to make an application to the arbitrator to make and publish a Second Interim Award in relation to the undisputed amount due to the respondent being the difference between the amount awarded to the respondent in the arbitrator's First Interim Award and the maximum amount of the counterclaim and/or set-off.

13) Shortly after that agreement, the present respondents in a letter of 10 October 1996 (copied to the appellant) wrote to the arbitrator:- *"We refer to your letter of the 4th October 1996.*

It is our intention to commence fresh arbitration proceedings to deal with matters not dealt with in the present arbitration.

We would respectfully submit that the proper course should be for our Set Off to be consolidated with those fresh proceedings to be heard before a new arbitrator. If you are minded to call a directions hearing the week commencing the 4th November is not convenient but the 25th would be."

14) The appellant did not accept that proposal. Accordingly on 14 November 1966 the respondents served a notice of arbitration in respect of a number of items of complaint which they had not pursued or had been refused permission to pursue in the arbitration before Mr Goldstraw. On 13 January 1997 the respondents then served a "***Notice of Discontinuance***" in the first arbitration:- *"Take notice that we the respondents hereby withdraw the counterclaim and will not proceed further with the same in this current arbitration".*

15) On 14 January 1997 a further meeting was held before Mr Goldstraw at which the respondents reiterated their intention not to pursue the set-off and counterclaim in the first arbitration. On 17 January the appellant's solicitor wrote to the respondents in which she stated: *"We wish to record that, through counsel, the claimant made it perfectly clear that there was good, strong and clear authorities that if you discontinued your counterclaim, then, [in] any subsequent proceedings you would be barred from beginning these claims again. This was said as it appeared to be your intention to bring the claims the subject matter of your counterclaim and set-off on a different occasion. Counsel made it perfectly clear that by discontinuing in this arbitration, you could not bring these claims again and any part of a claim containing these claims would be thrown out. In the light of this, you were asked if you wished to reconsider your position as you may have believed that you could resurrect these matters again and our position is that you cannot. You were asked if you understood the consequences of what you were doing and that you took steps in the full knowledge of the consequences.*

Your solicitor, Mr Falconer, from Haddon Owen & Son, said he understood what was being said but he made no admissions as to the correctness or otherwise of [the] legal position and that you wished to proceed with the course of action."

16) On 13 February 1997 Mr Simmonds was appointed as the second arbitrator pursuant to the respondents' notice of 14 November 1996. Mr Simmonds held a preliminary meeting on 11 March 1997 at which he directed that the respondents should submit their statement of claim by 15 April 1997.

17) On 19 April 1997 Mr Goldstraw made a further Order in the first arbitration to give effect to the Orders previously made including the parties' Consent Order which resolved the respondents' applications to the Court. He listed the items in the Scott Schedule which were now to be regarded as excluded from the first arbitration, and which totalled nearly £19,000.

18) There was a further excursion to this Court which resulted in an order of His Honour Judge Newman QC directing Mr Goldstraw to make an amended first interim award and to make a final award dealing with costs. Mr Goldstraw on 2 September 1997 published both an amended interim award awarding the appellant £229,566.42 and a final award giving the appellant the costs of the first arbitration and ordering the respondents to pay the arbitrator's costs of approximately £35,000. The respondents have not yet paid either sum.

19) As a preliminary point in the second arbitration the appellant challenged the jurisdiction of the arbitrator to make an award in relation to the 12 heads of claim which were the subject matter of Section C of the respondents' Statement of Case of 25 April 1997. These heads were described as:-
(1) Unfit for purpose;
(2) Plan;
(3) VAT;
(4) Roof space above second floor office kitchen area;
(5) Basic structure;
(6) Lift shaft;
(7) Basement structure;
(8) Training room second floor level (store) 4;
(9) Coffee shop - supporting beams above ground floor level;
(10) Ceilings to cellar, ground floor and first floor;
(11) Change of use of second floor from storage to offices;
(12) Scott Schedule in earlier arbitration.

20) The respondents' contentions were developed in some detail in both Section C and Section D of their statement of claim.

21) Mr Pennicott (who appeared for the appellant) explained that these heads of claim fall broadly into three categories:-
(i) Item 6, 8, 9, 10 and 11 are alleged defects which form the subject matter of the unsuccessful amendment applications in the first arbitration before Mr Goldstraw;

(ii) Items 1, 2, 3, 4, 5 and 7 did not feature in the counterclaim in the first arbitration nor did they form any part of the amendment application in that arbitration;

(iii) Item 12 now comprises 38 items contained in the Scott Schedule forming the discontinued counterclaim in the first arbitration.

22) The grounds upon which the appellant challenged the arbitrator's jurisdiction were threefold: as a result of the Consent Order made between the parties and the effect given to it by the arbitrator in the first arbitration, some of the heads of claim were ***res judicata*** and thus barred by cause of action estoppel; alternatively, the heads of claim were barred by issue estoppel; alternatively, the prosecution or re-prosecution of the identified heads of claim were an abuse of the arbitral process by reason of the *"extended principle of **res judicata**"*.

23) The issues relating to the arbitrator's jurisdiction were dealt with on the basis of written and oral statements on behalf of the parties. No witnesses were called, as recorded by the arbitrator. By his interim award of 2 October 1997 the arbitrator reached the following decisions:-

"(i) The Claimants are estopped from bringing into this arbitration items (3) and (5) of their Statement of Case. These items are res judicata and I have no jurisdiction to deal with them.

(ii) The Claimants are estopped from including in item (12) of their Statement of Case any items not contained within the Scott Schedule as amended at June 1996. Any such items are res judicata and I have no jurisdiction to deal with them.

For the avoidance of doubt items (1) - (11) are deemed for this purpose as not having been nor being included in the Scott Schedule.

(iii) Save as aforesaid at (i) and (ii) I have jurisdiction to deal with all matters subject of the Claimants' Statement of Case."

24) The appellant's appeal does not affect the arbitrator's award in so far as he held that he had jurisdiction to deal with items 1 (unfit for purpose), 6 (lift shaft), 7 (basement structure) and 10 (ceilings). The appellant contends that the arbitrator's decision was wrong in law in relation to items 2, 4, 8, 9, 11 and 12 (the Scott Schedule items) on the basis that the arbitrator had no jurisdiction to hear and determine any of them for the reasons relied on before the arbitrator, and also as regards the items in the second group on the ground that the respondents had not tendered any evidence and had expressly conceded that no *"**special circumstances**"* existed in relation to these items. I shall return to this latter ground but it stems from the fact that during argument before the arbitrator, Mr Faulkner, the respondents' solicitor, had intervened in the course of Mr Pennicott's submissions to say:- *"It may also assist, and I think I can curtail the matter even further, by accepting, on that second branch, on that alternative branch, that yes, I take Mr Pennicott's point that a lot of these matters could have been discovered and, Sir, if special circumstances are required, well some of those items must go."*.

25) Later Mr Pennicott in the course of his submissions asked if Mr Faulkner could indicate the ones which he accepted were *"caught by the statement because then of course you would have before you Sir, no dispute in relation to those matters and you could deal with them quite swiftly."*.

26) Mr Faulkner replied: *"... then my alternative argument would not apply to the following matters, and these are matters that I accept could have been raised with reasonable diligence. ..."*

27) He then identified items 2, 3, 8, 9 and 11, and, in answer to a question from the arbitrator said:- *"Yes, if it [his first line of argument] doesn't apply then I would accept that those matters could have been established with reasonable diligence"*.

28) Accordingly Mr Pennicott did not address the arbitrator further in relation to those items.

29) The arbitrator set out his reasons in his award. He dealt with each of the grounds relied on by the appellant. In relation to the first head he recorded that: *"the constituent elements to be considered for a valid defence of **res judicata** are:-*

(a) was there a valid, pronounced judicial decision

(b) was it final and on the merits

(c) did it determine the same question(s) as raised in the second arbitration."

30) He concluded that as regards (a) and (b) Mr Goldstraw had jurisdiction, and had made a valid award on 2 September 1997 which was final on the matters that it dealt with and was evidently made on the merits. The only question which the arbitrator had to decide was whether that award determined the same questions as raised in the arbitration. He considered that items 1 to 5 and 7 were not the subject of any decision since they were not items in the counterclaim in the first arbitration, and accordingly ***res judicata*** in its strict sense could not be used as a defence with respect to those items. As regards items 6 and 8 to 11 the arbitrator considered that since they were items in respect of which the respondents had unsuccessfully applied to amend the counterclaim in the first arbitration Mr Goldstraw's order striking out the counterclaim did not constitute a decision on the merits. He therefore rejected the argument that ***res judicata*** could be used as a defence in respect of those items. He arrived at a similar conclusion in relation to item 12 although he entered a caveat "to the extent that there may be new miscellaneous items (i.e. other than items 1 to 5 and 7 of the statement of case) I consider that these with reasonable diligence could have been brought into the first arbitration". (His later explanation of what he intended by "new miscellaneous items" is not relevant to this appeal.)

31) The second ground argued by the appellant before the arbitrator was that even if the items had not been the subject of a decision attracting the defence of ***res judicata*** they were nevertheless caught by the issue estoppel (which appears to merge with the "extended doctrine of ***res judicata***"). "Issue estoppel" is the application of the second limb of the principle in **Henderson v Henderson** (1843) 3 Hare 100 at pages 114-115:- *"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

32) In order to follow the arbitrator's award and to anticipate the submissions of the appeal it is convenient to set out passages from the authorities which were brought to the arbitrator's attention as well as some relevant to the appeal.

33) The principle of issue estoppel applies to arbitration: **Fidelitas Shipping Co Ltd v V/O Exportchleb** [1965] 1 QB 630 at page 643C per Diplock LJ: *"Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between the matters of their legal rights and duties are bound by the determination of that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal. ... Neither party can at any subsequent hearing in the arbitration advance arguments or adduce evidence on that issue [the subject of a previous interim award] directed to disputing the correctness of the determination previously made. ...*

In choosing arbitration as the method of determining disputes as to their respective legal rights and duties, the parties constitute the arbitrator the exclusive tribunal to determine all disputed questions of fact, but they do not thereby constitute it the exclusive tribunal to determine all the legal consequences of those facts...."

34) Earlier Diplock LJ had said at page 642: *"In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment on that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to show that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application will only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had*

exercised due diligence. This is but an example of a specific application of the general rule of public policy nemo debet bis vexari pro una et eadem causa. The determination of the issue between the parties gives rise to what I ventured to call in ***Thoday v. Thoday*** *([1964] P 181 at 198) an "issue estoppel". It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in any subsequent proceedings in the same suit in which the issue has been determined. The principle was expressed as long ago as 1843 in the words of Wigram, V.C., in* ***Henderson v. Henderson*** *.... ."*

35) The House of Lords gave full consideration to the ambit of the principles of cause of action and issue estoppel and their application in **Arnold v National Westminster Bank** [1991] 2 AC 93. Lord Keith of Kinkel who gave the leading speech said (at page 104F): *"The principles upon which cause of action estoppel is based are expressed in the maxims nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium. Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action. In* ***Henderson v Henderson*** *(1843) 3 Hare 100 at 114–115, [1843–60] All ER Rep 378 at 381–382 Wigram V-C expressed the matter thus: ....*

It will be seen that this passage appears to have opened the door towards the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action. The passage has since frequently been treated as settled law, in particular by Lord Shaw, giving the advice at the Judicial Committee of the Privy Council, in ***Hoystead v Taxation Comr*** *[1926] AC 155 at 170, [1925] All ER Rep 56 at 64. That particular part of it which admits the possible existence of exceptional cases was approved by Lord Kilbrandon in* ***Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*** *[1975] AC 581 at 590, saying:*

> *'The shutting out of a "****subject of litigation****"—a power which no court should exercise but after a scrupulous examination of all the circumstances—is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.'*

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue. "

36) He referred to Diplock LJ's observations in **Fidelitas** and went on to say (at page 106G): *"Then in* ***Brisbane City Council v A-G for Queensland*** *[1979] AC 411 at 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, said:*

> *'The second defence is one of res judicata. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in* ***Henderson v Henderson*** *(1843) 3 Hare 100, [1843–60] All ER Rep 378 and its existence has been reaffirmed by this Board in* ***Hoystead v Taxation Comr*** *[1926] AC 155. A recent application of it is to be found in the decision of the Board in* ***Yat Tung Co v Dao Heng Bank*** *[1975] AC 581. It was, in the judgment of the Board, there described in these words (at 590): "* ***there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings****." This reference to "****abuse of process****" had previously been made in Greenhalgh v Mallard [1947] 2 All ER 255 at 257 per Somervell LJ, and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'*

It thus appears that, although ***Henderson v Henderson*** *(1843) 3 Hare 100, [1843–60] All ER Rep 378 was a case of cause of action estoppel, the statement there by Wigram V-C has been held to be applicable also to issue estoppel. That statement includes the observation that there may be special circumstances where estoppel does not operate. The instant case is concerned with the nature of such special circumstances."*

37) Finally at page 108D Lord Keith said: *"In **Hunter v Chief Constable of West Midlands** [1982] AC 529 at 540–541 Lord Diplock said, with the concurrence of the other members of the House, that this passage had been adopted and approved by your Lordships' House in **DPP v Humphrys** [1977] AC 1.*
It is to be noted that there appears to be no decided case where issue estoppel has been held not to apply by reason that in the later proceedings a party has brought forward further relevant material which he could not by reasonable diligence have adduced in the earlier. There is, however, an impressive array of dicta of high authority in favour of the possibility of this. It was argued for the appellants that exceptions to the rule of issue estoppel should be admitted only in the case of the earlier judgment being a default or a foreign judgment and further that an exception should not be recognised where the point at issue had actually, as here, been raised and decided in the earlier proceedings, but only where the point might have been but was not so raised and decided. The later dicta are, however, adverse to these arguments. It was argued that there was no logical distinction between cause of action estoppel and issue estoppel and that, if the rule was absolute in the one case as regards points actually decided, so it should be in the other case. But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the two proceedings being identical, than they do in issue estoppel, where the subject matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the Carl-Zeiss case [1967] 1 AC 853 at 947."

38) In **Talbot v Berkshire County Council** [1994] QB 290 at 296 Stuart-Smith LJ said of the rule in **Henderson's case:-** *"The rule is thus in two parts. The first relates to those points which are actually decided by the courts; this is **res judicata** in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of **res judicata** but rather is founded on the principle of public policy and preventing multiplicity of action, it being in the public interest that there should be an end to litigation; the Court will stay or strike out the subsequent action as an abuse of process: see per Lord Wilberforce in **Brisbane City Council v Attorney General for Queensland** [1979] AC 411, 425G."*

39) **Talbot** was a personal injury case. The Court had to decide whether the rule in **Henderson's** case should apply to personal injury cases as there had been no previous decision on the point. Stuart-Smith LJ held that there was every reason why it could. He continued:- *"Mr Miller submitted that the rule should be limited to those cases where points could have been, but were not, taken in relation to a particular cause of action and defence. But in my judgment there is no warrant for so limiting it. In **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581 the cause of action in the second action was different from the plaintiff's claim in the first action; but it could have been raised by way of defence and counterclaim to the bank's counterclaim in the first action. It was accordingly not maintainable. Such limitation would substantially emasculate the rule. Moreover, there is safeguard to prevent injustice in that the Court will not apply the rule in its full rigour if there are special circumstances why it should not do so."*

40) **Yat Tung** had been considered by the High Court of Australia in **Port of Melbourne Authority v Anshun Proprietary Ltd** [1980-81] 147 CLR 589. In that case the majority (Gibbs CJ, Mason and Aickin JJ) said (at page 601):- *"However in **Yat Tung** the adoption of the principle in **Henderson v Henderson** was taken too far. Lord Kilbrandon spoke of it becoming "an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. As we have seen this statement is not supported by authority. And if we are to discard the traditional statement of principle because it*

was linked to the rules of common law pleading, there is no reason for rejecting the powerful arguments based on considerations of convenience and justice which were associated with it."

41) In a separate judgment Brennan J. said (at page 614):- *"Although **Henderson v Henderson** does not appear to assert the existence of a power to barr an action where the rule of **res judicata** has no operation, there have been observations of high authority which draw upon it as authority for the existence of a power to shut out a party from raising in subsequent proceedings an issue which was not actually decided in earlier proceedings by which the party could, and should, have raised in those proceedings: see **Yat Tung** and **Brisbane City Council v Attorney General** [1979] AC 411 at page 425. If the operation of the rule of **res judicata** were confined to rights which had been litigated in earlier proceedings, it would be necessary to invoke a power to stay proceedings brought to enforce a right outside the operation of the rule though belonging to the subject of the earlier litigation; and accordingly **Henderson v Henderson** was construed as applying the rule "in a wider sense", reserving to the Court a discretion to leave from its wider operation when "there is a danger of a party being shut out from bringing forward a genuine subject of litigation (**Brisbane City Council v Attorney General**). Whatever effect be attributed to **Henderson v Henderson** in estopping a party from litigating a particular issue, I do not think that **Henderson v Henderson** has hitherto been understood in this Court as applying to shut out a party from litigating a cause of action which has not merged in a judgment"."*

42) **Yat Tung** and **Port of Melbourne Authority v Anshun Proprietary Ltd** are amongst the cases used by the editor of ***Spencer Bower, Turner & Handley: Res Judicata*** to develop the theory of the extended principle.

43) Reference was also made to **New Brunswick Railway Company v British and French Trust Corpn. Ltd** [1939] AC 1 in which Lord Maugham LC said (at page 21): *"In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily and with complete precision, decided by the previous judgment; in other words by the res judicata in the accurate sense."*

44) Mr Pennicott placed some reliance on **Chandler v Welland,** 23 July 1996, unreported in which Popplewell J. had to consider the application of the doctrines of **res judicata** or issue estoppel in a building case which had some similarity with the facts before the arbitrator. The plaintiff had engaged the defendant as a building contractor. The contractor was not paid by the plaintiff and accordingly took proceedings in the County Court to recover the money due under the building contract. The plaintiff employer did not enter an appearance or a defence and accordingly the contractor obtained a default judgment. The employer applied for the judgment to be set aside and obtained an order that she might do so on paying £2,500 into court. However, that amount was not paid and accordingly the judgment stood. Some five years later the plaintiff commenced an action in the High Court to recover the costs of putting right defects together with a claim for the restitution of the money paid under the building contract of £25,655. Not surprisingly, the contactor applied to strike out these proceedings on the grounds that the issues sought to be raised were ones which had or should have been raised in answer to the County Court proceedings and could not be determined again. Popplewell J. considered the main authorities and concluded that at the time when the default judgment was entered there was available to the employer either a defence or counterclaim which could have been pleaded and put forward in answer to the claim. He said that although the plaintiff employer was involved in a divorce at the time and had not been able to obtain advice from a surveyor until comparatively recently before the commencement of her action, the proceedings were nevertheless an abuse of the process of the Court. *"It was open to the present plaintiffs to raise this matter as long ago as 1990 and the present defendant is now faced with a claim in respect of building all of which occurred some six or seven years ago and which he was perfectly entitled to believe had been fully and totally dealt with by his acceptance of the compromise of some £3,700."* An application for leave to appeal was made by the employer to the Court of Appeal but it was dismissed. (I was provided with the transcript of the judgment of Hirst LJ. but it does not deal with the present issues.)

45) It is evident from the award that the arbitrator understood one of the key questions which he had to decide for in a section of his reasons headed "Doctrine of extended ***res judicata***" he posed the question

"Could the new items of claim with reasonable diligence have been brought into the first arbitration?". He said, amongst other things:-

"There is no doubt that the manner in which the Defence and Counterclaim were presented initially and then developed must have been frustrating for the [appellant]. The evidence suggests that in 1994/1995 the Halls' Defence and Counterclaim was not being handled as well as it might have been. The reconstructed Scott Schedule was supposed to have been definitive yet application was subsequently made to bring in further issues. There were the matters of Further and Better Particulars, the pursuit of invoices and of legible copies of invoices.

However I do accept the principal thrust of the Claimants' submission in that it was only as simpler, smaller defects, etc were investigated in more detail that the more general and more serious problems came to light and eventually (at least in the Halls' eyes) these latter problems overtook the earlier ones. Their case needed a complete re-appraisal but when they endeavoured to make adjustments their application to amend was rejected.

Mr Pennicott made the point that the Halls were subsequently given the opportunity (through the compromise) to have their Counterclaim heard by Mr Goldstraw but they rejected this opportunity by withdrawing it. However their concern that movement was still taking place and advice received in November/December 1996 .... that the building was allegedly incorrectly designed created a situation whereby it was sensible to "start again" as it were giving time to set out their case properly.

Thus I accept that the Respondent generally had good reason for not bringing in or attempting to bring in to the first arbitration the "new" items in this arbitration, namely those at Section B of its submission."

46) There are however exceptions and I would comment on each Head of Claim as follows:- *" ...*

(2) The assertions in the Claimants' Statement of Claim go beyond the mere absence or inadequacy of plans. I accept that the alleged situation may have had some bearing on the time it took for the existence of other alleged design and structural defects to be appreciated. ...

(4) Roof Space above Second Floor Kitchen Area
The alleged inadequacy of the roof design is stated to have led to movement of the structure below causing fracturing. The visible evidence is stated to have appeared in December 1996 ..... . In that case clearly the issue could have been raised earlier." .....

"The various judgments brought to my attention emphasise that if with due diligence matters could have been raised in an earlier action and were not then they now may be estopped, subject to the consideration of special circumstances, e.g. ***Henderson****, page 224,* ***Fidelitas****, page 640. I have particularly studied the* ***Chandler*** *case which in a number of respects had circumstances similar to those subject of the present situation. Unfortunately little guidance is given in this and other cases as to what "special circumstances" encompass although various indications are given as to what they are not - in particular 'negligence, inadvertence or accident'. However in* ***Arnold,*** *Lord Keith expressed the opinion (page 109):*

> *"[that it should be law] ... that there may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings".*

Substantive further material became available to the Halls as they pursued their investigation of the building.

Taking account of the overall situation at the time I am satisfied that circumstances existed which may reasonably be construed as special circumstances and I conclude that the Claimants are entitled to pursue some but not all of their claims under Sections B and C of their Statement of Claim."

47) As to the third head relied upon by the appellant, the arbitrator said:- *"Reading of the appropriate cases drawn to my attention and reference to paragraph 443 at Chapter 26 of 'The Doctrine of Res Judicata' indicates that the extended doctrine of res judicata is itself based on abuse of process. If the respondent is suggesting that an abuse of process argument stands on its own, independently of res judicata, because the Claimants are now attempting to pursue claims which they failed to pursue comprehensively in the first arbitration, I am unable to agree save as regards the exceptions to which I refer later. Whatever criticism may be made as regards the initial handling of the first arbitration it would, I consider, be an injustice if the Halls were precluded from pursuing their claims now."*

48) Mr Pennicott essentially made the same submissions that he had made to the arbitrator. First, as regards item 12 (the Scott Schedule items) the effect of Mr Goldstraw's debarring order and the subsequent agreement was to preclude the respondents from pursuing 19 of the items pleaded in the second arbitration. Thirty-eight items therefore remained which had been pleaded and pursued by the respondents in the first arbitration as a defence, set-off and counterclaim to the appellant's claims under the building contract. Furthermore, by virtue of the Consent Order the respondents had agreed to pursue those 38 items in the first arbitration, but had subsequently and voluntarily decided to withdraw the items. Since the appellant had expended considerable costs in the first arbitration and had been awarded those costs (which have not been paid) it would be clearly wrong for the respondents now to be able to reinstate these 38 items.

49) Mr Pennicott submitted that the first arbitrator's awards had expressly recorded the withdrawal of these items which lay within his jurisdiction and although they were thus awards by default nonetheless the doctrine of **res judicata** applied, as they were awards as to the amount of the adjusted contract sum which took into account all available defences such as abatement or set-off which might have resulted in a different sum. Secondly, in the alternative, Mr Pennicott submitted that the extended **res judicata** principle applied: the items were raised in the first arbitration; they could and should have been pursued and there was no legitimate reason or special circumstance available in law to the arbitrator to permit them to be pursued in the second arbitration. Thirdly, the attempt to pursue the items before the second arbitrator was an abuse of the arbitral process. If it were permitted it would enable a party to stop a claim or defence in an arbitration if, for example, that party thought it was not going to be successful, and then to commence a further arbitration to see if it would do any better before another arbitrator. Forum shopping of this kind should not be allowed.

50) As regards items 2, 4, 8, 9 and 11 Mr Pennicott argued that issue estoppel and the extended principle applied and that, since it had been expressly conceded on the respondents' behalf by their solicitor that there were no special circumstances, it was not open to the arbitrator to hold that there were special circumstances displacing issue estoppel or justifying what would otherwise be an abuse. The fact that the items might conceivably constitute separate causes of action (which he did not concede) was irrelevant and did not provide an answer to the appellant's submission. The pursuit of these items would be an abuse of the arbitral process since it had been conceded that they all could and should have been raised in the first arbitration.

51) Mr Conlin for the respondents essentially emphasised the apparent concession made by counsel for the appellant on the first occasion in which the respondent's application to amend had been argued before Mr Goldstraw ie that if, for example, the lift shaft item were not allowed into the first arbitration by an amendment the respondents might nevertheless pursue a second arbitration in respect of it as a new cause of action. That concession had been referred to in the respondents' statement of claim and in their written submissions to Mr Simmonds and was seemingly mentioned by him in his interim award (albeit only in his summary of the respondents' case as presented to him).

52) Mr Conlin submitted that it was doubtful whether **Henderson v Henderson** applied to arbitration since the jurisdiction of an arbitrator was confined to the reference. He referred to **Mustill & Boyd on Commercial Arbitration** at page 413: *"There is, however, one respect in which this aspect of the doctrine of res judicata is of narrower application to arbitrations than to court proceedings. The arbitrator's jurisdiction is limited to issues falling within the scope of the arbitration agreement, and may be further limited by the terms of his appointment for the particular reference with which he is concerned. The doctrine of res judicata, in either its broad or its narrow sense, has no application to issues falling outside the terms of the arbitration agreement; and it is doubtful whether the rule in Henderson v Henderson applies to issues which are outside the scope of the matters referred to the arbitrator even though they fall within the terms of the arbitration agreement. On the other hand, a claim which does fall within the scope of the reference is deemed to be abandoned if it is not repeated in the claimant's pleading, and although the arbitrator has a discretion to allow it to be revived by amendment during the reference, the abandonment becomes irrevocable once the arbitrator has made his award."*

53) If the rule in **Henderson v Henderson** applied to an arbitration then it would be restricted to "***points of argument***" or alternatively "***points***" which would or might have decided an issue in a party's favour

and which were fundamental to the issue or properly belonged to the subject matter of earlier proceedings. Neither cause of action estoppel nor issue estoppel nor any extended doctrine or the abuse of process principle prevented a party bringing forward a cause of action not previously adjudicated upon provided it was not substantially the same as the one that had been advanced in the previous proceedings unless success in the new proceedings would result in an inconsistent judgment. He referred to ***Spencer Bower, Turner and Handley: The Doctrine of Res Judicata***, 3rd ed, 1996, at page 267, in which the editor said: *"It is therefore suggested that the extended doctrine does not prevent a party bringing forward in later litigation a cause of action not previously adjudicated upon, provided it is not substantially the same that one that has been, unless success in the new proceedings would not result in inconsistent judgments."*

54) I note however that earlier the editor said (at page 264, para 452): *"Other matters which may be taken as settled include:*

(a) cause of action estoppels and mergers by judgment bar all questions and defences whether raised or not;

(b) in the absence of special circumstances, issue estoppels bar all questions whether raised or not;

(c) all remedies for a cause of action must be sought in the one proceeding;

(d) causes of action arising out of the same factual context which have not been adjudicated upon in earlier proceedings will be barred;

(e) causes of action arising out of the same factual context which have not been adjudicated upon in earlier proceedings will be barred by the extended doctrine where the relief sought in the later proceedings, if granted, would be inconsistent with the relief in the former proceedings."

55) Mr Conlin also submitted that special circumstances were not confined to *"material which could not by reasonable diligence have been adduced"* but could include a combination of matters and an overall situation. Furthermore, in relation to the appellant's third ground - abuse of process - he submitted that "reasonableness" was an element of any definition and that, in particular in relation to the Scott Schedule item the further substantive defects becoming apparent it was perfectly reasonable for the respondents to withdraw the original Scott Schedule and to seek to reinstate it in a second arbitration. In addition in relation to the Scott Schedule items he argued that the strict doctrine did not apply because it raised a number of separate causes of action the merits of which were not adjudicated upon although raised in the earlier proceedings. He submitted that prima facie there was no reason where a party withdrew from the proceedings for the purpose of avoiding judgment reserving his liberty to bring a fresh action why he should not be able to do so. There were in any event special circumstances as found by the arbitrator.

56) As regards items 2, 4, 8, 9 and 11 Mr Conlin submitted that there were new and separate causes of action which the respondents were entitled to pursue and in any event the arbitrator found that there was special circumstances. The arbitrator had benefit of the copy of the relevant extract from the transcript when he arrived at his decision as to whether there were matters which could have been established with reasonable diligence: that was a formal admission which the arbitrator obviously took into account, and was entitled to act on the formal admission.

Decision

57) An appeal from the award of an arbitrator lies only if questions of law arise on the award. In deciding whether an arbitrator has reached the correct conclusion on a question of law, the facts found by the arbitrator and set out in the award are the only facts which a court can take into account. Here however, it is common ground between the parties that in order to understand the facts found by the arbitrator it is necessary to look at what had happened. I have therefore done so but only to see what facts were before the arbitrator when he came to make his award so as to see what he was referring to. It is convenient to consider each of the questions of law in turn as set out in the Notice of Motion. First , as to Item 12 - The Scott Schedule items - the question posed in the appellant's notice of motion is: *"whether a party to arbitration proceedings is entitled to seek an award in respect of issues and matters discontinued by that same party in earlier arbitration proceedings, particularly (but without prejudice to the generality of the foregoing) in circumstances where:*

(a) that party has failed and/or refused to pay either the principal sum due nor the costs of the earlier proceedings (or any part thereof) despite an Interim Award and a Final Award requiring the same to be paid, having ben published in such proceedings; and/or

(b) that party expressly agreed, by virtue of a Consent Order of the Court to pursue such issues and matters in the earlier arbitration proceedings,

*or whether that party is estopped from seeking such an award on the basis that such issues or matters are **res judicata,** alternatively, that the seeking of such an award is, in the particular circumstances set out above, an abuse of the arbitral process."*

58) Second, as to the remainder (2, 4, 8, 9 and 11) the question is similar: *"whether a party to arbitration proceedings is entitled to seek an award in respect of issues and matters which the same party accepts could have been pursued in the earlier arbitration proceedings connected with the same subject matter or whether that party is estopped from seeking such an award on the basis that the issues and matters are **res judicata**, alternatively, that the seeking of such an award is an abuse of the arbitral process."*

59) It is clear from **Talbot v Berkshire County Council** that the rule in **Henderson v Henderson** has two parts: ***res judicata*** in the strict sense and a rule which precludes a party from advancing in the same or separate proceedings points upon which the tribunal was actually required by the parties to form an opinion and pronounce a judgment, and which the parties exercising reasonable diligence might have brought forward at the time. The rationale of the second part is one of policy in preventing the multiplicity of actions. Nevertheless, it is equally clear from **Henderson** that there may also be special circumstances (to which I shall return later) which will permit the rule not to be applied.

60) It is desirable to deal first with two general points raised by Mr Conlin's arguments. The first is whether in some way the doctrine of ***res judicata***, or cause of action or issue estoppel does not apply to arbitrations.

61) There are some differences between arbitration and litigation. An arbitration is a contractual method of dispute resolution and is initiated so that there may be a decision on the dispute or disputes required by the contract to be referred to arbitration. A contract may require the dispute to be defined so in this instance clause 39.1 of the JCT form calls for written notice to be given "to such effect and such dispute or difference shall be referred to the arbitration and final decision of [the arbitrator]". The reference of a dispute necessarily includes any defence to the claim of the referring party whether or not it created the dispute. Furthermore where the arbitration is conducted under specific rules which permit a party to include other claims or to make counterclaims then the disputes referred also include all the issues arising from such additional claims or counterclaims. In this case clause 39.8 of the JCT form required the arbitration to be conducted in accordance with the JCT Arbitration Rules. These set out a basic procedure and a timetable which are intended to ensure that each party has a fair opportunity of presenting its case in full. A respondent has a right to submit both a defence and a counterclaim. The claimant is to answer the counterclaim. Accordingly where this is done the dispute referred will be enlarged to cover the issues arising from defence, counterclaim and the defence to the counterclaim.

62) The respondents elected to advance defences to the appellant contractor's claims for the appropriate adjusted contract sum and final account since they wished to defend those claims on the grounds that the value of the contract works was not that claimed since the works had not been executed or completed in accordance with the contract and were defective, incomplete or late. These contentions were the subject of what was termed the set-off or counterclaim. Procedurally Mr Goldstraw heard first issues relating to calculation and composition of the final account and adjusted contract sum (on the assumption that the works was properly carried out and completed) and was secondly to hear the issues relating to defects etc before he made his award taking into account his conclusion on each set of hearings. If therefore the respondents' case had been sustained on the facts they would then in law be entitled to an abatement of the adjusted contract sum or a set-off or set-offs on account of their losses. I can see no reason of policy why such a party to such arbitration should not be required to advance the whole of its case in answer to such a claim as made by the appellant. If it were not obliged

to do so the claimant might obtain an award for the final contract sum only to be unable to enforce in full or to be deprived of it by having to repay some or all of it in subsequent proceedings. Further to sanction the withdrawal of a defence, set off or counterclaim could lead to a party picking and choosing between arbitrators until the "right" one was found. This would indeed by an abuse of the arbitral process. Although arbitration is an alternative to litigation as a form of dispute resolution it does not provide such a series of alternatives.

63) Mr Conlin's submission is in my judgment contrary to the clear statement of principle by Diplock LJ in **Fidelitas Shipping Co Ltd v V/O Exportchleb** [1965] 1 QB 630 at page 643C. I do not consider that simply because he was there dealing with cause of action and issue estoppel in the context of one arbitration proceedings his statement is not applicable to successive arbitrations. Similarly ***Mustill & Boyd on Commercial Arbitration*** at page 413 serves only to emphasise that cause of action or issue estoppel operate only on claims or issues which fall within the scope of the arbitration agreement, and the particular reference. However as the authors say: *"On the other hand, a claim which does fall within the scope of the reference is deemed to be abandoned if it is not repeated in the claimant's pleading, and although the arbitrator has a discretion to allow it to be revived by amendment during the reference, the abandonment becomes irrevocable once the arbitrator has made his award."*

64) Secondly, on the facts and circumstances set out in the award the claims made by the respondents in the first arbitration and which reappeared in the second arbitration do not appear to be separate causes of action: they were all complaints about the respects in which the appellant had failed to comply with its obligations under the building contract. The respondents had one cause of action for breach of contract and effectively one defence namely that of abatement or set-off. There are instances where as a matter of fact and degree a distinction is validly to be made between some complaints of defective work such that some may as a matter of impression be treated as giving rise to separate causes of action: ***Steamship Mutual Underwriting Assn Ltd v Trollope & Colls Ltd*** (1986) 33 BLR 77. However since the respondents' claims in the second arbitration were either the same as those advanced in the first arbitration or were according to the arbitrator's findings a development or continuation of the original claims they cannot in my judgment be regarded as separate and new causes of action or defence or, in any event, materially different from those advanced in the first arbitration.

65) The first ground relied by the appellant was that item 12 was barred by what was termed by Stuart-Smith LJ in ***Talbot's*** case "***res judicata*** in the strict sense. (The circumstances set out in paragraphs (a) and (b) are irrelevant to this ground; those in paragraph (a) were not found by the arbitrator to be relevant for either of the other grounds and I shall therefore ignore them.) That rule only applies where there has been truly a decision either on the merits or which is to be treated as a decision on the merits. Where a party voluntarily withdraws a cause of action or defence from an arbitration whereby an award is made dismissing it and determining an amount that would or might have been different had the cause of action or defence been pursued that award is in my judgment tantamount to a decision on the merits and it cannot be right that there should thereafter be a resurrection of that cause of action (or defence in the form of a cause of action) against the party affected with consequences of the kinds that I have already described. To allow a party to do so would be contrary to the principles underlying the doctrine which were restated by Lord Keith in ***Arnold v National Westminster Bank*** [1991] 2 AC 93 at page 104F: *"The principles upon which cause of action estoppel is based are expressed in the maxims nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium."*

66) Moreover, viewed in terms of an arbitration agreement it is incumbent on a party to bring forward with diligence the whole of its case that it wishes to have considered. Clause 39.1 of the JCT conditions envisages a final and binding award on the dispute referred. In addition the principle restated in section 1 (a) of the Arbitration Act 1996 that *"the object of arbitration is to obtain the fair resolution of disputes ....without unnecessary delay ...."* is not new. A party has also to comply with procedural rules which it has accepted in or by virtue of the arbitration agreement and with directions of the tribunal and compliance will also mean that it must find out and decide what its case within such a framework. Once it has done so it cannot without the consent of the other party then withdraw a

cause of action or defence with a view to its prosecution in separate proceedings against that other party for arbitration is a consensual process and is a submission to a particular tribunal, which in many cases will be a person agreed between the parties. To allow a party unilaterally to opt out of an arbitration in favour of another arbitrator because it did not like the prospect of the originally chosen arbitrator reaching a decision on its case (even if it had adequately prepared) is in my judgment quite unacceptable and, as Mr Pennicott rightly submitted, would lead to "forum shopping". In these respects procedure in arbitration may differ from court procedure where, subject to observance of the rules of court, a party may be free to abandon a claim or defence and resurrect it without the consent of any other party and is also generally not able to choose its tribunal. The arbitrator did not find that there was any such consent on the part of the appellant. A fortiori the strict rule must also apply where a party applies for but does not obtain leave to amend its case to bring in a new item of claim or defence for it cannot thereafter be allowed to circumvent its failure to comply with the procedural rules of the first arbitration and to commence a new arbitration. In this case of course the appellant agreed in October 1996, as recorded in the consent order, to allow the respondents to return to the arbitrator with its counterclaim. In my judgment in the absence of a finding of a clear agreement thereafter to allow the respondents to withdraw its counterclaim, the respondents were precluded from advancing item 12 in the second arbitration as Mr Goldstraw's award determined finally the amount of the adjusted contract sum and that award is conclusive as to any defence of abatement that was or could have been available to the respondents. The award very precisely decided the appellant's cause of action and with it all the defences available to the respondents within the scope of the arbitration agreement. In addition the award effectively endorsed and embraced the arbitrator's earlier decisions refusing the amendment sought. The respondents are bound by it as regards item 12.

67) However it is in any event clear that issue estoppel also applies. Items in the Scott Schedule were plainly before the arbitrator. Therefore the respondents are plainly issue estopped (unless there is, in effect, a public policy reason why they should be exempted) for the items are all matters which could and therefore should have been litigated in the first arbitration. It is in my view plain from the authorities that there have to be special circumstances to displace the application of the doctrine: a party *is* estopped from raising those matters and not, as the arbitrator said: *"if with due diligence matters could have been raised in an earlier action and were not then they now* ***may be*** *estopped"*. Unfortunately, as the arbitrator observed, little guidance is given as to what might displace the doctrine, ie what are "***special circumstances***". In my judgment it is clear from the application of **Henderson v Henderson** in **Arnold** and in the other cases referred to above that it is not sufficient that the items were known but through inadvertence or lack of reasonable diligence etc were not pleaded for otherwise there would have been no need for the House of Lords to emphasise that issue estoppel does not apply where the matter could not with reasonable diligence have been discovered. Indeed since neither lack of diligence nor "***negligence, inadvertence, or even accident***" suffice the special circumstances must be exceptional and additional to the circumstances which do not suffice. Furthermore, unless it had been found by the arbitrator that the reason why the respondents had elected to take the course that they did namely to withdraw certain Scott Schedule items from the jurisdiction of the first arbitrator (disregarding their agreement in the consent order to allow the first arbitrator to deal with them) was prompted by what was said by counsel for the appellant before the first arbitrator (and as I have already recorded there was no such finding), there appears to me to be no special circumstances which would be regarded in law as permitting the arbitrator, properly directing himself as to the principles of law, to have held that the respondents could maintain these items in the second arbitration. The arbitrator's findings are that the respondents had either advanced the items in the first arbitration or could with diligence have done so had they pursued the requisite investigations and sought and obtained proper advice. Accordingly I have come to the conclusion that the arbitrator was wrong in law in allowing item 12 of the Scott Schedule: Mr Goldstraw's award is final and binding on the subject-matter of item 12.

68) I do not consider it necessary to decide whether the learned editor of ***Spencer Bower Turner & Handley*** is right in the fascinating argument in chapter 26 of ***The Doctrine of Res Judicata***, relied upon by Mr Pennicott. The authorities to which I was referred in Mr Pennicott's careful submissions go

some way to justifying the proposition that there is some third and more general principle of law that it is an abuse of the arbitral process to withdraw claims and defences and then to revive them in a fresh arbitration. My principal difficulty in accepting the argument is that it seems to me that on the authorities binding on me to be merely another way of expressing or justifying issue estoppel: see eg **Arnold** and Talbot which speak *"**abuse of process**"* as the rationale for the *"**extended Principle**"*. The Australian authorities do however suggest that there might be a broader approach. In my judgment the same result is to be achieved as a matter of analysing the nature of an agreement to arbitrate and its implications, as I have set out above when considering the first ground relied on.

69) The question of law posed by the applicant in reality asks whether the circumstances found by the arbitrator could in law justify an exception to the principle that a party cannot in subsequent proceedings bring forward points which were or which might have been advanced in earlier proceedings, but were not. The answer must be: No.

70) I now turn to items 2, 4, 8, 9 and 11. Items 2 and 4 were not part of the counterclaim in the first arbitration and as such do not obviously fall within the appellant's first ground. However they formed part of those within Section B of the respondents' submissions to Mr Simmonds with regard to which the arbitrator found that the respondents "generally had good reason for not bringing [them].... There are however exceptions....". Amongst the exceptions were items 2 and 4. The first item related to general inadequacy of plans which plainly was known to the respondents prior to the commencement of the first arbitration as was item 4 for the arbitrator found that the movement of the structure was on the respondents' own evidence visible to them in December 1996. Items 8, 9 and 11 were all items which, as the arbitrator found, were ones in respect of which the respondents had unsuccessfully applied to amend their counterclaim in the first arbitration.

71) In my judgment for the same reasons that I have given in relation to item 12 the strict rule applies to all these items, other than, perhaps, item 2 (since on the arbitrator's finding item 2 may not have been a matter of abatement, even though it was conceded before the arbitrator to be one for which no special circumstances existed). They are all matters which if established would or might have affected the determination of the adjusted contract sum. Mr Goldstraw's award is final and binding in respect of them.

72) In any event, on the arbitrator's findings all the items (including item 2) are barred by the application of the "***extended principle***" for the reasons set out above. Even if I leave aside the respondent's solicitor's admission or concession that there were no special circumstances to justify items 2, 8, 9 and 11 (by which he meant they could all have been established with reasonable diligence) the arbitrator's findings establish only those circumstances which do not suffice, since it is not, for example, sufficient in law that it was more convenient for the respondents to withdraw items or not to pursue item with diligence so as to present them together with other items in a new arbitration. I can therefore see no special circumstances available to the arbitrator which in law could justify his conclusion that in law the respondents were nevertheless entitled to bring them forward. In my view therefore this part of the award must also be set aside as Mr Goldstraw's award is equally binding in respect of them.

73) Since no useful purpose would be served by remitting the affected parts of the award to the arbitrator for further consideration there will (subject to submissions) be orders as follows:

1. That the Interim Award dated of 2 October 1997 of Mr D. T. Simmonds be varied by deleting paragraph (ii) of the Award and replacing it by the following: *"The Claimants are estopped from including items (2), (4), (8), (9), (11) and (12) of their Statement of Case. These items are res judicata or are covered by the extended principle of res judicata and I have no jurisdiction to deal with them".*
2. That the Interim Award as so varied shall be read and applied as if it had been so made on 2 October 1997.

Mr Ian Pennicott for the Appellant (Solicitor: J.E. Taylor)
Mr Geoffrey Conlin for the Respondents (Solicitor: D. Faulkner)